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By email attachment to multiple addressees

May 4, 2021

Toronto Catholic District School
80 Sheppard Ave. E.,
Toronto, ON
M2N 6E8

Attention: Chair of the Board
All Trustees
Director of Education
Integrity Commissioner

Dear Sirs et Mesdames:

Re: Board Communication on the Legal Issues Arising from Conflicts of Interests at the TCDSB

"*Dissent,* in the form of carefully orchestrated protests and polemics carried on in the media, *is opposed to ecclesial communion and to a correct understanding of the hierarchical constitution of the People of God.* Opposition to the teaching of the Church's Pastors cannot be seen as a legitimate expression either of Christian freedom or of the diversity of the Spirit's gifts. When this happens, the Church's Pastors have the duty to act in conformity with their apostolic mission, insisting *that the right of the faithful* to receive Catholic doctrine in its purity and integrity must always be respected."

Pope St. John Paul II, Papal Encyclical, *Veritatis Splendour*, n. 113.2

I practise law in Ontario, but I write this communication to the School Board as a 'friend of the Board", and not on behalf of any client. Some of the current Trustees have a tenure long enough to remember that, in 2011, I submitted to Cardinal Collins (primarily) and, secondarily, to all of the Trustees of the Board and the Assembly of Catholic Bishops of Ontario, a similar "friend of Cardinal" legal opinion on the Equity and Inclusive Education Policy, generally, and on the subject of so-called "Gay-Straight Alliance" groups in your schools, specifically. That opinion, dated May 18, 2011, as well as another legal opinion submitted by Toronto lawyer Michael Osborne, was the subject of a detailed analysis by your Board's solicitors, BLG, which was in turn communicated to the Trustees by way of a Memo dated August 31, 2011 (the "2011 BLG Opinion").

I am a Catholic Elector of the Halton Catholic District School Board, and have been following the recent public controversy arising from its handling of its "Rainbow Flag Resolution" and "Critical Race Theory Resolution" (my terms). That controversy has sparked a number of conversations among Catholic electors of both my Board and yours.

It is my understanding that your Board (the "TCDSB") is about to deliberate on resolutions to approve the flying of the "Rainbow Flag" at its schools during the month of June, 2021, and approve moving forward with a plan to incorporate into its curricula the ideologies promoted by the organization that goes by the name Black Lives Matter, and those that come under the general description of "Critical Race Theory".

As a member of the "Class of Persons" in the Province of Ontario who possess what is known as Denominational Rights, I cannot resist the urge to again volunteer my assistance to the Board in helping it avoid serious errors in corporate governance. I have over thirty years experience in providing legal advice in this area to regulated financial institutions, and also served nine years as a volunteer member of the Board of Directors of my local Children's Aid Society, including one year as Chair of the Board, and one year as Past-Chair. My input here is offered in good faith, and I trust, just as my 2011submission was received in good faith, it too will be received in good faith.

I also trust that all of the Trustees of the TCDSB honestly acknowledge that they owe fiduciary duties to all of their Catholic Electors who support the Constitutionally Protected Mandate I will explain below. I do not know how I could draw any contrary inference from the requirement in clause 1(d) of your *Code of Conduct* that each Trustee "recognize and rigorously defend the constitutional right of Catholic education", as well as the public record of each of them answering "I will" to the question – ***"Will you be faithful to the teachings of the Church and to the Primacy of the Roman Pontiff and the authority of the Magisterium?"*** --- when they each took the oath of office after their election to the office of Trustee. I also trust that all of the Trustees know and understand the implications of the word "Magisterium", and can discern when a person who is lobbying them on denominational issues dissents from the teachings of the Magisterium.[1]

In this context, my legal commentary to you must be viewed as coming from someone whose interests are perfectly aligned with what should be considered the legitimate interests of the Trustees. There is no ***conflict of interest*** that I need to disclose to you in making my submissions. I am a member in good standing of the Catholic Church and a Catholic Elector of my own Board who considers himself bound, as a matter of conscience, to observe all of the magisterial teachings of the Catholic Church. This is the only religion that I have embraced. I am NOT a believer in the "Religion of OECTA", and not a member of the "Church of OECTA". These two "religions" are incompatible.[2] Moreover, in my opinion, as a lawyer, the TDSCB

[1] "In brief, the magisterium consists of what the pope and the bishops in union with him officially teach. The Second Vatican Council, in its 1965 *Dogmatic Constitution on Divine Revelation (Dei Verum)*, refined this understanding of the Church's magisterium when it taught that 'the task of giving an authentic interpretation of the Word of God, whether in its written form or in the form of Tradition, has been entrusted to the living teaching office of the Church alone' (10)": Kenneth D. Whitehead, entry for *Magisterium*, Encyclopedia of Catholic Social Thought, Social Science and Social Policy (Lanham, MD: Scarecrow Press, Inc., 2007).

[2] Members of the Church of OECTA will often refuse to admit that they have, in a spiritual sense, left the Catholic Church and become what Pope St. John Paul II sometimes called "practical atheists", often euphemistically couching their lobbying efforts directed at Catholic Trustees as merely an appeal to a "broader vision" of Catholicism than that of the Magisterium. Then there are other Catholic Electors who deny any close association

does not have the legal or constitutional authority to engage in the religious indoctrination of its students in any religion other than the Catholic religion, as taught by its Magisterium.[3]

I think this is an opportune time for the TCDSB to review its conflicts of interest "management" obligations, and take appropriate action. In my opinion, a failure to do so could materially expose the TCDSB and many of its individual Trustees to valid legal claims asserted by its Catholic Electors.

The Executive Summary:

1. The TCDSB itself owes fiduciary duties to its Catholic Electors who support the Constitutionally Protected Mandate of the Board, as defined in cases such as *Daly*. This Mandate is derived from the rights and privileges referred to in section 93 of the *Constitution Act, 1867* ("Section 93"). To say so, and to go further and say this Mandate *informs* the content and parameters of the fiduciary duties is NOT to improperly use "Section 93" as a "sword" against the Board and its Trustees, as objected to by the authors of the 2011 BLG Opinion. The Trustees, in turn, owe a fiduciary duty to the Board to not act or vote in a way that frustrates the ability of the Board to fulfill its fiduciary duties to the Catholic Electors.

2. There are some basic and fundamental duties that are common to all fiduciary relationships. These include, broadly, a duty of full disclosure and a duty of loyalty to the beneficiary of the fiduciary party (i.e., to put the interests of their beneficiaries above their own personal interests and those of any third party special interest group). However, the full and precise scope of the fiduciary duties in any given case is further informed and defined by any unique features of the particular fiduciary relationship involved (e.g., financial advisor/client, doctor/patient, Priest/parishioner, trustee of a

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with the Church of OECTA, but who nevertheless then attempt to bully our Trustees into approving their own idiosyncratic and subjective religious beliefs that are incompatible with magisterial teachings, and imposing them, by their decisions, on everyone else connected with the Board. Such Catholics are proud of their *dissent* from the magisterial teachings and do not tolerate dissent from their dissent. I do dissent from their dissent. I want my Trustees to be accountable to the faithful Catholic Electors, and I presume that they want to be held accountable to them should they fail to fulfill their Constitutionally Protected Mandate.

[3]In the 1990 decision of the Ontario Court of Appeal in the *Elgin County Case*, the court established the general principle that, as a matter of constitutional law, indoctrination in religion is prohibited in government-funded schools. Notwithstanding this general principle, the Denominational Rights of Catholic Electors in Ontario who adhere to the magisterial teachings of the Catholic Church present a clear, but singular, *exception* to this general prohibition. Thus, when Catholic Electors who are members of the Church of OECTA demand that Catholic Trustees adopt a particular policy that contradicts a magisterial teaching of the Catholic Church they cannot be said to be asserting Denominational Rights, which are the collective rights of the adherent Catholic Electors, exclusively. At best, if the Trustees reject their lobbying efforts, they could, as individuals, complain that the Board has infringed their *Charter* right to freedom of religion, or make a complaint of discrimination on the basis of "creed" under the Ontario Human Rights Code. However, as we all know, the Board has a perfect defence to any such claims or complaints, and that would be the very Denominational Rights that members of the Church of OECTA cannot assert, due to their dissent from magisterial teaching.

family trust/beneficiary, estate trustee/beneficiaries of the estate, corporate officer/corporation, Ontario Catholic School Board/Catholic Electors).

3. The full and precise scope of the fiduciary duties an Ontario Catholic separate school board owes to its faithful Catholic Electors is further informed by:

   (a) the magisterial teachings of the Catholic Church, especially the *Code of Canon Law*;
   (b) the Board's Constitutionally Protected Mandate, as explicated by the Courts;
   (c) the denominational rights of Catholic Electors, as explicated by the Courts;
   (d) the text of any relevant statutory re-statements of the denominational rights and privileges of Catholic Electors, including ss. 1(4) and 1(4.1) of the *Education Act*, the parallel provisions of the amended *Labour Relations Act, 1995* and the *School Board Collective Bargaining Act, 2014*, and section 19 of the *Human Rights Code* (Ontario);
   (e) the text of any industry-wide codes or standards of conduct for school board trustees; and
   (f) the text of the school board's own *Code of Conduct.*

4. The foregoing has, at a minimum, the following legal implications for the TCDSB in respect of all denominational issues that come before it:

   (a) the Board and its Trustees must always put the interests of the Catholic Electors who support the Mandate of the Board ahead of their own personal interests and the interests of all other persons or special interest groups;

   (b) the Board and its Trustees must seek out and use all reasonable means at their disposal, including the judicial remedy in Section 93, to oppose government action and legislative and regulatory measures that prejudicially affect the rights and privileges of the Catholic Electors (the "Denominational Rights");

   (c) the Board and its Trustees must recognize that they do not have the legal capacity or authority to unilaterally *waive* any Denominational Rights on behalf of their Catholic Electors, whether or not they do so under duress from representatives of the provincial government or special interest or advocacy groups;

   (d) the Board and its Trustees must reject all advice and lobbying efforts from persons and groups that are hostile to the magisterial teachings of the Catholic Church;

   (e) having recognized the obvious reality that the essential purpose of a Catholic school is to indoctrinate its students in the teachings of the Catholic Church, the Courts have now settled (see the *Loyola* case) that those "teachings" are those taught by its Magisterium, exclusively. Moreover, the *Loyola* decision has essentially signalled to future litigants that the Courts will defer to the Catholic Church's own understanding of what kinds of documents issued by the Church should be accepted by the secular courts as conclusive evidence of what the Catholic Church actually teaches. On most denominational matters, there will be no compelling reason why the TCDSB should think it necessary to retain the services of an expert like Professor Douglas Farrow of

McGill University to provide it with advice on what is to be considered a magisterial document and on whether or not a proposed course of action contradicts a magisterial teaching of the Catholic Church, or, God-forbid, tolerate being lobbied by the officers of OECTA or other dissenting Catholics on such matters. Professor Farrow has already shown you the tools you need to answer such questions, and those tools have been approved by the Courts;

(f) the Board must put in place a *Code of Conduct* that both appropriately reflects all of the legal implications expressed above and includes an effective mechanism to manage any conflicts of interest that may arise, including non-pecuniary conflicts of interest as defined by the common law. This mechanism must require the Trustees to fulfill their duty of full disclosure of conflicts of interest, and absent themselves from any discussion or voting on denominational matters affected by the identified conflict of interest; and

(g) the Board must vigorously enforce its *Code of Conduct* against offending Trustees.

5. A failure by the Board or any of its Trustees to fulfill the duties described above will constitute a breach of fiduciary duty that will trigger a variety of causes of action and their attendant legal remedies to which the injured Catholic Electors should have recourse as a matter of law. Some of them are those that are available to any beneficiary who is victimized by a fiduciary's wrongful conduct, generally; other causes of action and remedies are those that are uniquely available to Catholic Electors. Those causes of action/remedies will include actions for a declaration that the "seat" of the offending Trustee on the Board is "vacant", actions for damages and injunctive relief for breaches of fiduciary duty, actions for damages for the tort of misfeasance in public office, and applications for judicial review.

6. Whatever the authors of the 2011 BLG Opinion actually meant by their talk of "shields" and "swords" (I still am not sure, ten years later), any inference Trustees may wish to draw from it that Catholic Electors do not have any effective legal means to compel their Catholic Board and its Trustees to act in accordance with Catholic doctrine cannot possibly be accurate (see page 1 of the opinion). In the grand scheme of things, the constitutional protections of Section 93 would be illusory if the Trustees (the very people who have a fiduciary duty of loyalty to their electors) could themselves, with impunity, at the same time have a legal right to just stand by and let the provincial government and special interest groups prejudicially affect the rights and privileges of the electors?

7. Apart from vigorously enforcing its *Code of Conduct* against offending Trustees, the TCDSB could further mitigate its risk of legal liability in other ways. For example, applicants for judicial review, seeking perhaps a declaration that a particular decision of the Board was null and void, do so on administrative law grounds ---- that the Board made a decision by taking into consideration things that they ought not to have taken into consideration, and NOT taking consideration other things they ought to have taken into consideration. It is obvious that the TCDSB could strengthen its legal position by:

(a) refusing to tolerate being lobbied by special interest groups that have no legal standing to do so (like OECTA and the various LGBT political action organizations) on denominational matters;

(b) pre-screening the participants on committees assigned the task of making recommendations on denominational matters for their loyalty to magisterial teaching of the Catholic Church and/or conflicts of interests, and removing from the committees those persons who do not pass the screening process; and

(c) putting the onus on Catholic Electors who profess to be loyal to the Church but who nevertheless lobby Trustees to vote in favour of a resolution that would, objectively, contradict magisterial teaching, to present magisterial documents of the Church that support their position. There is no good reason for Trustees to be defensive about their loyalty to the Church and assume that they themselves bear the onus of finding and presenting the magisterial documents that support their opposition to the proposed resolution.[4]

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[4] That said, if Trustees cannot resist the urge to "take the bait" and present to the dissenter magisterial documents that defend the Catholic position on a proposed resolution, I do not recommend expending the effort and energy to prepare a 50 page dissertation on the subject. Instead, they should focus their attention on presenting the best two or three magisterial documents that most clearly and succinctly present the Church's position. For example, in the case of the "Rainbow Flag" resolution, I would try to focus the disssenter's attention on the 1986 CDF document entitled "*Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons".* Cardinal Ratzinger [later Pope Benedict XVI] wrote the following [n. 8-9]:

"....[I]ncreasing numbers of people today, even within the Church, are bringing enormous pressure to bear on the Church to accept the homosexual condition as though it were not disordered and to condone homosexual activity. Those within the Church who argue in this fashion often have close ties with those with similar views outside it. These latter groups are guided by a vision opposed to the truth about the human person, which is fully disclosed in the mystery of Christ. They reflect, even if not entirely consciously, a materialistic ideology which denies the transcendent nature of the human person as well as the supernatural vocation of every individual.

The Church's ministers must ensure that homosexual persons in their care will not be misled by this point of view, so profoundly opposed to the teaching of the Church. But the risk is great and there are many who seek to create confusion regarding the Church's position, and then to use that confusion to their own advantage.

9. The movement within the Church, which takes the form of pressure groups of various names and sizes, attempts to give the impression that it represents all homosexual persons who are Catholics. As a matter of fact, its membership is by and large restricted to those who either ignore the teaching of the Church or seek somehow to undermine it. It brings together under the aegis of Catholicism homosexual persons who have no intention of abandoning their homosexual behaviour. **One tactic used is to protest that any and all criticism of or reservations about homosexual people, their activity and lifestyle, are simply diverse forms of unjust discrimination. [emphasis added]**

There is an effort in some countries to manipulate the Church by gaining the often well-intentioned support of her pastors with a view to changing civil-statutes and laws. This is done in order to conform to these pressure groups' concept that homosexuality is at least a completely harmless, if not an entirely good, thing. Even when the practice of homosexuality may seriously threaten the lives and well-being of a large number of people, its advocates remain undeterred and refuse to consider the magnitude of the risks involved.

The Detailed Analysis:

The TCDSB Code of Conduct – The Fiduciary Duties of the Board and its Trustees and the Management of Conflicts of Interest

In my view, the existing *Code of Conduct* does an adequate job of both setting out how pecuniary (monetary) conflicts of interest should be handled, and explaining the statutory requirements of the *Municipal Conflicts of Interest Act* (Ontario) (the "MCIA"). However, this does not tell us the *whole* story. The MCIA deals only with pecuniary conflicts of interest, and clearly supplants or replaces the common law principles that used to apply to them (at least in Ontario, and in respect of elected municipal officers and school board trustees). The common law principles governing non-pecuniary conflicts of interest involving directors and officers of corporations and other fiduciaries remain applicable to school board trustees. At common law, a school board trustee can be found to be disqualified from service on the Board if he or she has a non-pecuniary personal and substantial "interest" that a "reasonably well-informed person would conclude might influence" the exercise of the fiduciary duties owed by the trustee. In my opinion, such an "interest" would certainly include any "personal interest" that would be incompatible with his or her fiduciary duties to the Board and/or its Catholic Electors who adhere to the magisterial teachings of the Catholic Church. It would also include a superior "loyalty" that the trustee is perceived to have to advocacy groups or special interests that are hostile to the Catholic Church, or that seek to frustrate the Trustees in their efforts to carry out the Constitutionally Protected Mandate of the Board. In my opinion, a number of current Trustees of the TCDSB have already engaged in public conduct from which a reasonable inference can be drawn that they dissent from the magisterial teachings of the Catholic Church. Others have engaged in conduct from which a reasonable inference can be drawn that they have a loyalty to homosexual political action groups that are openly hostile to the Catholic Church in general, and to efforts by the Trustees to carry out the Constitutionally Protected Mandate, specifically. Their conduct also has demonstrated that they value this loyalty over their loyalty to the Board and its Catholic Electors who adhere to the magisterial teachings of the Church.

The existing *Code of Conduct* gives this topic very short shrift, and is, with respect, very out of date, given the very relevant 2007 decision of the Alberta Queens Bench in *Calgary Roman Catholic Separate School District No. 1 v. O'Malley*[5]. There are only a few oblique references

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The Church can never be so callous. It is true that her clear position cannot be revised by pressure from civil legislation or the trend of the moment. But she is really concerned about the many who are not represented by the pro-homosexual movement and about those who may have been tempted to believe its deceitful propaganda. She is also aware that the view that homosexual activity is equivalent to, or as acceptable as, the sexual expression of conjugal love has a direct impact on society's understanding of the nature and rights of the family and puts them in jeopardy."

Another useful magisterial document to cite would be the CDF's *Considerations re Homosexual Unions* (2003), especially the text in II-5, which asserts that, while toleration of evil is sometimes morally acceptable, approval of evil is never justified.

[5] 2007 ABQB 574 (hereinafter referred to as "*O'Malley"*). See paragraphs 95-99: [95] Elected officials are expected to be free from conflicts so as to enable them to provide an unbiased, even-handed, and disinterested consideration of anything that comes before the elected body and to co-operate with their colleagues to administer

to the topic are in section 6. I note that it says, at one point: "Where a Trustee.....has any pecuniary interest....**or any other conflict of interest in any matter** [emphasis added] and is present at a meeting of the Board at which the matter is the subject of consideration, the Trustee shall.....". It then goes on to indicate the proper steps to be taken, in all cases.[6] In the *O'Malley* case, the code of conduct of the Calgary Catholic Board was much more explicit about non-pecuniary conflicts of interest: "Trustees shall be loyal to the interest of the ownership which

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the affairs of the elected body in a judicial manner. The Board submitted that a trustee who is in litigation with the very Board of which he is a member is attempting to "serve two masters".

[96] Disqualification at common law was discussed in ***Old St. Boniface Residence Assn. Inc. v. Winnipeg (City)***, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170. Sopinka J., speaking for the majority, discussed at p. 1196 the nature of "personal interest" which will disqualify at common law:

> I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.

[97] Therefore, common law disqualification may occur for both pecuniary and non-pecuniary reasons. The interest must be personal and substantial such that a reasonably well-informed person would conclude that it might influence the exercise of the public duty owed by that person. The interest must be more than an interest held in common with other persons of like opinion.

[98] In the matter at hand, the Board argued that there are at least two common law grounds for disqualifying Mr. O'Malley. First, the Board asserted that disqualification is reasonable based on Mr. O'Malley's discussing and voting on the motion to commence legal proceedings against him. Second, the Board took the position that disqualification should follow Mr. O'Malley's having repeatedly sued the very Board of which he was a member.

[99] With respect to the first ground, Mr. O'Malley had a "substantial personal interest" in the November 10, 2005 motion. This personal interest was both pecuniary and non-pecuniary.. He had a non-pecuniary personal interest in continuing in office which would necessarily have influenced his vote irrespective of whether it was consistent with his public duty. In addition, he had a pecuniary interest based on the Board's claim for solicitor and client costs. A reasonably well-informed person would conclude that these interests would influence the exercise of his public duty.

[6]Later in section 6 we see: "No Trustee shall use his or her position, authority or influence for personal....gain.....or for the personal.....gain.....of a relative, friend and/or business associate.....A Trustee shall not use his or her position, authority or influence to give any person or organization special treatment that might, or might be perceived to, advance the interests of the Trustee, or the interests of a relative, friend, and/or business associate of the Trustee."

loyalty shall supersede the personal interest of any trustee or any loyalty to any advocacy or special interest groups."[7]

Of course, the fact that the TCDSB's *Code of Conduct* does not contain such an explicit clause on the subject does not mean that the Trustees can ignore the common law in respect of non-pecuniary conflicts of interest. Yet, in the last ten years since my 2011 submission to you, I have seen several Catholic Boards in Ontario completely ignore this aspect of the law. In my

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[7] See *O'Malley*, paragraphs 109-112:[109] Mr. O'Malley's steadfast refusal to play by the rules has caused untold turmoil and grief, not to mention the wasted time, money and resources expended to address and respond to his unethical conduct, frivolous lawsuits and unmeritorious complaints. It is clear from authorities such as ***Margolis*** at p.4 and ***Toronto v. Bowes*** (1854), 4 Gr. 489, aff'd. (1856), 6 Gr. 1 (C.A.), aff'd. (1858), 11 Moo. P.C. 463 that a school board trustee is a fiduciary.The position of fiduciary imports a high degree of trust requiring a very high standard of care. The need to maintain integrity in public office is of paramount importance and requires that elected officials be held to a very high objective standard of care.

[110] Ms. Moore, the corporate governance expert, testified that, upon reading Mr. O'Malley's Amended Statement of Defence, she concluded that Mr. O'Malley has a misguided understanding of to whom his fiduciary duties are owed. Ms. Moore testified that the fiduciary duties are owed to the corporate body (the Board) which is, in turn, accountable to the Catholic ownership. Mr. O'Malley wrongly believes that his duties are owed only to the people who voted for him. At p. 11 of her report, Ms. Moore quotes as follows from Carol Hansell's text entitled *Corporate Governance: what directors need to know* (Toronto: Carswell, 2003):

> […] the courts have been very clear that the fact of a director having been nominated to the board by a particular person does not entitle that director to prefer the interests of that person to the interests of the corporation. *A director must be concerned first and foremost with the interest of the corporation.* As an Ontario court put it, the corporate life of a nominee director who votes against the interests of his or her nominator 'may be neither happy nor long', but that director must nevertheless act in the best interests of the corporation. [Emphasis in expert report.]

[111] The Board also relied upon Michael Ng's text, *Fiduciary Duties: Obligations of Loyalty and Faithfulness*, looseleaf (Aurora, Ont.: Canada Law Book, 2003) at p. 2-6 for the proposition that the standard of faithfulness required of a fiduciary depends on the fiduciary's role but that, often, codes of professional conduct governing a particular group of fiduciaries inform the standard.

[112] The Board's Code of Conduct Policy GP-5 (the "Code of Conduct") sets out the standard of faithfulness and lays out the obligations owed by a trustee of the Board. The Board summarized as follows the provisions of the Code of Conduct which it alleges were breached by Mr. O'Malley:

> (a) The preamble which provides that trustees shall conduct themselves in an ethical and prudent manner and in a manner that reflects respect for the dignity and worth of all individuals;
>
> (b) Clause 1 of the Code of Conduct which stipulates that trustees shall be loyal to the interest of the ownership which loyalty shall supersede the personal interest of any trustee or any loyalty to any advocacy or special interest groups;.....[emphasis added]

own Board, a Trustee was known to have membership in at least one homosexual political action group, but, to the best of my knowledge and belief, he never formally declared to the Board a conflict of interest on denominational matters, and never absented himself from Board meetings when such matters came up for discussion and in respect of which there were irreconcilable differences between the desires of his special interest group and magisterial teachings of the Catholic Church.

With respect, the conduct of some of your own Trustees in the last ten or so years has been equally problematic. I have observed the following kinds of public conduct, much of which has never been formally acknowledged by the Board, on the record, as reflecting an intolerable personal conflict of interest. Some of your Trustees have engaged in more than one kind:

1. issuing public statements from which a reasonable inference can be drawn that the Trustee dissents from magisterial teachings of the Catholic Church, and therefore has a personal interest of an ideological nature that clearly conflicts with the interests of the Board, having regard to its Constitutionally Protected Mandate;

2. issuing public statements from which a reasonable inference can be drawn that the Trustee has a loyalty to one or more homosexual special interest and advocacy groups that supercedes his or her loyalty to the Board and its Catholic Electors who adhere to the magisterial teachings of the Church;

3. engaging in (and possibly leading or at least co-ordinating one's own political activities with) public political campaigns in which the Trustee invites members of the public to either lobby his or her Trustee colleagues (whether by persuasion or by intimidation) to cast their vote on a Board resolution coming up for a vote in a way that constitutes a breach of their fiduciary duties;

4. issuing, in advance, public statements on how the Trustee will be voting on an upcoming resolution, from which a reasonable inference can be drawn that the Trustee has already "made up his her mind" and will not be listening to contrary views expressed by colleagues with an open mind. This is, in itself, a breach of elected official's fiduciary duties;

5. issuing public statements that amount to counselling Trustees in neighbouring Catholic Separate School Boards to vote a certain way on resolutions of a denominational nature that would constitute a breach of their fiduciary duties. This is improper meddling in the affairs of another Board;

6. lobbying the Minister of Education to interfere in the affairs of the TCDSB that are of a denominational nature, in contravention of both the *Education Act* and Section 93 [I am thinking here of the recent PPM-128 controversy], and counselling the Minister to commit the tort of misfeasance in public office;

7. allowing other persons who have no legal standing to do so, to lobby the Trustee to vote on a resolution coming up for a vote in way that would constitute a breach by the Trustee

of his or her fiduciary obligations, and not reporting such lobbying efforts to the Chair of the Board, forthwith; and

8. failing to formally disclose any of the above-described conduct, as applicable, to the Board at a meeting of the Board. Such a failure, as previously noted, is in itself a breach of a Trustee's fiduciary duties.

In my opinion, it is not unreasonable for the Board to at least demand, without exception, that any Trustee who has engaged in any one or more of these behaviours to comply with the *Code of Conduct* and the requirements of the common law, before any votes are taken on the "Rainbow Flag" and "Critical Race Theory" resolutions. Compliance would require the Trustee to take the steps outlined in section 6:

(a) prior to the votes being taken, disclose the offending conduct and the personal conflict of interest and the general nature thereof inferred from that conduct. If the Trustee is affiliated with any special interest or advocacy group, such as by way of membership or through donations, or publicly expressed support for the aims, goals, and strategies, that must be disclosed. If the Trustee collaborated with the group in a public campaign to influence decisions of the Board, that, and the details of the nature and extent of such collaboration, must be disclosed;

(b) refrain from taking part in the discussion of, or vote on the resolutions in respect of which the Trustee has a conflict of interest;

(c) refrain from discussing the issue with any other person;

(d) refrain from attempting in any way, whether before, during or after the meeting to influence the voting on such resolution (this is very problematic in the current case, as some Trustees have already done was is clearly prohibited); and

(e) leave the meeting or the part of the meeting during which the matter is under consideration.

Denominational Rights

The non-pecuniary conflict of interest analysis I have presented here is predicated on the assumption that the Board directly (and its Trustees, indirectly and individually) owe *fiduciary duties* to some entity or some persons. We cannot fully understand how such conflicts of interest should be handled unless we first have a correct understanding of the full nature and scope of the fiduciary relationships between the Board, the Trustees, and their Catholic Electors. In turn, in my view, we cannot have such a correct understanding of these fiduciary relationships unless we know what Denominational Rights are, and who possesses them.

I have always been puzzled that the authors of the 2011 BLG Opinion never got around to discussing either the fiduciary duties of the Board and its Trustees or the fact that the Board's own *Code of Conduct* imposed (and still imposes) on each Trustee an explicit duty to "recognize

and rigorously defend the constitutional right of Catholic Education" (clause 1(d)). Instead, they spent a lot of ink talking about "shields" and "swords" and how Section 93 cannot be used as a "sword" by the Catholic Electors against the Board and its Trustees, before finally pressing their legal opinion that the Board has no legal obligation to assert a Section 93 claim against the provincial government, on behalf of their Catholic Electors, if they do not wish to, and there is nothing the electors can do about it. But as I explain more fully in Appendix "A", neither I nor Michael Osborne suggested that Section 93 be used as a "sword". Speaking for myself, all I have ever asserted is that Catholic Electors have recourse to private law causes of action if the Board and its Trustee commit breaches of their fiduciary duties. In the *O'Malley* decision (cited later), the Court appeared to accept the following proposition of law [at paragraph 111]: "[T]he standard of faithfulness required of a fiduciary depends on the fiduciary's role but that, often, codes of professional conduct governing a particular group of fiduciaries inform the standard." Building on this statement, I have simply added other items to the *list* of things that *inform* the standard Catholic School Boards and their Trustees are required to meet, including, but not limited to, the rights and privileges *referred to* in Section 93. This kind of analysis has nothing to do with using Section 93 as a "sword", a notion, in any event, for which the authors cited no legal authority.

To be quite specific, I submit that the full and precise scope of the fiduciary duties an Ontario Catholic School Board and its Trustees owe to its faithful Catholic Electors and the standards they must meet are informed by, in addition to the fundamental duties of full disclosure and loyalty common to all fiduciary-beneficiary relationships:

(a) the magisterial teachings of the Catholic Church, especially the *Code of Canon Law*;
(b) the Board's Constitutionally Protected Mandate, as explicated by the Courts;
(c) the denominational rights of Catholic Electors, as explicated by the Courts;
(d) the text of any relevant statutory re-statements of the denominational rights and privileges of Catholic Electors, including ss. 1(4) and 1(4.1) of the *Education Act*, the parallel provisions of the amended *Labour Relations Act, 1995* and the *School Board Collective Bargaining Act, 2014*, and section 19 of the *Human Rights Code* (Ontario);[8]

[8] In essence, a duty to exercise powers under the *Education Act* in a manner consistent with and respectful of the Denominational Rights has been specifically incorporated into the statutory duty in subsection 1(4.1) of the *Education Act* (Ontario), which applies to many persons, including the Trustees of a Catholic Board. See also subsection 1(4).

Constitutional rights and privileges

S. 1(4) This Act does not adversely affect any right or privilegeguaranteed by section 93 of the *Constitution Act, 1867* or by section 23 of the *Canadian Charter of Rights and Freedoms*. 1997, c. 3, s. 2 (6).

Same

(4.1) 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* and by section 23 of the *Canadian Charter of Rights and Freedoms*. 1997, c. 31, s. 1 (5).

(e) the text of any industry-wide codes or standards of conduct for school board trustees; and
(f) the text of the school board's own *Code of Conduct.*

The Catholic Electors of the TCDSB possess the denominational rights and privileges *referred to* but not specifically described in Section 93. These rights and privileges have been further interpreted and explicated by the Supreme Court of Canada and the Ontario Court of Appeal, in various decisions. Electors have often been collectively referred to by the courts as members of the "Class of Persons" who possess these rights. In *A.G. (Que.) v. Greater Hull School Board*,[9] a 1984 decision of the Supreme Court of Canada, Justices Le Dain and Lamer characterized [at paragraphs 83-84] these rights as "collective rights", suggesting that "it is in the interests of the class of persons or community as a whole in denominational education that is to be looked at and not the interests of the individual ratepayer." Accordingly, they recognized that the Trustees of separate school boards like the TCDSB are only the ***representatives*** of such a class for purposes of the management of denominational schools, and the rights of the class in respect of such management are necessarily to be determined by reference to the powers of management conferred by law on the trustees, through whom the class of persons may exercise their collective rights. This explains why the courts customarily (if inaccurately) refer to the rights or powers of the trustees themselves in considering the rights of a class of persons under Section 93.[10]I submit that they also

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For the parallel provisions of the *Human Rights Code*, see the following*:*

Separate school rights preserved

19. (1) This Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under the *Constitution Act, 1867* and the *Education Act*. R.S.O. 1990, c. H.19, s. 19 (1).

Duties of teachers

(2) This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers. R.S.O. 1990, c. H.19, s. 19 (2).

S. 19(2) was intended to ensure that teachers could comply with section 264(1)(c) of the *Education Act* without being accused of contravening the *Human Rights Code.* S. 264(1)(c) says:"It is the duty of a teacher and a temporary teacher, …. to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues." "Chastity", of course, is either an element of "purity", or is one of the "other virtues". In 2011, I argued that Gay-Straight Alliance groups notoriously disrespect Christian morality, and scoff at any suggestion that persons with a same-sex attraction should cultivate the virtue of chastity. Today, in my view, the homosexual activists groups that promote the "Rainbow Flag" do not hide the fact that they use this symbol to reflect their own similar disdain for the virtue of chastity. One clear secular and legal objection to proposed Rainbow Flag Resolution is that passage of it by the TCDSB would objectively convey to its own teachers an invitation to contravene a provision of the *Education Act.*

See note 16 below for the text of the relevant parallel provisions of the *Labour Relations Act, 1995* and the *School Boards Collective Bargaining Act, 2014***,** S.O. 2014, CH 5.

[9][1984] 2 S.C.R. 575. Hereinafter often referred to as "*Greater Hull".*

[10]I have noticed that the TCDSB's own *Code of Conduct* speaks of, in clause 1(d), "defending the constitutional right of Catholic education", instead of "defending the constitutional rights of its Catholic Electors", which would be more accurate.

have legal standing to exercise these rights themselves, without the co-operation or assistance of their trustees,[11] particularly in those circumstances when the Board itself has engaged in conduct that is in breach of its corporate fiduciary obligations to its Catholic Electors, and a majority of the elected Trustees are in breach of *their* fiduciary obligations to cast their votes on Board resolutions in such a way as to ensure that the Board does NOT commit a breach of *its* fiduciary obligations to the same Catholic Electors.

In *Calgary Roman Catholic Separate School District No. 1 v. O'Malley*[12], a case that was about a Catholic School Board, but one in which denominational rights and the differences between public boards and separate boards were not in issue, the Alberta Queen's Bench correctly identified the general rule that a "school board trustee is a fiduciary" and owes those fiduciary obligations "to the corporate body (the Board) which is, in turn, accountable to the Catholic ownership." [109-110]

But this does not tell the whole story. The Court went on to quote, approvingly, from the decision of the Ontario Superior Court of Justice in *Hearst (Town) v. District School Board Ontario North East,*[2000] O.J. No. 3419 at paras. 39 and 40: "While they [the trustees] are accountable to their communities, that accountability is both general and specific. From time to time, there will be a conflict between the interests of a specific constituency and the school community in general. That is to be expected. The trustees must make decisions in the best interests of the entire school community while trying to accommodate the specific constituencies." We submit that this appropriately describes to whom a public school board (and, indirectly, their Trustees) owe fiduciary obligations on all questions to be determined, and to whom a separate school board (and, indirectly, their Trustees) owe fiduciary duties on all *non-denominational* questions.

That said, with respect to *denominational* questions, the beneficiaries of the duty of loyalty of an Ontario separate school board and its Trustees form a very different subset of the taxpayers whose children may attend their schools. In that specific context, there is only a single "specific constituency" the Board and its Trustees must serve, in priority to the demands of all others.

The Ontario Court of Appeal proclaimed in the case of *Daly* v. *Ontario (A.G.)*[13]the constitutionally protected mandate of an Ontario separate school board to be to transmit the Magisterial teachings of the Catholic Church to its students. In light of this decision, and because the interests of the electors are "collective", there is no choice but to employ a legal fiction that all electors want their Trustees to fulfill that mandate. How could Trustees possibly

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[11] We note that some of the original Applicants in the *Daly* case (see note 5 below) were not trustees of a Catholic separate school board. Neither the Trial Court nor the Ontario Court of Appeal had any issue with their standing to bring the Application to determine whether or not the Province of Ontario had prejudiced the rights and privileges of Catholic electors.

[12]2007 ABQB 574.

[13]*Daly* v. *Ontario (A.G.)*, (1999), 44 O.R. (3d) 349 (C.A.); leave to appeal to S.C.C. dismissed October 21, 1999. Herein often referred to simply as "*Daly*".

act in the best interests of both faithful Catholics and those who dissent from the Church's teachings, in respect of a denominational matter, at the same time? Their interests are irreconcilable. The right choice is clear, however, since pursuit of the interests of dissenters has no constitutional or statutory mandate. At best, dissenters seek to impose their personal "religious" beliefs on faithful Catholics, which are protected by the merely individual rights that are listed in the *Charter of Rights and Freedoms*, but which are explicitly subordinated to the denominational rights of faithful Catholic Electors. Ever since the "Elgin County Case", the *Education* Act and the *Charter* have been interpreted by the Courts to prohibit government schools from indoctrinating their students in any particular religious beliefs, with the only exception to this principle being the right of Catholic Electors, established at the time of Confederation, to have taxpayer-funded schools that indoctrinate their students in the precepts of the Catholic Church, as taught by the Magisterium.[14]

In *Alberta v. Elder Advocates of Alberta Society*, [15] the Supreme Court of Canada described the fiduciary obligation as "one of utmost loyalty to the beneficiary". The Court when on to say: "As Finn states, the fiduciary principle's function 'is not to mediate between interests... It is to secure the paramountcy of *one side*'s interests . . . . The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests' (P. D. Finn, "The Fiduciary Principle", in T. G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), 1, at p. 27 (underlining added); see also *Hodgkinson*, at p. 468, *per* Sopinka J. and McLachlin J. (as she then was), dissenting). Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship." [43-44].

In the past, some Catholic separate school boards and their Catholic Trustees have acted as if they possessed, as a matter of law, the *discretion* to unilaterally *waive* a particular denominational right possessed by their Catholic Electors, on their behalf. In light of the fiduciary nature of their duties, as described above, a number of statutory amendments to the provincial education-related statutes, and the collective nature of the rights of the electors, I doubt very much that they ever had any such authority, and certainly, that they have any such authority now.[16]

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[14]Some Directors of Education in the Catholic system and some of their Trustees seem to have trouble accepting the legal reality that their Boards are prohibited from attempting to indoctrinate students in the teachings of, for example, the United Church of Canada.

[15]2011 SCC 24 (CanLII), [2011] 2 SCR 261.

[16]Indeed, at one time even some labour arbitrators and the Courts thought that this was true. In *Re Essex County Roman Catholic Separate School Board and Tremblay-Webster et al.,* 1984 CanLII 2138, the Ontario Court of Appeal astonishingly said the following: "Section 93 of the *Constitution Act, 1867* prohibits the provincial Legislature from making laws which prejudicially affect any right or privilege with respect to denominational schools but does not prohibit voluntary collective agreements with respect to those rights and privileges." In other words, the Trustees of a Catholic School Board were not compelled by any law to negotiate with OECTA a collective agreement that made a termination of a teacher's employment for denominational cause (e.g. the teacher married outside of the Church) subject to arbitration by a secular arbitrator, but it could choose to do so if it wished. Once it did make this choice, however, it and its Catholic Electors were bound by the terms of the collective agreement. The Trustees had negotiated away the right of the Catholic Electors to have such decisions made without interference from outside parties, and the Ontario Court of Appeal did not have a problem with that.

It is speculation of my part, but I think the purpose of the following subsequent amendments to the *Labour Relations Act* and the *School Boards Collective Bargaining Act, 2014* was to, by statute, reverse the legal effect of the Ontario Court of Appeal's decision in *Re Essex:*

See the *School Boards Collective Bargaining Act, 2014***,** S.O. 2014, CH 5

Constitutional rights and privileges

S. 1(3) This Act and the *Labour Relations Act, 1995* do not prejudicially affect any right or privilege guaranteed by section 93 of the *Constitution Act, 1867* or by section 23 of the *Canadian Charter of Rights and Freedoms*, and every authority given by this Act and the *Labour Relations Act, 1995* shall be exercised in a manner consistent with those rights and privileges. [in force since 1998]

Note also Section subsection 3 (1): This Act applies to every school board in Ontario, to the bargaining agents that represent employees of those school boards and to the employees represented by those bargaining agents.

It seems to me that the applied effect of this statute, as revised, is that every Catholic School Board in Ontario, and OECTA are all bound by law, in conducting their negotiations for collective agreements, to respect the rights and privileges of the Catholic Electors. In other words, OECTA cannot ask for provisions that would prejudicially affect the rights and privileges of Catholic Electors, and the Board could not agree to them even if OECTA asked for them. It cannot be reasonably asserted, therefore, that a Catholic Board has the lawful authority to unilateral *waive* such rights and privileges of the Class of Persons who possess them.

Re Essex was bad law and its reversal by the Legislature of Ontario was appropriate. The very notion that, as a matter of constitutional law, a substantive constitutional right is *capable of beingwaived*, even by the right-holder himself, has been regarded as very dubious in *Charter* jurisprudence. See *R. v. Horner*, 2013 SKQB 340, at paragraphs 29-36 and 54. See also *Syndicat Northcrest v. Amselem,* 2004 SCC 47 (CanLII), at paragraphs 92 and 100. Add to mix the distinguishing factors that Section 93 rights are collective rights, and not an individual right like the *Charter* right to freedom of religion, and the alleged *waiver* is attempted by a mere "proxyholder" of the right-holder, without the prior knowledge and consent of all of the persons in the Class of Persons who possess the rights, the case for the validity of such a waiver by Catholic School Board Trustees is even weaker than in the *Charter* context.

Another applied effect of subsection 1(3) is the indirect amendment of the provisions of the *Labour Relations Act.* This suggests to me that when contemplating whether or not to file and pursue grievances against a Catholic School Board for unfair treatment of a teacher, on behalf of the teacher, OECTA is prohibited from using its authority to discriminate against teachers mistreated because they were perceived by the administration to be "too Catholic" and in favour of teachers who dissent from magisterial teachings of the Church, whether or not their treatment by the administration was justified. This change in the law should also mean, in theory, we should no longer see arbitrator decisions like we saw in the infamous Joanna Manning case (1994). See *Metropolitan Separate School Board v. OECTA* (1994) 41 L.C. (4th) 353 (Ont.). I use the phrase "in theory", because I know from personal experience that such discriminatory conduct on the part of OECTA remains real and systemic. Catholic teachers who adhere to the magisterial teachings of the Church are often mistreated, for that reason, by their supervisors, and when they turn to their union for help, they get "unfair representation".

In the Joanna Manning case, the arbitrator ruled that what is now the TCDSB could not discipline her even though she had written a newspaper article in which she was critical of the Catholic Church's position on the role of women within the Church. The disciplinary action taken against her was a denial of a promotion, and removal from teaching religion in the Board's schools, although she suffered no loss of income in her new assigned position. The arbitrator held that this constituted punishment without just cause. In my view, in this case, the arbitrator's interference in the Board's control over her discipline over denominational issues prejudicially affected the Denominational Rights of the Catholic Electors. Any attempt by OECTA to take a similar case to arbitration today, it seems to me, would be prohibited by the current version of the *Labour Relations Act, 1995.*

Another aspect that is "essential to" the fiduciary-beneficiary relationship is compelling the fiduciary to fulfill its duty of full disclosure of wrongdoing it knows has been committed against the beneficiary. This specific duty flows from the fiduciary's common law duties of "loyalty, fidelity, and candour." [17]

How Should the Lobbying Efforts of OECTA Church Members and LGBTQ Political Activists be handled by the Board?

In my opinion, one of the reasons why Catholic School Boards in Ontario seem so dysfunctional and are constantly in a state of internal turmoil is their tendency to be far too tolerant of inappropriate interference in denominational issues by "busybodies" -- entities and persons who have no legal standing to even comment on these issues, and Catholic Electors who dissent from the magisterial teachings of the Church. Much time, effort, and emotional energy is wasted on dealing with their unsolicited commentary, when, ultimately, the only basis on which a decision has to made is whether the passage of a proposed resolution is compatible with the magisterial teachings of the Catholic Church. It seems to me ill-advised and uncharitable to say anything to them that will give them a false hope that the Trustees will take their presentations and petitions into consideration.

I take note that the TCDSB *Code of Conduct* says the following in section 2: "It is imperative that the Trustees act, and be seen to act, in the best interests of the public they serve. Trustees are elected to represent all stakeholders in the TCDSB..." As I have argued previously, this not precisely accurate, and should be corrected, as it may be a source of a "false hope". The practical reality is that the children of many non-Catholics attend your schools, and some of their parents think that the Board has no choice but to admit their children to its schools if they prefer them over the public schools. But the constitutional reality is that they attend your schools only "by the grace" of the Catholic community, and, notwithstanding the *Erazo* decision of the Divisional Court in 2016, this has been so since the 1928 *Hirsch* decision of the Privy Council (the highest court in the land at the time).[18] So, while the Minister of Education can reasonably

[17]In *Dunsmuir v Royal Group, Inc.*, 2017 ONSC 4391 (CanLII), the Superior Court of Ontario said, at paragraph 134: "A fiduciary who knows about wrongdoing committed against the beneficiary has a duty to tell the beneficiary. In *Canson Enterprises Ltd. v. Boughton & Co*., 1991 CanLII 52 (SCC), 1991 SCJ 91, the Supreme Court of Canada held that a lawyer breached his duty to his client who was the buyer of land. The land had been subject to a wrongful flip by an intermediate buyer in breach of its duties to the final buyer. The lawyer had acted on the intermediate flip. It is significant that in that case, the lawyer had not been a principal participating in the flip. Rather, he knew about it and as a duty to the ultimate buyer, the lawyer had a duty to disclose to his client the breaches of duty committed against it. Similarly, the fact that Mr. Goegan did not make a personal profit on the Vaughan West land flip is no answer in law to the claim that his knowledge and silence were breaches of his fiduciary duty to disclose the Vaughan West land flip. His common law duties of loyalty, fidelity, and candour required him to disclose to the corporation the conflicts of interest and the misappropriation of corporate opportunities and assets of which he had knowledge from his participation in the transactions. See also *EM Plastic & Electric Product Ltd. v. Hobza*, [1992] OJ No. 4173 (Gen. Div), at paras. 235 and 236, *affirmed*, [1993] OJ No 5078 (CA), *leave to appeal refused*, [2007] SCCA No. 92."

[18]See *Hirsch et al. v. Protestant Bd.School Com'rs of Montreal et al., 1928 CanLII 500 (UK JCPC)*("*Hirsch"*). See also *Griffin v. Blainville Deux-Montagnes (Commission scolaire regionale)* (1989), 63 D.L.R. (4th) 37 (Que. S.C.), in which the court refused a request from English-speaking Catholic students for an order directing an English-speaking Protestant dissentient Board to admit them to its schools, on the ground that it lacked jurisdiction under

say that the Board must consider the non-Catholic parents of students to be "stakeholders" of equal status to the Catholic Electors in respect of the non-denominational aspects of your operations, and that consultations with them on such matters should be welcomed and encouraged, they cannot be "stakeholders" in respect of the denominational aspects. Indeed, the only "stakeholders" in respect of the denominational aspects of your operations are the Catholic Electors who adhere to the magisterial teachings of the Catholic Church. Non-Catholic and dissenting Catholic "busybodies" who seek to lobby the Trustees on denominational issues should be politely told that their efforts will not be tolerated.

One of two important legal principles recognized by the Supreme Court of Canada in the *Greater Hull* case [see the case report attached to this emailed letter] is the principle that, where the Trustees of a Catholic Board are exercising a Denominational Right of its Catholic Electors, any attempt by a provincial government to fetter the Trustees' discretionary powers of decision by requiring them to seek the approval of, or input from, persons who are not their Catholic Electors, is unconstitutional.

By extension of this principle, if consultation with "outsiders" on denominational matters cannot be compelled by government authority, it seems to me that it must be equally true that Trustees commit of breach of a fiduciary duty to the Catholic Electors if they *voluntarily* permit "outsiders" to influence their decision-making. This surely "waters down" or "prejudicially affects" both the exclusive influence that the Catholic Electors have over their Trustees by "right and privilege" and the accountability of the Trustees to the Catholic Electors.

I would put OECTA in same category as the non-Catholic parents of students and the dissenting Catholic Electors. OECTA is a secular union created by the authority of a provincial statute and all of its activities are governed exclusively by the provisions of the *Labour Relations Act, 1995* and the *School Boards Collective Bargaining Act, 2014*; it is not, and cannot be, a Catholic Elector of the TCDSB. It is not a religious organization recognized as an approved "order" or "ministry" or "institute" of the Catholic Church. Why do Catholic Boards continue to tolerate unsolicited lobbying from OECTA on denominational issues? For that matter, why do Catholic

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section 93 of the *Constitution Act, 1967* to do so. It reconfirmed that section 93 was intended to protect, in Quebec, the denominational rights of Protestants only. Of course, the same applies in Ontario for Catholics. This means that section 42 of the *Education Act*, on its face, is unconstitutional, and is just waiting for some plaintiff to challenge its constitutionality. The text of section 42 itself admits that *Hirsch* is still good law, as the requirement to admit non-Catholic students explicitly purports to apply only to the high schools. It has just not been updated to reflect the Supreme Court of Canada's holding in *Reference re Bill 30*, [1987] 1 S.C.R. 1148, at paras. 59-60, to the effect that the rights to full funding and all other denominational rights now extend through the end of high school. It also means that the decision of the Divisional Court of Ontario in *Erazo v. Dufferin-Peel Catholic District SchoolBoard*, 2014 ONSC 2072 (CanLII)is bad law. All five lawyers (including three judges) involved in the case pretended to not know of the existence of the *Hirsch* and *Griffin* decisions. It also means that all those "agreements" between Catholic Boards and the Ministry of Education over the last few decades, which purport to bind the Boards to accept non-catholic students, are probably unenforceable against the Catholic electors of those Boards.

Boards continue to tolerate OECTA interference in the elections of Trustees? Why is OECTA not firmly told that both of these activities are not lawful[19]activities of a union?

How Can We Know What is Magisterial Teaching of the Catholic Church?

When the Ontario Court of Appeal, in the *Daly* case, referred to the "Roman Catholic faith" in proclaiming the Constitutionally Protected Mandate of Ontario Catholic Separate School Boards, it surely did not contemplate the very peculiar religious beliefs of OECTA or indeed of any individual person who claims to be Catholic but dissents from the teachings of the Magisterium.[20] If it did, the Denominational Rights of the "class of persons" entitled to assert them would become unintelligible and meaningless. How can the subjective religious views of OECTA's President become **the** benchmark for all Catholics served by all of the Catholic Boards in Ontario? On this point, I note that the 2011 BLG Opinion tended to express agreement with my view and Michael Osborne's view that courts hearing Section 93 actions would want to hear evidence of the authoritative teachings of the Catholic Church, and accept that evidence, if presented (page 14 of the BLG Opinion). I trust that the TCDSB now agrees with the view of its own legal counsel that the typical OECTA position on denominational issues that the Board

[19]I am using the term "not lawful" here in the limited sense of an "entity's" lack of legal capacity, which flows from "ultra vires doctrine" familiar to lawyers who understand corporate law and administrative law. As indicated elsewhere in this letter, in Ontario, unions cannot be Catholic Electors (only individuals can be), and, as an "entity", a teachers' union arguably gets its authority to "act" exclusively from the *Labour Relations Act, 1995* and the *School Boards Collective Bargaining Act*, *2014*. I take the position that neither statute contains any provision that explicitly authorizes such a union, or that could reasonably be *interpreted* as authorizing such a union, from a constitutional law perspective, to interfere in Trustee elections or Trustees' deliberations on denominational issues. Of course, if such a union actually goes as far as to engage in bribery or intimidation of Trustees, such conduct would also be "unlawful" in a criminal law sense. That OECTA has in the past made monetary and "in kind" contributions to the election campaigns of "favoured" Trustee candidates (favoured if they dissent from magisterial teachings of the Church), and withheld such assistance from "disfavoured" candidates, is well known in the Catholic community. That said, it must be acknowledged that fairly recent amendments to the *Municipal Elections Act, 1996* have now eliminated OECTA's ability to make direct "contributions" to the election campaigns of candidates in Trustee elections, and severely constrained its ability to even engage in third party advertising during municipal elections.

OECTA is likely to object to my analysis by pointing to the decision of the Supreme Court of Canada in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, as authority for the proposition that unions have an *inherent* legal capacity to engage in public advocacy on a variety of social and political issues. The Court did endorse this general proposition, but only in a qualified way. It cautioned that its legal capacity to engage in such activity could be constrained by the terms of its constating documents. The Court was not asked to comment on whether it could be further constrained by the Denominational Rights referred to in Section 93, or in provincial statutes governing the conduct of unions that re-stated those Denominational Rights in order to rebut any inference that the provincial government was enabling other entities to prejudicially affect the rights and privileges of Catholic Electors. I think a reasonable court asked to address this question would conclude that a union's capacity to engage in such activity is also limited by the superior constitutional rights of Catholic Electors.

[20] By contrast, Canadian law seems to me to be fairly clear that, in religious freedom cases involving the *Charter* rights of individuals, the subjective understanding of the individual of his religious obligations is what is relevant (and what a civil court is bound to accept), even if that understanding is not consistent with the "official" teachings of his or her "Church". See *Syndicat Northcrest v. Amselem,* 2004 SCC 47 (CanLII).

should embrace a "broader view of Catholic values" than what is prescribed by its Magisterium is absurd.

That said, the BLG claim that "the issue of how the content of Catholic doctrine should be proved in court is not settled" (p. 14) was a very uninformed one. The trial court decision in *Loyola High School v. Courshesne,* 2010 QCCS 2631 (CanLII) was released in 2010, and therefore it should have been known to the authors of the 2011 BLG Opinion at the time of its writing. In that case, McGill Professor Douglas Farrow provided expert evidence to the Quebec Superior Court on the nature of the Magisterium of the Catholic Church. At paragraphs 281-285, Justice Gerard Dugre wrote (rough English translation): "As explained by the expert Farrow, in addition to the Pope and the Roman Curia, composed of bishops and cardinals, the Catholic Church has dicasteries, similar to civilian government departments. Among the most important dicasteries is the Congregation for Catholic Education……Documents produced by these dicasteries are part of the 'ordinary magisterium' of the Catholic Church and, as such, have full authority. These texts also had direct application to Catholic schools, including Loyola. The expert Farrow refers to this excerpt of the piece P-11, entitled The Catholic School, which reads: '28. From the foregoing it appears that at the outset, the school should adjust its training program and methods to the vision of reality on which it is based, which justifies its purpose and which governs all of its activities.' Finally, as explained by the expert Farrow, statements of the Assembly of Quebec Catholic Bishops (including press releases) are not part of the Magisterium of the Church and therefore are not authority. In any event, it is wrong to pretend that the Assembly of Quebec Catholic Bishops has agreed with the imposition of the ERC program on private Catholic denominational schools. The Court finds the testimony of the expert Farrow concluded that Loyola would be acting contrary to the doctrine of the Catholic Church by teaching the 'Ethics and Religious Culture' course with the program mandated by the Minister of Education, Recreation and Sport." [21]

It therefore seems to me that, as a matter of both Catholic teaching and judicial proceedings involving Denominational Rights, it is now beyond dispute that formal written pronouncements of the Church's Congregation for the Doctrine of the Faith ("CDF"), the *Catechism*, Papal Encyclicals, and the *Code of Canon Law* constitute magisterial documents, and present the teachings of the Magisterium. It is also beyond dispute that Catholics are required to adhere to such teachings and shun contrary doctrines, and that they have a right, under the laws of the Church, to receive teaching from their Pastors and others having a teaching ministry in the Church that is faithful to the Magisterium. In other words, for a Catholic, there is no such thing as a "right to dissent" from the fundamental contents of faith and morals as taught by the Magisterium of the Catholic Church. Moreover, the laity have a duty to "be on guard, in questions of opinion, against proposing their own view as the teaching of the Church" (Canon 227, *Code of Canon Law*).

Thus, in respect of denominational issues (i.e., issues relating to the Catholicity of the Board's Schools), no matter how much parents and students dialogue with or complain to the Board, the Trustees have a legal, fiduciary, and constitutional duty to adhere to the teachings of the Magisterium of the Catholic Church. As a matter of administrative law, it would be unlawful for the Trustees to take into consideration the views of Catholics who dissent from Church teaching,

[21]This decision was reversed on appeal, but then re-instated upon further appeal to the Supreme Court of Canada.

or the views of non-Catholics who are allowed to attend its schools only "by the grace" (see *Hirsch*) of the Catholic Board, in deciding whether or not a resolution on a denominational matter should be passed.

What Legal Recourse, if any, do the Catholic Electors have against a Trustee who has committed a breach of fiduciary duty?

In my opinion, Catholic Electors have multiple causes of action against Catholic Boards and their trustees for the kind of breaches of fiduciary duty identified in this letter.

There are many examples of court applications and actions successfully prosecuted by individuals and organizations against school boards and individual trustees (and by the school board itself against individual trustees), in the nature of:

1. applications for judicial review of decisions made or policies enacted by school boards or other school authorities on administrative law grounds [see ss. 2(1) of the *Judicial Review Procedures Act* (Ontario)] . The most prominent recent example is the Supreme Court of Canada's decision in *Chamberlain v. Surrey School District No. 36,* [2002] 4 S.C.R. 710.

2. applications for a court order compelling a public official to carry out a statutory duty [ss. 2(1) *Judicial Review Procedures Act*; ss. 1(4.1) *Education Act*]. Although the general rule is that a breach of a statutory duty does not give a member of the public a cause of action for damages for the breach *per se*, this general rule does not rule out other causes of action and their associated forms of relief, such as an order compelling the public official to carry out the statutory duty, and an award of damages for deliberate breaches of fiduciary duty.[22] In *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (S.C.C.). Iacobucci J. made the following comments (at p. 286):

> I wish to stress that this conclusion is not inconsistent with *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, in which the Court established that the nominate tort of statutory breach does not exist. *Saskatchewan Wheat Pool* states only that it is insufficient that the defendant has breached the statute. *It does not, however, establish that the breach of a statute cannot give rise to liability if the constituent elements of tortious responsibility have been satisfied.* Put a different way, the mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the officer from civil liability. Just as a public officer who breaches a statute might be liable for negligence, so too might a public officer who breaches a statute be liable for misfeasance in a public office. *Saskatchewan Wheat Pool* would only be relevant to this motion if the appellants had pleaded no more than a failure to discharge a statutory obligation … [Underline in original, italicized emphasis added].

[22] Subject to any statutory provision that might protect a trustee from third party loss or damage claims, or require the board to indemnify the trustee against such liability; subject also to the common law, which will protect a trustee against such liability, provided his or her actions were done in "good faith". The argument here would be that breaches of fiduciary duty, especially deliberate ones, cannot be done "in good faith". See *O'Malley*, at paragraphs 121-122.

3. applications for a court order declaring a trustee's seat vacant for violations of a school board's conflict of interest policies,and the common law regarding other forms of conflict of interest. See, for example, the *O'Malley* case, where the board itself took disqualification proceedings against an individual trustee, and *Amaral v. Kennedy*, 2010 ONSC 5776 (CanLII), where disqualification proceedings were taken against a trustee by an individual who was, presumably, an elector. If a Trustee refuses to comply with the requirements of the *Code of Conduct* in connection with a personal/ideological conflict of interest, the Board itself can and should take legal action to have his or her seat declared vacant. However, if a Catholic Board itself refuses to take such action, it seems to me at least arguable that any Catholic Elector has the legal standing to seek a court order declaring the seat to be vacant.[23]

Apart from the above, which are more obvious examples, there is also the more controversial possible cause of action known as misfeasance in public office, which, if pursued against school board trustees, would have the advantage of avoiding the awkward corporate law issues that may be present in other proceedings. Trustees may be akin to directors of a corporation, but they are clearly also elected public officials. On the other hand, this "tort" is an intentional tort, which means that the plaintiff would have to prove that the public official actually intended to harm Catholic Electors who want the Catholic schools to adhere to the teachings of the Magisterium. The elements of this intentional tort are well set out in the case of *Pikangikum v. Nault,* 2010 ONSC 5122 (CanLII).[24]

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[23] See the *O'Malley* case report, wherein the Court remarks: "[Mr. O'Malley] was very familiar with the statutory prohibition and its sanction, having, as an elector, brought disqualification proceedings against a Trustee himself; *O'Malley v. Valentine,* [1992] A.J. No. 1401."[at paragraph 79]

[24] See the following excerpts from the case report:

"ELEMENTS OF MALFEASANCE IN PUBLIC OFFICE

[181] Malfeasance in public office is an intentional tort. A tort is an action (other than a breach of contract) by someone that causes damage to someone else for which the injured party may sue for compensation. In this case the action must have been done deliberately, not accidentally.

[182] Deliberate misconduct in these cases consists of:

(i) an intentional illegal act; and

(ii) an intent to harm an individual or class of individuals. [*Odhavji Estate v. Woodhouse,*2003 SCC 69 (CanLII), [2003] 3 SCR 263 ¶25]

[183] In the case of *Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3S.C.R. 263 The Supreme Court of Canada noted that misfeasance of office can arise in one of two ways, what was called Category A and Category B. (¶ 22).

[184] "Category A involves conduct that is specifically intended to injure a person or class of persons."

[185] "Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff."

[186] The Band submits that Mr. Nault's conduct falls within Category A. With respect to Category A, the fact that the public officer acted for the express purpose of harming the party suing is sufficient to satisfy each ingredient of the tort. (¶23)

[187] What are those ingredients?

[188] One may recover damages for malfeasance in public office only if it can be shown that the person being sued:

- was a public official at the time of the alleged wrongdoing
- who caused damage to the party who has sued
- by deliberately engaging in unlawful conduct in the exercise of his public functions. (The act of an individual that is otherwise not actionable does not become so because of the motive or reason for doing so. (*Roncarelli v. Duplessis*, [1959] S.C.J. No.1 pg. 18 citing House of Lords in *Allen v. Flood*))
- with an awareness that his conduct was unlawful and likely to injure or where the official acted with reckless indifference or with wilful blindness as to the likely result of his actions upon the person suing. (*Odhavji Estate v. Woodhouse,*2003 SCC 69 (CanLII), [2003] 3 SCR 263 ¶32)

[189] Oliver Wendell Holmes Jr. wrote that even a dog knows the difference between being stumbled over by accident and being kicked deliberately. In this case the person suing must have been kicked deliberately.

[190] The Supreme Court of Canada has told us that:

> The tort applies not only to a public officer who wilfully injures a member of the public through intentional abuse of a statutory power but also to a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty. [*Odhavji Estate v. Woodhouse,*2003 SCC 69 (CanLII), [2003] 3 SCR 263 ¶30]

[191] A claim may arise as a result of the misuse of power the official has or as a result of purporting to use power he doesn't have. (*Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 SCR 263 ¶22)

[192] As already noted the relevant act (or omission, in the sense described) must be unlawful.

[193] Liability may arise as a result of an action or as a result of a failure to act but failure to act can amount to misfeasance in a public office only in those circumstances in which the public officer is under a legal obligation to act.[*Odhavji Estate v. Woodhouse*, 2003 SCC 69 (CanLII), [2003] 3 SCR 263 ¶24] "

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All of the above is respectfully submitted.

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Appendix "A"

A Supplemental Commentary on the 2011 BLG Opinion

Here I intend to present, for readers who might be interested in more detailed discussion of the obvious differences between my legal opinions and those of BLG, a significant correction of the 2011 BLG Opinion. I fear that it influenced the TCDSB and other Ontario Catholic separate school boards to wrongly believe that Catholic Electors have ***no*** legal remedies if a Board and its Trustees refuse "to act in accordance with Catholic doctrine." I placed this commentary in an Appendix so that readers not so interested are not distracted from the essential arguments I have put forward in this letter.

The first objection I have is that this legal conclusion went far beyond what was necessary to deal with specific controversy at that time. At that time (and perhaps at the time of the more recent case of the Ministry of Education's attempt to compel Catholic Boards to amend their policies to make them in line with PPM-128) the controversy was specifically about the Board's lack of interest in challenging a provincial government demand that prejudicially affected the rights and privileges of Catholic Electors. The 2011 BLG Opinion could have specifically dealt with the question at hand without going further to address whether or not a Catholic Board has a legal duty to comply with the magisterial teachings of the Catholic Church that is enforceable by its Catholic Electors. The issue we are dealing with in this letter does not involve government action at all, and the TCDSB may be inappropriately influenced by a 2011 legal opinion that did not adequately deal with the subject of fiduciary duties generally.[25]

Second, in my view, the authors of the BLG Opinion committed the logical fallacy of "arguing beside the point" by insisting that Section 93cannot be used as a "sword" against the Board or its Trustees by its own Catholic Electors. My "point" in my legal opinion reviewed by BLG (and I believe this was Mr. Osborne's "point" as well) was that Section 93, as well as the duties stated in the *Code of Conduct* of the TCDSB, and the statutory restatements of the Section 93 rights and privileges in the *Education Act*, the *Labour Relations Act, 1995*and the *School Board Collective Bargaining Act, 2014* are all elements that ***inform*** the full and complete scope of the *fiduciary duties* Ontario Catholic separate school boards and their Trustees owe to the beneficiaries of that fiduciary-beneficiary relationship. Instead, BLG operated from the false premise that we were arguing that Section 93 *per se* required a Catholic Board and its Trustees to "act in accordance with Catholic doctrine." Indeed, if it is BLG's position that a beneficiary of a

[25]Unfortunately, the 2011 BLG Opinion is not very helpful to the Board now, as it considers the Rainbow Flag and Critical Race Theory Resolutions in that it provided no guidance whatsoever on the question of the nature and content of any fiduciary duties the Board and its Trustees might owe to its Catholic Electors. This was puzzling, as BLG had full knowledge of the 2007 *O'Malley* decision at the time.

fiduciary relationship who has been victimized by a breach of fiduciary duty has no legal remedy against the fiduciary, that would be a remarkably unintelligible legal conclusion. If Michael Osborne and I argued in favour of the use of any "sword", the "sword" we had in mind was not a Section 93 proceeding, but rather an action for damages against the Board for breach of fiduciary duty, combined, perhaps, with a claim for injunctive relief. I suggested that another potential "sword" was an application for judicial review of the Board's decision to take no action on the matter.[26]

Just so that everyone clearly understands how Section 93 *informs* the Denominational Rights, and in turn, the fiduciary duties they give rise to -----these duties are owed to the "Class of Persons" who are entitled to the rights and privileges *referred* to in Section 93. While 93 *raises* these rights and privileges, which are derived from other sources of the law, to the level of constitutional rights that may be raised as a "shield" (as the BLG Opinion says) against unconstitutional actions taken by and statutes and regulations enacted by the Ontario Government, it surely does not say that these rights and privileges cannot be enforced by their beneficiaries, the Catholic Electors, against the Trustees who themselves, by their own acts or omissions, either prejudicially affect those same rights and privileges, or give permission to parties other than the Provincial Government to act in way that prejudicially affects these rights and privileges.

The Ontario Court of Appeal, in *Daly v. Ontario (Minister of Education)* case [1999 CanLII 3715], re-confirmed what now must be regarded as a "constitutional fact" that was *informed* by Section 93 when it described the "active pursuit of the goal of indoctrinating students in the teachings of the Catholic religion" as the "constitutionally protected aim of the Catholic schools." It went on to say:"The purpose of granting to Roman Catholics the right to funding for separate schools and the right to elect trustees to manage their own schools was to enable the

[26]Initially, as I understand it, BLG advised the TCDSB that it had no choice but to give into the Ministry of Education's demands in respect of the EIE Policy and Gay-Straight Alliance Groups. However, after it reviewed my opinion and that of Michael Osborne, it changed its position to the following: The Board had an arguable case, relying upon the remedy provided in Section 93, to challenge the EIE Policy, but that would be totally up to the Board own's discretion. In other words, if it chose not to challenge the government's demands, there was nothing its Catholic Electors could do about it.

Contrary to BLG's original and revised opinion, Michael Osborne and I had independently come to the same conclusion that the TCDSB had a fiduciary obligation to its Catholic Electors to challenge the Ontario Government, on their behalf, over its attempt to force Catholic High Schools to allow its students to establish student-led Gay-Straight Alliance Groups, even if this meant permitting the student leaders to use these groups to attack the teachings of the Catholic Church on the subject of homosexuality.We said that the TCDSB was obligated make its objections known to the Ontario Government, and then initiate the judicial remedy provided by section 93 if it refused to concede that its demands were *ultra vires*the provincial legislature. Moreover, if the TCDSB refused to take such action, it would be in breach of its fiduciary duties to its Catholic Electors, who would then have recourse to many of the same private law remedies that any beneficiary of a fiduciary relationship would have for a breach of a fiduciary duty, and perhaps others.

teachings of the Roman Catholic faith to be transmitted to the children of Roman Catholics while educating them in secular subjects."[27]

[27]In the trial decision in *Daly v. Ontario (Attorney General,* Sharpe, J. acknowledged the important differences between the Catholic philosophy of education and the secular vision of education. He said: "Unlike the public schools, which are precluded from attempting to indoctrinate their students with any sectarian religious beliefs (*Canadian Civil Liberties Assn. v. Ontario (Minister of Education*) (1990), 71 O.R. (2d) 341(C.A.) [the "Elgin County Case**"], separate schools have a constitutionally protected mandate to do so.** Separate schools do not aim to teach their students *about* [matters such as life, the meaning of life, and the spiritual life] from a neutral or objective point of view. Separate schools explicitly reject that secular **approach and have consistently defined their mission to be the inculcation of a particular religious faith as the appropriate way for students to confront these issues in their lives. The very notion of religious faith involves an acceptance of the limits of the human intellect and of the need to accept, on faith, certain fundamental precepts as a guide to life."**