

# Philip Horgan Law Office

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File No.: PELR 1576

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November 11, 2022

***Via email only: [brendan.browne@tcdsb.org](mailto:brendan.browne@tcdsb.org), [antonella.ceddia@tcdsb.org](mailto:antonella.ceddia@tcdsb.org), [joseph.martino@tcdsb.org](mailto:joseph.martino@tcdsb.org), [markus.dedomenico@tcdsb.org](mailto:markus.dedomenico@tcdsb.org), [ida.lipreti@tcdsb.org](mailto:ida.lipreti@tcdsb.org), [teresa.lubinski@tcdsb.org](mailto:teresa.lubinski@tcdsb.org), [maria.rizzo@tcdsb.org](mailto:maria.rizzo@tcdsb.org), [frank.damico@tcdsb.org](mailto:frank.damico@tcdsb.org), [mike.delgrande@tcdsb.org](mailto:mike.delgrande@tcdsb.org), [garry.tanuan@tcdsb.org](mailto:garry.tanuan@tcdsb.org), [norman.dipasquale@tcdsb.org](mailto:norman.dipasquale@tcdsb.org), [daniel.digiorgio@tcdsb.org](mailto:daniel.digiorgio@tcdsb.org), [angela.kennedy@tcdsb.org](mailto:angela.kennedy@tcdsb.org), [nancy.crawford@tcdsb.org](mailto:nancy.crawford@tcdsb.org)***

Brendan Browne/Antonella Ceddia/Board of Trustees  
Toronto Catholic District School Board  
80 Sheppard Avenue East  
North York, Ontario M2N 6E8

Dear Mr. Browne, Ms. Ceddia and Trustees,

**Re: 2022 Municipal Election – Trustee, Toronto Catholic District School Board (“TCDSB”)  
Ward 1 (Etobicoke North) – election between Robert Pella and Joseph Martino  
Request for recount**

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I am the lawyer for Robert Pella, a candidate for TCDSB trustee in Ward 1 (Etobicoke North) in the recent 2022 municipal election.

Past midnight on October 24, 2022 (voting day), Mr. Pella was in the lead at 2139 votes to Mr. Martino’s 2132. Around 2:00 AM, the vote count changed such that Mr. Martino led by one vote, at 2148 to Mr. Pella’s 2147. This result was declared by Mr. Elvidge on Thursday, October 27, 2022.

Mr. Pella respectfully requests that the TCDSB pass a resolution ordering the City Clerk to conduct a recount in the above trustee race. The Clerk has confirmed that there is no automatic recount unless the votes are exactly equal. However, the *Municipal Elections Act* provides that the TCDSB may pass a resolution requiring a recount within 30 days of October 27, 2022.<sup>1</sup>

Mr. Pella further requests the opportunity for himself and/or his counsel to address any meeting the TCDSB may hold to consider a resolution for a recount.

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<sup>1</sup> [Municipal Elections Act, 1996, S.O. 1996, c. 32, Sched., at s. 57\(1\)\(b\)\(i\)](#) [“MEA”].

It is a quasi-constitutional principle, fundamental to our democracy, that the proper majority vote is recorded, i.e. all valid votes are included and invalid ones rejected.<sup>2</sup> The narrow margin in the Ward 1 TCDSB race means that, given certain ambiguities of the voting process, neither Mr. Pella nor the public can be satisfied that Mr. Martino has a true majority. This public concern is reflected in the press coverage the Ward 1 TCDSB election has already attracted.<sup>3</sup>

“A determination of this issue is not only important to the two affected candidates. It is important to all candidates and to the City Clerk’s office, as well as to all of the electors who took to the polls to exercise their most sacred franchise – so as to know definitively whether the electors have indeed chosen one of the candidates over the other. The electors must be satisfied that the election has been completed”.<sup>4</sup>

Our inquiries to the City Clerk’s office have revealed, in the Clerk’s initial response, that 258 “undervotes” and one (1) “overvote” were recorded for the office of Ward 1 TCDSB trustee. See enclosed letter from John D. Elvidge dated November 3, 2022.

An “undervote” refers to a ballot where the computerized vote tabulator does not record a vote in the TCDSB race, although it may do so in the mayor or city council race. There is a real possibility that the vote tabulator will not record a faint mark, since it may be calibrated to ignore marks below a certain “threshold”. An “overvote” refers to a ballot where the tabulator records votes for multiple candidates in the same race. Again, there is a real possibility that the voter simply crossed out a first attempt, attempted to rank candidates by number, or something similar, such that a voting intention could be discerned.<sup>5</sup>

For these reasons, there is legal precedent for a court-ordered recount based on undervotes and overvotes.<sup>6</sup> Moreover, given the evidence already available to the public, it is in the interests of the TCDSB’s own legitimacy to require a recount.

The candidates, their scrutineers, and their lawyers are entitled to be present at an *MEA* s. 57 recount.<sup>7</sup> As such, there would be an opportunity to observe and potentially correct any ambiguities in the process.

As a final note, I would respectfully point out that Mr. Joseph Martino is precluded from any votes or deliberations on this matter pursuant to the *Municipal Conflict of Interest Act*, s. 5,<sup>8</sup> and by the TCDSB policy entitled Conflict of Interest, Trustees Policy T.01,<sup>9</sup> TCDSB trustees are paid a stipend, so Mr. Martino has a pecuniary interest in a Ward 1 recount.

If the TCDSB does not order a recount, my client will be obliged to pursue a court application. In my view, if the TCDSB wishes to preserve its reputation for fairness, and upholding the integrity of

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<sup>2</sup> [Herbert Goldie v The Corporation of the Township of Brock, et al., 2010 ONSC 6930 at 15-17](#) [“Goldie”].

<sup>3</sup> [“One vote is all that separates the winner from the loser in this Toronto race”](#): Ben Mussett, *Toronto Star*, October 25, 2022.

<sup>4</sup> [Chapman v City of Kitchener, 2010 ONSC 7222 at 33](#) [“Chapman”].

<sup>5</sup> [Goldie at 36, 38](#).

<sup>6</sup> [Di Biase v Vaughan \(City\)](#), 2007 CanLII 38388 (ON SC). See also [Chapman](#), in which a recount of overvotes was ordered for a race with a one-vote margin.

<sup>7</sup> [MEA s. 61](#).

<sup>8</sup> [Municipal Conflict of Interest Act, RSO 1990, c. M.50, s. 5](#).

<sup>9</sup> [Conflict of Interest, Trustees Policy T.01](#).

the democratic process, it would be well-advised to pass a s. 57 resolution for a recount in advance of the court process.

Thank you for your attention to this matter. I look forward to receiving your response as soon as possible, given the timelines involved.

Yours truly,

A handwritten signature in blue ink, appearing to read "Philip H. Horgan".

**PHILIP H. HORGAN**

PHH/rf

Cc: Robert Pella  
Joseph Martino  
Markus de Domenico  
Ida Li Preti  
Teresa Lubinski  
Maria Rizzo  
Frank D'Amico  
Michael Del Grande  
Gary Tanuan  
Norm Di Pasquale  
Daniel Di Giorgio  
Angela Kennedy  
Nancy Crawford