

**YORK CATHOLIC DISTRICT SCHOOL BOARD
AGENDA
SPECIAL BOARD MEETING**

Thursday, October 26, 2023

Immediately Following Special CTW - approximately 3:30 pm

	Page#
1. OPENING PRAYER / LAND ACKNOWLEDGEMENT	F. Alexander
2. ROLL CALL	D. Scuglia
3. APPROVAL OF NEW MATERIAL	F. Alexander
4. APPROVAL OF AGENDA	F. Alexander
5. DECLARATIONS OF CONFLICT OF INTEREST FOR CURRENT MEETING	
6. DECLARATIONS OF CONFLICT OF INTEREST FROM PREVIOUS MEETING	
7. APPROVAL OF PREVIOUS MINUTES: NIL	
8. BUSINESS ARISING FROM THE MINUTES	
9. CHAIR'S REPORT / UPDATE / INSPIRATIONAL MESSAGES: NIL	
10. OCSTA BOARD OF DIRECTOR'S UPDATE: NIL	
11. DIRECTOR'S REPORT: NIL	
12. STUDENT TRUSTEES' REPORT: NIL	
13. RECOGNITION / OUTSIDE PRESENTATIONS: NIL	
14. DELEGATIONS: NIL	
15. JOURNEY TOWARDS OUR VISION - STAFF PRESENTATIONS: NIL	
16. ACTION ITEM(S) (PART C) (including Committee Reports) :	
a) Approval of Report No. 2023:24 Special Committee of the Whole (Oct 24)	M. Iafrate
b) TBD	F. Alexander
17. DISCUSSION ITEM(S): NIL	
18. INFORMATION ITEM(S):	
a) October 13, 2023 Legal Response from WeirFoulds LLP	F. Alexander 2
b) YCDSB Response to WeirFoulds LLP	F. Alexander 13
19. NOTICES OF MOTION:	
<i>(Notices of Motion are to be submitted in writing and will return to the subsequent meeting as Information, the following meeting as Discussion, and finally Action at the next Board Meeting.)</i>	
20. FUTURE AGENDA ITEM(S) / REQUEST FOR INFORMATION	
21. ADJOURNMENT	F. Alexander

**Lord our God,
Grant that our spirit may recognize Your Spirit and Your love.
Help us hold fast to all the blessings You have allowed us to experience.
Send a great light to shine among the many people whose task
is to lead the way so that Your kingdom may come. Amen**

WeirFoulds^{LLP}

FACSIMILE COVER SHEET

DATE	October 13, 2023	FILE	24701
TO	Frank Alexander, Chair York Catholic District School Board	FAX	905-713-1272
FROM	Raj Anand	PHONE	416-947-5091
		PAGES (Including Cover Sheet)	11

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Barristers & Solicitors

WeirFoulds LLP

October 13, 2023

VIA FAX: 905-713-1272

AND EMAIL: frank.alexander@ycdsb.ca

Frank Alexander, Chair
York Catholic District School Board
Catholic Education Centre
320 Bloomington Road West
Aurora ON L4G 0M1

Dear Mr. Alexander:

Re: Trustee Theresa McNicol

I have been retained by Trustee Theresa McNicol to respond to your letter of September 28, 2023. In that correspondence you notified her of a Motion by the Board of Trustees on September 26, 2023 to impose three sanctions on her, and you set Sunday, October 15, 2023 as her deadline to make a written submission to the Board in response. You indicate that the Board was acting pursuant to s. 218.3(6) of the *Education Act* and Section E of Policy 118, the Trustee Code of Conduct.

Also on September 28, 2023, you provided a Notice of Censure, in which you state that she breached

- Policy 117 (I assume you are referring to Policy 118) Trustee Code of Conduct
- Policy 613 Equity and Inclusive Education
- Policy 425 Workplace Harassment

For the reasons that follow, my respectful submission is that the Board's September 26, 2023 Motion to censure Trustee McNicol, and any sanction flowing from it, were made without jurisdiction by the Board and are null and void. Moreover, there is no jurisdiction, and it would be an abuse of process at this point, for the Board and individual Trustees to attempt to resuscitate stale allegations that have inflicted immeasurable harm on Trustee McNicol through inappropriate and very public attempts to misuse legitimate Code of Conduct remedies against her.

It is therefore unnecessary in this letter to address the purported conclusion of the investigator that there were any breaches of these three policies. Trustee McNicol reserves her rights in this

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File 24701.1

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regard, and also reserves her rights with respect to legal entitlements against the Board under the common law and statutes arising out of these matters.

The Board's September 26, 2023 Motion was null and void, and beyond the Board's jurisdiction, for several reasons. As I will explain in more detail below,

1. No complaint of a breach of the Code of Conduct was ever processed as required by the Procedure Addendum to Policy 118, and none of the steps required by that Addendum was followed. The complainants made abundantly clear that their complaint was "outside the scope" of the Code of Conduct.
2. The belated attempt by Vice-Chair lafrate to file a Code of Conduct complaint against Trustee McNicol by email on September 2, 2023, after receiving the JMJ Workplace Investigation Law LLP (JMJ) report on August 22, 2023, is about 14 months out of time, and it too has not been and cannot be processed under the Procedure Addendum to Policy 118.
3. The Board made no inquiries, and made no determination, as required by s. 218.3(2), (3) and (6) of the *Education Act* and Superior Court jurisprudence, of whether Trustee McNicol breached the Code of Conduct.
4. The Board has purported to impose a sanction – barring Trustee McNicol from Board meetings for more than three years – that is clearly unavailable under s. 218.3(3) of the *Education Act* and section 3.6.7 of the Procedure Addendum to Policy 118. In any event, it is entirely disproportionate and without precedent in its severity.
5. Policy 425 on Workplace Harassment evidently applies, as it states, "to all York Catholic District School Board employees. All staff are expected to abide by this policy". There is no provision to make a complaint against a Trustee.
6. Policy 613 on Equity and Inclusive Education also has no application to trustees, and there is no provision to make a complaint against a Trustee.

For all of these reasons the Board had no jurisdiction to issue any sanctions on September 26, 2023, and they are null and void. Moreover, the Board has no jurisdiction to commence a Code of Conduct or any other investigation process at this point under the *Education Act* and the Board's policies.

1. There is no Code of Conduct complaint for the Board to act upon

Trustee Elizabeth Crowe, Board Chair at the time, wrote to Trustees on July 7, 2022 that any concerns regarding Trustee McNicol's July 3, 2022 correspondence would have to be dealt with by filing a complaint under Policy 118. Trustee Marchese, on behalf of the intended complainants,

declined to do so, as she later confirmed to JMJ. Trustee Marchese wrote on July 18, 2022 that the Code of Conduct was never intended to cover complaints of discrimination.

As Chair Crowe stated in her August 13, 2022 Report to the Special Committee of the Whole, “the parties did not wish to pursue the use of our Code of Conduct policy and its Procedure to address their complaint. They wished to have a meeting with all trustees except Trustee McNicol...” As Chair Crowe told JMJ, her colleagues had 15 days to lodge a Code of Conduct complaint¹, and they refused to do so because they felt the Code of Conduct policy and procedure did not deal with disciplinary actions and felt they needed a different and more public process.

The result is that none of the steps that are required by the Code of Conduct Procedure took place: informal complaint procedure, meetings to discuss remedial measures, formal complaint procedure, notice of a written complaint to Trustee McNicol, and much more. All of these have time limits that are intended to ensure expeditious resolution of conduct issues.

It is worthwhile to look again at the process flowchart that appears on the last page of the Code of Conduct Procedure, which stipulates the steps and the time frames for the processing of a Code of Conduct investigation. None was carried out; there was no Code of Conduct investigation or decision.

There were then motions on September 27 and December 20, 2022 and a letter from Education Minister Lecce on April 3, 2023. The Board then passed a motion on April 25, 2023 to engage an external investigator, which turned out to be JMJ.

The April 25, 2023 makes no reference to the Code of Conduct, or to any policy of the York Catholic District School Board. JMJ received no mandate to investigate breaches of any of the three policies listed above. After making findings of fact, the JMJ report searches for policies to apply, and it lists these three.

On January 31, 2023, before passing the April 25 motion, the Board had requested a legal opinion on whether the Code of Conduct addressed allegations of harassment and discrimination. The Board received an opinion dated March 7, 2023 confirming that the Code of Conduct did not

¹ The Procedure states: “A Trustee who has reasonable grounds to believe that another Trustee of the Board has breached the Board’s Code of Conduct may bring the alleged breach to the attention of the Chair of the Board no more than fifteen (15) calendar days after the alleged breach comes to the attention of the Trustee reporting the alleged breach.”

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incorporate the prohibitions against discrimination under the *Human Rights Code*, since the relationship between trustees did not relate to employment or services, goods or facilities offered to the public.

After passing the April 25, 2023 motion, the Board amended the Code of Conduct on May 15, 2023 to add discrimination and harassment. As JMJ recognized, this did not apply retrospectively to events that had occurred in July 2022, in respect of which all time limits had long expired.

2. Trustee lafrate's September 2, 2023 "complaint" was never investigated or processed either

Trustee lafrate attempted to file a Code of Complaint on September 2, 2023, apparently relying on the JMJ report. Trustee lafrate was about 14 months beyond the time limit of 15 days in the Procedure Addendum, which follows the direction in section 3.6.5 of the Code of Conduct that "a complaint of Trustee conduct that is contrary to this policy shall be addressed in a timely manner according to the Procedure".

In any event, none of the steps outlined above that are required to proceed with a Code of Complaint took place following Trustee lafrate's "complaint". Again, there was no Code of Conduct investigation, Trustee McNicol had no opportunity to address the September 2, 2023 memo, and the Chair simply deposited it onto the agenda of the September 26, 2023 with this statement to Trustees: "Because the complaint is related to the Findings of Fact by the investigator who handled the Discrimination Claim, I'm adding it to the related Action Item on the September 26, 2023 Board meeting.

In other words, the only Code of Conduct "complaint" that went before the Board on September 26, 2023 postdated any investigation. This is not the process that is followed in any circumstances, and it is not the process that is mandated by the Code of Conduct and Procedure that the Board put in place as required by the *Education Act*.

3. The Board made no inquiries and made no determination on whether Trustee McNicol breached the Code of Conduct before issuing its sanction on September 26, 2023

JMJ's conclusions do not relate to a Code of Conduct complaint, since there was none, and the complainants refused to file one. JMJ's conclusions do not relate to Trustee lafrate's September 2, 2023 "complaint", which postdates the JMJ report. There is no evidence of any other "inquiries" by the Board (required by s. 218.3(2) of the *Education Act*) into an allegation that Trustee McNicol breached the Code of Conduct.

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There is also no evidence that "based on the results of the inquiries", the Board has "[determined] whether the member has breached the Board's code of conduct." There is no motion to that effect on September 26, 2023 or on any other date.

Subsection 218.3(3) allows the Board to impose a sanction only "if the board determines under subsection (2) that the member has breached the board's code of conduct", and satisfaction of that statutory requirement is the precondition to the process that follows: written notice of the determination under subsection (6), and an opportunity to make written submissions within a period of at least 14 days.² The Divisional Court made clear that this is a statutory precondition,

² The entire section of the *Education Act* dealing with the Code of Conduct process makes clear the requirement of a "determination" of breach before any sanction and submissions can proceed. **218.3 (1)** A member of a board who has reasonable grounds to believe that a member of the board has breached the board's code of conduct may bring the alleged breach to the attention of the board. 2009, c. 25, s. 25.

Same

(2) If an alleged breach is brought to the attention of the board under subsection (1), the board shall make inquiries into the matter and shall, based on the results of the inquiries, determine whether the member has breached the board's code of conduct. 2009, c. 25, s. 25.

Same

(3) If the board determines under subsection (2) that the member has breached the board's code of conduct, the board may impose one or more of the following sanctions:

1. Censure of the member.
2. Barring the member from attending all or part of a meeting of the board or a meeting of a committee of the board.
3. Barring the member from sitting on one or more committees of the board, for the period of time specified by the board.

(6) If a board determines that a member has breached the board's code of conduct under subsection (2),

- (a) the board shall give the member written notice of the determination and of any sanction imposed by the board;
- (b) the notice shall inform the member that he or she may make written submissions to the board in respect of the determination or sanction by a date specified in the notice that is at least 14 days after the notice is received by the member; and

stating in the recent *Del Grande* decision involving the Toronto Catholic District School Board: "The board is required to make a determination as to whether misconduct has occurred..."³

4. The sanction imposed by the Board on September 26, 2023 is unauthorized and beyond its jurisdiction

The *Education Act* and the Board's own Code of Conduct specifically limit the sanctions that are available to the Board. Under s. 218.3(3), there are three⁴:

- censure;
- exclusion from all or part of a board or committee meeting; or
- exclusion from one or more committees for a period of time.

(c) the board shall consider any submissions made by the member in accordance with clause (b) and shall confirm or revoke the determination within 14 days after the submissions are received.

(7) If the board revokes a determination under clause (6) (c), any sanction imposed by the board is revoked. 2009, c. 25, s. 25.

Same

(8) If the board confirms a determination under clause (6) (c), the board shall, within the time referred to in that clause, confirm, vary or revoke the sanction.

³ *Del Grande v. Toronto Catholic District School Board*, 2023 ONSC 349, at para 43

⁴ (3) If the board determines under subsection (2) that the member has breached the board's code of conduct, the board may impose one or more of the following sanctions:

1. Censure of the member.
2. Barring the member from attending all or part of a meeting of the board or a meeting of a committee of the board.
3. Barring the member from sitting on one or more committees of the board, for the period of time specified by the board.

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In its Code of Conduct, the Board specifically confirms that it does not have the authority to impose any more onerous sanctions.⁵

The third paragraph of the September 26, 2023 resolution – barring Trustee McNicol from attending all committee meetings for more than three years – is superfluous, because it is covered by the second paragraph of the resolution. The second paragraph of the resolution is unlawful, since the Board's jurisdiction allows it to bar a trustee from attending a Board meeting, not all Board meetings for more than three years.

If the Legislature intended to allow Boards to exclude Trustees for most of an electoral term, para 3 of s. 218.3(3) would be unnecessary; para 2, which applies equally to committee and Board meeting exclusion, would already cover exclusion from multiple meetings, not just a meeting. Exclusion from multiple meetings is permitted only in the case of committees under para 3.

Quite apart from the Board's absence of jurisdiction, a prohibition of more than three years is disproportionate and punitive to the Trustee's constituents, who are thereby disenfranchised. Even if it were theoretically authorized, such a penalty is clearly unreasonable. You will see that in the *Del Grande* case, the TCDSB imposed several sanctions, but did not bar the trustee from participating in Board meetings, despite finding that he had engaged in very serious misconduct.

In that case Mr. Del Grande had made "offensive and inappropriate" comments about "fetishistic behaviour" to express his opposition to the addition of gender identity and gender expression as protected grounds of discrimination in the TCDSB's Code of Conduct, as directed by the Minister of Education.

5. Policy 425 on Workplace Harassment (cited in the September 26, 2023 resolution) does not apply to Trustees

It would be surprising to the senior management and Trustees of the Board, and to the reader of Policy 425, to read JMJ's inclusion of Trustees in the Board's Workplace Harassment policy. The conclusion to the contrary in the JMJ report is clearly incorrect and unreasonable.

⁵ "The Board of Trustees do not have the authority to impose sanctions other than those specifically defined by the Act. The Board shall not impose a sanction which is more onerous than the above but may impose one that is less onerous, such as a warning, a formal apology in writing, or a requirement that the Trustee successfully complete specified professional development courses at the expense of the board."

The policy clearly states its objective: "that all persons employed by the Board have the right to work in an environment free from harassment as defined by the Occupational Health and Safety act and the Ontario Human Rights Code."⁶

Under the heading Responsibilities, it is stated: "This policy applies to all York Catholic District School Board employees. All staff are expected to abide by this policy by refraining from any form of harassment and by fully cooperating in any investigation of a harassment complaint. Fostering a harassment-free workplace is a shared responsibility."⁷

Trustees are not employed by the Board; they are not staff; and they are not situated in the workplace.

The policy provides for the Superintendent of Human Resources to review complaints under the policy. It would be unusual for an employee two levels below the Board in the hierarchy to review complaints against Trustees of the Board.

The Responsibilities section makes clear the role of the Trustees: to receive monthly reports from the Director of Education, and to deal with complaints against senior management.⁸

All of this is clear from the fact that none of the complaint and investigation procedures that are set out in Policy 425 took place in Trustee McNicol's case:

⁶ Section 2 (emphasis added)

⁷ Section 4 (emphasis added)

⁸ 4.1 Board of Trustees

4.1.1 To receive a monthly report from the Director of Education in the Committee of the Whole which includes the number of complaints and any trends and systemic issues that need to be addressed proactively.

4.1.2 To deal with complaints of harassment against the Director of Education in a timely manner, using an external service provider, as set out in the Procedures to this Policy.

4.1.7 To receive any complaints of harassment regarding a member of the senior team and to forward them to an external service provider for investigation. Trustees shall be notified that a complaint has been received although trustees shall not be told the names of the parties involved. Trustees shall also be notified when the investigation is complete and whether or not the complaint had merit and if any actions are being taken by the Director.

- The complaint was not submitted to Ms. McNicol's immediate supervisor or the Superintendent of Human Resources, as required by section 1.1.1, because a trustee does not have a supervisor, and the complaint was not against the complainants' supervisor.
- There was no screening or acknowledgment of the complaint by the supervisor under section 1.1.2.
- The investigation was not commenced within 10 work days, and no extenuating circumstances were communicated to the parties prior to the expiration of 90 days (or at all) as required by section 1.1.4.
- Neither the School Superintendent nor the Superintendent of Human Resources reviewed the JMJ report to determine whether harassment occurred and what remedies were warranted, as required by section 1.1.5.
- They did not inform the parties in writing of the decision on finding and remedy, as required by section 1.1.6.

None of this occurred, and what was done instead did not comply with Policy 425, because Policy 425 was clearly inapplicable.

6. Policy 613 on Equity and Inclusive Education (cited in the September 26, 2023 resolution) does not apply to Trustees

Section 4 lists 11 individuals or groups who have responsibilities under the policy. Its broad reach includes parents, employees and students of the Board, as well as the Superintendent, Directors, Senior Managers, Principals and Teachers. Trustees are not included; indeed, there is not a single reference to Trustees in this policy, and there is no procedure under which complaints against Trustees could be investigated.

Again, Policy 613 did not apply to the complaint against Ms. McNicol. There is no investigation process in Policy 613, and none of the required steps in the general human rights complaints process was followed. No complaint was filed on the complaints form, as required, and there was no intake or preliminary assessment that the requisite threshold was met.

CONCLUSION

For all of these reasons, the Board's censure motion and sanctions are unlawful. Ms. McNicol's full rights and privileges, including the right to attend Board meetings, should be reinstated forthwith, and I ask for confirmation no later than October 20, 2023.

Legal costs reimbursement

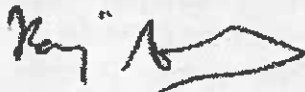
Section C of the Code of Conduct Procedure states: "In circumstances where a legal or procedural issue arises in the course of a complaint, a Trustee may find it necessary to retain legal counsel."

That was necessary here. The above submission address an absence of proper process and compliance with the governing law and the Board's own policies. Trustee McNicol has been required to obtain legal representation to protect her interests, her reputation and the integrity of Board processes.

In my respectful submission, she is entitled to reimbursement of her legal expenses that have resulted and may continue to accrue if the Board persists in its course of action. I make this point without prejudice to any other legal remedy that may be available to Trustee McNicol apart from the reconsideration process that these submissions directly address.

Yours truly,

WeirFoulds LLP



Raj Anand
Partner

RA/dh



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October 19, 2023

Sent by email: ranand@weirfoulds.com

Raj Anand, Partner
WeirFoulds LLP
4100 – 66 Wellington Street
PO Box 35, TD Bank Tower
Toronto, Ontario, M5K 1B7

Dear Mr. Anand,

Re: Trustee Theresa McNicol

This letter is to acknowledge your letter of October 13, 2023.

Now that we have received Trustee McNicol's response to the Board's sanctions, we will now proceed to satisfy the requirements of the Education Act 218.3 (6) and SECTION E: NOTIFICATION AND RECONSIDERATION OF DECISION BY BOARD, of Policy 118 – PROCEDURE: ALLEGED BREACH OF THE TRUSTEE CODE OF CONDUCT.

We will hold a Board Meeting by October 28, 2023 to make a final decision on the Board's original resolution.

Yours truly,

A handwritten signature in black ink, appearing to read "Frank Alexander", written over a horizontal line.

Frank Alexander
Chair of the Board