

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N:

MICHAEL RAMSAY

Applicant

and

WATERLOO REGION DISTRICT SCHOOL BOARD

Respondent

APPLICATION UNDER Rules 14.05(2), 38 and 68 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 and Sections 2(1) and 6(1) of the Judicial Review Procedure Act, RSO 1990, c J.1.

FACTUM OF THE APPLICANT

I. OVERVIEW

1. The Applicant seeks judicial review of the Waterloo Region District School Board’s (the “Board”) decision to confirm its previous decision that he breached the Trustee Code of Conduct and its attendant sanctions (the “Decision”). The Board violated the Applicant’s right to procedural fairness because the Chair of the Board was tainted by a reasonable apprehension of bias when he veered into the role of investigator and advocate against the Applicant. The Decision could not have passed without his vote. The Board also improperly held deliberations *in camera*.

2. Further, the Applicant seeks substantive review of the Decision. It is unreasonable because the Board’s reasons fail to meet the requisite standard of justification, transparency, and intelligibility. They do not explain how the facts make out the alleged breaches of the Code of

Conduct. The Decision also demonstrates a complete failure to balance the Applicant's *Charter*-protected right to free expression against the statutory objectives of the *Education Act*.

3. The Applicant also submits that the Board has failed to meet the high bar for establishing that any part of the Record of Proceedings should be redacted, sealed, or in any way kept out of the public record. As was determined at a Case Conference dated November 2, 2022, those submissions are incorporated into Part III(C) of this Factum. This matter is one which directly engages the values of democratic accountability and fairness which are at the core of the principle of court openness. The entire court file should be part of the public record.

II. FACTUAL SUMMARY

4. Mike Ramsay (the "Applicant") lives in Breslau, Ontario. He served as a police officer with the Waterloo Regional Police for 11 years. He is currently a practicing paralegal. Since 1989, Mr. Ramsay has served six terms as a trustee for the Waterloo Region District School Board.¹

5. The Waterloo Region District School Board is a public school board exercising authority under the *Education Act*, RSO 1990, c E.2 (the "*Education Act*") in the Waterloo Region. The Board is governed by the *Education Act*, the Board Bylaws and the Board Policy G201 – Trustee Code of Conduct (the "Code").²

6. In accordance with s. 218.3 of the *Education Act*, the Code sets out a process for complaints that a trustee has breached the Code.³

¹ Application Record, Tab 3, *Affidavit of Michael Ramsay* at para. 2.

² Record of Proceedings, Tab 2, *Bylaws – Board of Trustees – WRDSB*; Tab 1, *WRDSB Board Policy G201*.

³ *Education Act*, [RSO 1990, c E.2](#), s. 218.3 [*Education Act*]; Record of Proceedings, Tab 1, *WRDSB Board Policy G201*, ss. 27-75.

A. The Complaint against the Applicant

7. On February 24, 2022, a Board trustee, ██████████ (the “Complainant”), submitted a complaint to the Board alleging that the Applicant breached the Code (the “Complaint”).⁴ The Complaint alleged that the Applicant had failed to uphold the dignity and integrity of his office, engaged in uncivil behaviour, and disclosed confidential information. The facts pertaining to the allegations are summarized below, beginning at paragraph 13.

8. On March 1, 2022, as required ss. 40, 54, and 57 of the Code, the Board retained Barry H. Bresner of ADR Chambers (“Mr. Bresner” or the “Integrity Commissioner”) to act as Integrity Commissioner. His role was to investigate the Complaint and provide a report with factual findings to the Board. The decision as to whether the facts disclosed a breach of the Code lied with the Board.⁵

9. On March 22, 2022, Chair Scott Piatkowski (the “Chair” or “Chair Piatkowski”) made 58 pages of written allegations against the Applicant in support of the Complaint to Mr. Bresner.⁶ In his written submissions, the Chair states that he has not filed a complaint himself because he was “convinced that it would be impossible to fulfill [his] duties as Chair with respect to the Code of Conduct” if he were to do so.⁷

10. Nevertheless, Chair Piatkowski set out lengthy allegations, many of which are irrelevant to the facts alleged in the Complaint. The Chair alleged “that the scope of Trustee Ramsay’s transgressions of the Code is even greater than suggested in the complaint...”⁸ As “Appendix A” to his submissions, the Chair attached an email to the Applicant dated December 12, 2021 which was sent within one week of his acclamation as Chair. In the email, Chair Piatkowski “pre-

⁴ *Ibid* at para. 3; Record of Proceedings, Tab 3, *Code of Conduct Complaint dated February 24, 2022*.

⁵ Application Record, Tab 3, *Affidavit of Michael Ramsay* at para. 4.

⁶ *Ibid* at para. 6; Application Record, Tab 3C.

⁷ Application Record, Tab 3C, *Chair Piatkowski’s Written Submissions dated March 21, 2022*, p. 46.

⁸ *Ibid*.

emptively” warned the Applicant, stating: “Since it is only the beginning of my term as Chair, I wanted to take the opportunity now to note my expectation that you will conduct yourself in a manner that complies with both the Education Act and our Code of Conduct.”⁹

11. Chair Piatkowski included eight emails from various individuals or groups raising disagreements with or complaints about the Applicant with no connection to the Complaint. The emails range in date from October 2020 to January 2022.¹⁰ They raise a variety of issues unconnected to the Complaint, including a debate around a Board meeting where Halloween practices were discussed. Strangely, the Appendices also include a letter accusing the Applicant of racism and having “been violent to Black community members.”¹¹

12. On April 22, 2022, the Applicant provided Mr. Bresner with his written reply to the Complaint. On April 27, 2022, the Applicant met with Mr. Bresner over telephone. On April 28, 2022, the Applicant provided a written clarification to the Integrity Commissioner. In his written clarification, the Applicant argued that the Chair’s submissions breached s. 58 of the Code because the Chair was conducting his own investigation.¹² [REDACTED]

[REDACTED].¹³

B. The Integrity Commissioner’s Report

13. [REDACTED]
[REDACTED]
[REDACTED]:

a. [REDACTED];

⁹ Application Record, Tab 3C, *Chair Piatkowski’s Written Submissions dated March 21, 2022*, p. 47.
¹⁰ *Ibid* at pp. 66-103.
¹¹ *Ibid* at p. 87.
¹² Application Record, Tab 3B, p. 39.
¹³ Record of Proceedings, Tab 5, *Report of Integrity Commissioner dated May 31, 2022* at para. 10.
¹⁴ Application Record, Tab 3, *Affidavit of Michael Ramsay* at para. 7; Record of Proceedings, Tab 5, *Report of Integrity Commissioner dated May 31, 2022* at para. 22.

b. [REDACTED]

c. [REDACTED].

14. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁵

15. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁸.

17. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁹.

¹⁵ Record of Proceedings, Tab 5, *Report of Integrity Commissioner dated May 31, 2022* at para. 23.

¹⁶ *Ibid* at paras. 26, 27, 73.

¹⁷ *Ibid* at paras. 25, 28-31, 37.

¹⁸ *Ibid* at paras. 32-33.

¹⁹ *Ibid* at paras. 44-49.

18. [REDACTED]

[REDACTED] .²⁰

19. [REDACTED]

[REDACTED] .²¹

C. The Board’s Decisions

20. On June 6, 2022, the Board deliberated *in camera* on whether to find the Applicant in breach of the Code. Pursuant to s. 62 of the Code, [REDACTED]

[REDACTED].²² The *in-camera* meeting was followed by a public meeting where the Board voted 6-3 to find the Applicant had breached the Code. Subsequently, the Board voted along the same lines to sanction the Applicant by censuring him, barring him from attending meetings until September 30, 2022, and disentitling him from receiving *in-camera* materials.²³

21. On June 8, 2022, the Board provided a written notice of its decision (the “First Notice”), signed by Chair Piatkowski, informing the Applicant that he could submit written submissions requesting that the Board reconsider its decision by June 24, 2022.²⁴

²⁰ *Ibid* at paras. 51-54.

²¹ *Ibid* at paras. 55-56.

²² Application Record, Tab 3, *Affidavit of Michael Ramsay* at para. 8; Record of Proceedings, Tab 12, *Special In Camera Minutes dated June 6, 2022*.

²³ Application Record, Tab 3, *Affidavit of Michael Ramsay* at para. 8; Record of Proceedings, Tab 10, *Video of Special Meeting dated June 6, 2022*; Tab 11, *Transcript of Video of Special Meeting dated June 6, 2022*.

²⁴ Application Record, Tab 3, *Affidavit of Michael Ramsay* at para. 9; Record of Proceedings, Tab 14, *Written Notice of Breach of Board Policy G201 dated June 8, 2022*.

22. On June 24, 2022, the Applicant provided his written request for reconsideration (the “Request for Reconsideration”) to the Board.²⁵ The Applicant argued that the Board’s decision:

- a. violated procedural fairness by failing to provide reasons, incorporating a biased decision maker, and deliberating in camera;²⁶ and
- b. was unreasonable because it was unintelligible and unjustified, contrary to the legal and factual context, and failed to address the Applicant’s *Charter* right to free expression.²⁷

23. On June 27, 2022, the Board deliberated *in camera* whether to confirm or revoke its decision that the Applicant breached the Code. Despite the sanction imposed on the Applicant, he was allowed to be present during the Board’s deliberations, but not participate or provide oral submissions, pursuant to s. 74 of the Code.²⁸ At the public meeting immediately following, the Board voted 6-3 to confirm its finding that the Applicant breached the Code. The Board voted similarly to confirm its sanction.²⁹

24. On July 6, 2022, the Board provided a written notice of the Decision (the “Second Notice”), signed by Chair Piatkowski, informing the Applicant that the Board has found him in breach of the Code.³⁰ The Second Notice listed the motions passed by the Board at the meetings and set out the following reasons:³¹

In the Integrity Commissioners report issued May 31, 2022, Mr. Bresner noted ‘refusing to accept and respect the decisions of the Chair and the Board’ and ‘accusing fellow trustees of unlawful conduct’ as summaries of breaches alleged by the complainant. Mr. Bresner’s report made findings of fact relevant to breaches of the following sections of the Code of Conduct:

[The Second Notice reproduces sections from the Code which are omitted here]

²⁵ Application Record, Tab 3, *Affidavit of Michael Ramsay* at para.10.

²⁶ Record of Proceedings, Tab 15, *Trustee Ramsay’s Request for Reconsideration dated June 24, 2022*, pp. 175-78.

²⁷ *Ibid* at pp. 178-81.

²⁸ Application Record, Tab 3, *Affidavit of Michael Ramsay* at para. 11.

²⁹ *Ibid*; Record of Proceedings, Tab 19, *Video of Board Meeting dated June 27, 2022*; Tab 20, *Transcript of Video of Board Meeting dated June 27, 2022*.

³⁰ Application Record, Tab 2, *Reasons of the Waterloo Region District School Board dated July 6, 2022*.

³¹ *Ibid* at pp. 21-22.

As was noted at paragraph 62 of his report, Mr. Bresner noted “that there is considerable overlap between the provisions of the Code and certain conduct may involve a consideration of one or more of the provisions.” Mr. Bresner made findings of fact which are relevant to the above sections at paragraphs 25-43 and 45-49 of his report. For these reasons, the trustees confirmed that your conduct and actions at meetings of the Committee of the Whole, and certain emails, tweets and retweets made by you in January and February 2022, constituted a breach of the Board’s Code of Conduct.

25. The Applicant now seeks judicial review of the Decision because the Board violated its duty of procedural fairness by incorporating Chair Piatkowski, whose submissions create a reasonable apprehension of bias, and by deliberating *in camera*. Further, the Applicant seeks substantive review of the Decision because the Board’s reasons fail to make a transparent and intelligible connection between Mr. Bresner’s findings of fact and the identified Code provisions. The Board also failed to balance the Applicant’s *Charter* right to free expression as required by *Doré and Loyola*.³²

III. LAW AND ARGUMENT

26. The Applicant raises the following grounds for review:
- a. The Decision violated the Applicant’s right to procedural fairness because
 - i. Chair Piatkowski’s conduct and involvement taints the Decision with a reasonable apprehension of bias;
 - ii. The Board impermissibly held its deliberations *in camera*; and
 - b. The Decision is unreasonable because
 - i. The reasons fail to disclose a chain of reasoning which renders the Decision unjustified, unintelligible and opaque; and

³² Application Record, Tab 1, *Notice of Application dated July 26, 2022*.

- ii. The Board failed to engage in the necessary balancing between the Applicant's right to freedom of expression and the statutory objectives of the *Education Act*.

27. Pursuant to the Court's order following a case conference on November 2, 2021, the Applicant also argues that the entire Record of Proceedings should be included in the Court's public file.

D. The Decision violated the Applicant's right to procedural fairness

- i. Chair Piatkowski's involvement taints the Decision with a reasonable apprehension of bias

28. Chair Piatkowski's submissions created a reasonable apprehension that he was biased. As the votes to find the Applicant in breach of the Code could not have passed without his vote, his bias taints the whole Decision and violated the Applicant's right to procedural fairness. The impact of the Chair's reasonable apprehension of bias on the Decision as a whole is amplified by his role as author of the Second Notice which formed the reasons for the Decision.

29. Procedural fairness "requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker."³³ The test for reasonable apprehension of bias is³⁴

what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously would not decide fairly.

30. The Chair's submissions would leave a reasonable person with the conclusion that he could not decide impartially. The Chair said as much himself in his submissions, stating that he was "convinced that it would be impossible to fulfill [his] duties as Chair with respect to the

³³ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 45 [*Baker*].

³⁴ *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at 394, per de Grandpré cit'd approvingly in *Baker*, *supra* note 33 at para. 46.

Code of Conduct” if he were to bring a complaint himself.³⁵ However, in substance, the Chair brought his own complaints which went outside the scope of the original Complaint. The Chair was correct to recognize that he could not be impartial and a complainant. He erred in making a complaint through another means (i.e. his written submissions) and nevertheless participating in the Decision.

31. In his written submissions, the Chair acts as both investigator and advocate – roles which are incompatible with his role as a decision maker. The Code prohibits trustees from engaging in their investigation in the course of a formal inquiry into an allegation of a breach of the Code.³⁶ That is precisely what Chair Piatkowski did. He states in his written submissions that “the scope of Trustee Ramsay’s transgressions of the Code is even greater than suggested in the complaint.”³⁷ The Chair included eight emails from non-trustees with a wide range of complaints unrelated to the allegations in the Complaint. The emails include disagreements with the Applicant from previous years and make baseless accusations of racism against him. The material is irrelevant to the issues before the board and prejudicial to the Applicant. Given that the Chair had taken it upon himself to build a case against the Applicant, a reasonable person would not conclude that he would be able to decide the issues before the Board in an impartial manner.

32. Where a decision is made by multiple decision makers and one is disqualified on the basis of bias, the question becomes whether the entire panel is tainted. The Court must evaluate the role of the decision-makers in the panel and whether the biased decision-maker had cast the

³⁵ Application Record, Tab 3C, *Chair Piatkowski’s Written Submissions dated March 21, 2022*, p. 46.

³⁶ Record of Proceedings, Tab 1, *WRDSB Board Policy G201*, s. 58.

³⁷ Application Record, Tab 3C, *Chair Piatkowski’s Written Submissions dated March 21, 2022*, p. 46.

deciding vote.³⁸ In the case at bar, Chair Piatkowski's involvement was significant as he authored the written notices which provided the reasons for the Decision.³⁹ As Chair, he also controlled deliberations.⁴⁰ Most significantly, the Chair cast the deciding vote. A two-thirds majority was required to confirm the finding that the Applicant breached the Code and the vote was 6-3.⁴¹ But for the Chair's vote, the finding could not have been confirmed and the Decision would not have been made.

33. The Chair's submissions lead a reasonable observer to conclude he could not decide the matter impartially. His role as author of the reasons and the necessity of his vote to the Decision mean that his reasonable apprehension of bias taints the whole Decision.

ii. The deliberations were improperly conducted *in camera*

34. The decision to conduct the deliberations whether to find the Applicant in breach of the Code *in camera* was a breach of the duty of fairness owed to him. Natural justice and statutory provisions required that the deliberation be held before the public.

35. A key factor in determining the scope of the content of the duty of fairness is "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'."⁴² Section 207 of the *Education Act* requires that board meetings be open to the public subject only to specific statutory criteria. The potential reasons for conducting a meeting *in camera* are provided at subsection (2).⁴³

³⁸ *101115379 Saskatchewan Ltd. v Saskatchewan (Financial and Consumer Affairs Authority)*, [2019 SKCA 31](#) at paras. 204-205.

³⁹ Record of Proceedings, Tab 14, *Written Notice of Breach of Board Policy G201 dated June 8, 2022*; Tab 21, *Written Notice of Reconsideration of Breach of Board Policy G201 – Trustee Code of Conduct dated July 6, 2022*.

⁴⁰ See e.g. Record of Proceedings, Tab 20, *Transcript of Video of Board Meeting dated June 27, 2022* at p. 323 where the Chair decides that another trustee may not speak with respect to the motion to revoke the initial finding that the Applicant had breached the Code.

⁴¹ Record of Proceedings, Tab 1, *WRDSB Board Policy G201*, s. 73; Record of Proceedings, Tab 19, *Video of Board Meeting dated June 27, 2022*; Tab 20, *Transcript of Video of Board Meeting dated June 27, 2022* at p. 328-29.

⁴² *Baker*, *supra* note 33 at para. 24.

⁴³ *Education Act*, s. 207(1), (2).

- (2) A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves,
- (a) the security of the property of the board;
 - (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board or a pupil or his or her parent or guardian;
 - (c) the acquisition or disposal of a school site;
 - (d) decisions in respect of negotiations with employees of the board; or
 - (e) litigation affecting the board. R.S.O. 1990, c. E.2, s. 207 (2); 2021, c. 4, Sched. 11, s. 7 (1).

These criteria are incorporated into s. 61 of the Code.⁴⁴

36. **First**, paragraphs (a), (c), and (d) are certainly not engaged.

37. **Second**, paragraph (b) relating to the disclosure of intimate, personal, or financial information is not engaged. While the Complaint alleged that the Applicant disclosed confidential information by identifying an employee, [REDACTED]

[REDACTED].⁴⁵ Further, mere identification of the employee in reference to a public statement on social media does not constitute “intimate, personal, or financial information.”

38. **Third**, paragraph (e) is not engaged. [REDACTED]

Nothing in the Complaint, [REDACTED] discusses matters which touch on that litigation.

⁴⁴ Record of Proceedings, Tab 1, WRDSB Board Policy G201, s. 61.

⁴⁵ Record of Proceedings, Tab 12, *Special in Camera Minutes dated June 6, 2022*. Note that there are no minutes or transcript of the *in camera* deliberations in relation to the Decision dated June 27, 2022 in the Record. However, the Decision did not include a finding in relation to the confidential information allegations: see Record of Proceedings, Tab 20, *Transcript of Video of Board Meeting dated June 27, 2022 (to 29:00)* at p. 7; Tab 21, *Written Notice of Reconsideration of Breach of Board Policy G201 – Trustee Code of Conduct dated July 6, 2022*.

39. This case is analogous to the Ontario Court of Appeal’s decision in *Canadian Broadcasting Corporation v. Ferrier*. In that case, it was found that the *Police Services Act* statutorily creates a presumption of an open hearing which is “considerably fortified by the s. 2(b) *Charter* right.”⁴⁶ Just as in that case, the present matter involved a quasi-judicial decision which attracts a principle of openness.⁴⁷ Just as in that case, school board meetings “perform an important democratic function” which is “fostered by transparency and accessibility.”⁴⁸ The open court principle is analogous to administrative bodies which are statutorily required to conduct open hearings.⁴⁹ “The open court principle is of vital importance to the fair administration of justice.”⁵⁰

40. Accordingly, the *Education Act*, s. 2(b) of the *Charter* and procedural fairness required that the Board conduct its deliberations before the public.

E. The Decision was unreasonable

i. The Board’s Reasons are insufficient

41. The Board’s reasons as set out in the Second Notice fail to meet the requisite standard of justification, transparency and intelligibility. They fail to connect the Integrity Commissioner’s findings of fact to the Board’s findings of breaches of the Code in a manner that explain to the Applicant or a reasonable third party why the Board decided the way it did. This failure renders the Decision unreasonable.

42. Where, as here, the decision maker “has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled

⁴⁶ *Canadian Broadcasting Corporation v. Ferrier*, [2019 ONCA 1025](#) at paras. 59, 62 [*Ferrier*].

⁴⁷ *Ibid* at para. 71.

⁴⁸ *Ibid* at para. 57 cit’g *Langenfeld v. Toronto (City) Police Services Board*, [2018 ONSC 3447](#).

⁴⁹ See *Palkowski v. Ivancic*, [2009 ONCA 705](#) at para. 29.

⁵⁰ *Magnotta Winery Corp. v Ontario (Alcohol and Gaming Commission)*, [2015 ONSC 6234](#) at para. 26.

approach to reasonableness review is one which puts those reasons first.”⁵¹ Therefore, the Court must look to the reasons contained in the Second Notice to evaluate the reasonableness of the Decision.

43. To be reasonable, the Decision must bear “the hallmarks of reasonableness – justification, transparency and intelligibility.”⁵² This standard requires that the reasons reveal “an internally coherent and rational chain of analysis.”⁵³ Reasons that are transparent and intelligible draw “a line of analysis...that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.”⁵⁴ Merely “repeat[ing] statutory language, summariz[ing] arguments made, and then stat[ing] a peremptory conclusion” will not suffice.⁵⁵ The reasons must demonstrate “statements of fact, analysis, inference and judgement.”⁵⁶

44. The reasons for the Decision, as contained in the Second Notice, do not stand up to such scrutiny. They “fail to reveal a rational chain of analysis” and “do not make it possible to understand” how the Board arrived at its finding.⁵⁷ Three out of the five pages of the Second Notice consist of a summary of the process up to the point that it was written.

45. The remaining two pages which purport to explain the Decision, merely consist of the statement “Mr. Bresner’s report made findings of fact relevant to breaches of the following sections of the Code of Conduct” which is followed by a list of excerpted sections from the Code. The remaining explanation is confined to a paragraph which states that “Mr. Bresner made findings of fact which are relevant to the above sections at paragraphs 25-43 and 45-49 of his report.” That is immediately followed by the conclusory statement “For these reasons, the

⁵¹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) at para. 84 [*Vavilov*].

⁵² *Ibid* at para. 99.

⁵³ *Ibid* at para. 85.

⁵⁴ *Ibid* at para. 102.

⁵⁵ *Ibid*.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at para. 103.

trustees confirmed that your conduct and actions at meetings of the Committee of the Whole, and certain emails, tweets and retweets made by you in January and February 2022, constituted a breach of the Board’s Code of Conduct.”

46. The reasons commit the error identified in *Vavilov* of “repeat[ing] statutory language” and then “stat[ing] a peremptory conclusion.”⁵⁸ The reasons do not reveal the inferences or analysis necessary to connect the facts found by the Integrity Commissioner to the breaches found by the Board. The Applicant is left in the dark. No reference is even made to the arguments he raised in his Request for Reconsideration. There is no indication that the Board at all grappled with his arguments.

47. The reasons are neither intelligible nor transparent. They fail to justify the Board’s Decision. Accordingly, the Decision must be found to be unreasonable.

ii. The Board failed to balance the Applicant’s *Charter* right to free expression

48. An element of the Board’s failure to justify the Decision is that the reasons make no mention of the *Charter* right to free expression of the Applicant. The Applicant raised the issue that his s. 2(b) right was being infringed in his Written Reply and Request for Reconsideration.⁵⁹

49. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁶⁰ There is no

⁵⁸ *Ibid* at para. 102.

⁵⁹ Application Record, Tab 3A, *Written Reply of Michael Ramsay dated April 22, 2022* at p. 2; Record of Proceedings, Tab 15, *Trustee Ramsay’s Request for Reconsideration dated June 24, 2022* at p. 7.

⁶⁰ Record of Proceedings, Tab 12, *Special in Camera Minutes dated June 6, 2022* at p. 2.

indication of any deliberation or balancing taking place. Neither the First Notice nor the Second Notice make any reference to the Applicant’s *Charter*-guaranteed right to free expression.⁶¹

50. This failure renders the Board’s Decision unreasonable. The *Doré* framework requires that the Board “proportionately balance the *Charter* protections – values and rights – at stake in their decisions with the relevant statutory mandate.”⁶² Where, as here, the impugned decision impinges on a *Charter* protection, it must reflect “a proportionate balancing” of said protection.⁶³ A decision which results from “an unexplained refusal or failure to consider an applicable *Charter* right” cannot be considered reasonable.⁶⁴

51. The Decision finds the Applicant in breach of the Code for comments made in meetings and online. The Applicant alerted the Board to the impact of such a finding on his right to free expression. It was incumbent on the Board to conduct the requisite balancing analysis. Its failure to do so is unreasonable. Accordingly, the Decision ought to be quashed.

F. The Record of Proceedings is properly part of the public record of this matter

52. The Applicant submits that the entire Record of Proceedings is properly part of the Court’s public record. There is a strong presumption that the record is to be made public and that presumption has not been overcome by the Board.

i. There is a strong presumption that the entire record is to be made public

53. The *Courts of Justice Act* establishes a standard that all documents filed in a civil proceeding may be obtained by a member of the public subject to an order of the Court that the

⁶¹ Record of Proceedings, Tab 14, *Written Notice of Breach of Board Policy G201 dated June 8, 2022*; Tab 21, *Written Notice of Reconsideration of Breach of Board Policy G201 – Trustee Code of Conduct dated July 6, 2022*.

⁶² *Loyola High School v. Quebec (Attorney General)*, [2015 SCC 12](#) at para. 35 [*Loyola*] cit’g *Doré v. Barreau du Québec*, [2012 SCC 12](#) at para. 55 [*Doré*].

⁶³ *Loyola*, *supra* note 62 at para. 39.

⁶⁴ *Ferrier*, *supra* note 46 at para. 60.

document be sealed and treated as confidential.⁶⁵ This statutory presumption carries is “constitutionally-entrenched.” The open court principle – which applies to court files as well as hearings – is supported by the right to free expression and “represents a central feature of a liberal democracy.”⁶⁶ There is “a strong presumption in favour of open courts” and even the discomfort and embarrassment that results from the intrusion of the justice system “is not, as a general matter, enough to overturn” it.⁶⁷

54. The “strong presumption that justice should proceed in public view” is premised on a principle of openness which “is protected by the constitutional guarantee of freedom of expression.” Further, openness “is essential to the proper functioning of our democracy” which is particularly relevant in the present matter where an elected official was barred from executing his role.

ii. The Board has not overcome the strong presumption that the entire Record of Proceedings belongs in the public record

55. To overturn the strong presumption, the onus is on the party seeking the sealing or redaction order to meet a three-part test. First, as a threshold requirement, the party seeking to seal must meet the high bar of showing “that openness presents a *serious* risk to a competing interest of *public* importance [*emphasis added*].” Second, the party must show that the order is necessary to prevent the risk. Third, the party must show that the benefits of the order outweigh the negative effects.⁶⁸

56. **First**, the Board has not met the high bar of showing that publicly filing the Record of Proceedings poses a serious risk an interest of public importance. A mere assertion of a privacy interest is insufficient to qualify as a public interest. Only a narrower aspect of privacy, when it

⁶⁵ *Courts of Justice Act*, RSO 1990, c C.43, s. 137.

⁶⁶ *Sherman Estate v. Donovan*, [2021 SCC 25](#) at para. 1 [*Sherman Estate*].

⁶⁷ *Ibid* at para. 2.

⁶⁸ *Ibid* at paras. 3, 38.

impinges on human dignity, will constitute a public interest for the purpose of this test.⁶⁹ The information in question must go beyond generic information about a given person. It must reveal “something sensitive about them as an individual.”⁷⁰ The information must “strike at an individual’s biographical core.”⁷¹ Even if information touches on a person’s biographical core, it must be shown that there is a serious risk to the interest posed by court openness.

57. There is no evidentiary record to support that anything contained in Tabs 5, 12 or elsewhere in the Record of Proceedings touches upon such sensitive information. The result in *Sherman Estate* is telling. That case involved the estate of two high-profile individuals that died in a highly publicized manner. And yet, the Court denied the request for any order limiting the open court principle.

58. **Second**, the broad redactions applied by the Board are not necessary. Even if a sufficiently sensitive privacy interest were engaged, it is not necessary to redact the entire Report. If any redactions are warranted, they should be tailored to the specific information at issue and as limited as possible to mitigate the impact on court openness.

59. **Third**, any claim of privacy must fail at the final balancing stage because there is a particularly strong public interest in openness in this matter. The Applicant is a democratically elected official. He was alleged to have breached the Code. The Report which set out the facts was kept confidential. The deliberations were kept confidential. All that was made available to the public was the Board’s vote to find him in breach. Consequently, he was barred from attending meetings and censured. As a matter of democratic accountability and fairness, the public interest favours including the Report in the public record.⁷²

⁶⁹ *Ibid* at paras. 7, 73.

⁷⁰ *Ibid* at para. 75.

⁷¹ *Ibid* at para. 70.

⁷² See *Ferrier*, *supra* note 46 at para. 57.

60. Accordingly, the Applicant requests that this Court decline any redaction or sealing order. In the alternative, the Applicants submits that any redactions should be made as minimal as possible to mitigate the impact on openness.

IV. REMEDY REQUESTED

61. The Applicant respectfully requests that this Court quash the Decision. As the Chair's vote was necessary for the Decision to pass, the Applicant submits that it is unnecessary to remit the matter for reconsideration.

62. In the alternative, if the matter is remitted to the Board for reconsideration, the Applicant requests that the Court prohibit Chair Piatkowski from participating in the decision or having any role in the decision-making process.

63. The Applicant further requests that the Court remedy the *Charter* breach by making a declaration to the effect that the Applicant's s. 2(b) right to freedom of expression was infringed.

64. With respect to the issue of sealing and redacting the Record of Proceedings, the Applicant requests that this Court deny any request by the Board which would limit court openness and public access to the complete court file. The Applicant requests that unredacted versions of the Record of Proceedings be included in the public court file.

Dated this 30th day of December, 2022.



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