



**May 29, 2023**

**Ottawa-Carleton District School Board (OCDSB)**

# **FORMAL REVIEW REPORT – FINDINGS**

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**Trustee Code of Conduct Complaint of  
Trustee Donna Dickson against Trustee Nili Kaplan-Myrth**

**Investigation and Report By  
Michael L. Maynard**

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## 1.0 TERMS OF REFERENCE / MANDATE

### 1.1 – Introduction

On or around February 22, 2023, ADR Chambers Inc. was contacted by staff at the Ottawa-Carleton District School Board (“OCDSB” or the “Board”) requesting services for the conduct of a formal review (“Review” or “Investigation”) of a complaint (“Complaint”) made under Board policy P.073.GOV – the Board Member Code of Conduct (“Code of Conduct” or “Code”).

The Complaint was made to the Board by Trustee Donna Dickson (“Complainant” or “Trustee Dickson”) regarding the conduct of Trustee Dr. Nili Kaplan-Myrth (“Respondent” or “Trustee Kaplan-Myrth”), jointly the “Parties”.

Through ADR Chambers, I was retained to complete this review as an outside consultant in accordance with section 4.22(c) and 4.23 of the Code, which are noted beginning on page 4 herein. However, in accordance with section 4.26 of the Code, this report is limited to a “finding of facts”. Accordingly, I am precluded from offering any opinion or recommendation as to whether the Respondent contravened the Code of Conduct. This report only accounts for the facts of the matter, although with appropriate reference to broader contextual factors that might have impacted my determination of the facts. It ultimately falls to the Board of Trustees to determine whether the Code applies to these facts, and whether it was breached as a consequence of the activities described herein.

### 1.2 – Legislative and Policy Framework

Boards of Education in Ontario are governed by the *Education Act*<sup>1</sup>, and Ontario Regulation 246/18<sup>2</sup> sets the requirement that every school board must adopt a Code.

#### **Education Act**

##### Code of conduct

218.2 (1) A board may adopt a code of conduct that applies to the members of the board.

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<sup>1</sup> *Education Act*, R.S.O. 1990, c. E.2

<sup>2</sup> MEMBERS OF SCHOOL BOARDS - CODE OF CONDUCT, Ontario Regulation 246/18 under the *Education Act*

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.

(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.

### **O. Reg. 246/18**

#### **Code of conduct**

1. (1) Every board shall adopt a code of conduct that applies to the members of the board.

The Board's Code of Conduct sets out in its preamble sections, per below its objective, and various definitions and procedural regulations, including the above-noted sections 4.22, 4.23, and 4.26.

### **Code of Conduct**

#### **1.0 Objective**

To establish a standard of conduct and a mechanism for managing inappropriate conduct for Ottawa-Carleton District School Board members in discharging their duties as the legislative officers of the Board entrusted with the duty as fiduciaries to act at all times with the utmost good faith and respect in the best interests of the organization.

[...]

#### **3.0 Policy**

#### **Code of Conduct**

- 3.1 The Board believes that the conduct of its members is integral to the quality of work, the reputation and the integrity of the Board of Trustees.

3.2 All members of the Board shall be governed equally by this code of conduct and are expected to uphold the letter and spirit of this Code of Conduct.

3.3 The Code of Conduct shall apply to members of the Board with respect to issues raised by, and amongst, members of the Board.

[...]

#### Steps of Formal Review

4.22 If a formal review of an allegation of a breach of the Code of Conduct is undertaken, it shall be done by:

- a) The Chair and Vice-Chair of the Board, if appropriate (see Section 4.1); or
- b) Any two of the Chair, Vice-Chair and the alternate trustees (see Sections 4.2 and 4.3); or
- c) An outside consultant chosen by the Chair and Vice-Chair.

4.23 The Chair and Vice-Chair shall determine if the formal review will be undertaken by an outside consultant.

4.24 Regardless of who undertakes the formal review, it shall be undertaken using the following steps:

- a) Procedural fairness and the rules of natural justice shall govern the formal review. The formal review will be conducted in private and, to the extent possible, protecting the confidentiality of the parties involved.

[...]

4.26 The final report of the investigators shall outline the finding of facts, but not contain a recommendation or opinion as to whether the Code of Conduct has been breached. This will be determined by the Board of Trustees as a whole.

## 2.0 THE INVESTIGATION

I formally commenced this review on March 6, 2023, following my receipt of the Complaint and other materials from the Board. My process included:

- i. Reviewing the initial Complaint documentation provided to me, comprising the Complainant's written submissions, as well as other relevant and supporting documents provided by the Board and the Parties;
- ii. Interviews with the Parties, and two third-party witnesses, as follows:
  - a. The Complainant, on March 21 and 23, 2023;
  - b. The Respondent, with her legal counsel, on April 19, 2023;
  - c. Witness One, on May 5, 2023;
  - d. Witness Two, on May 5, 2023;

The standard of proof in this matter was the civil balance of probabilities standard.

## 3.0 CONTEXT / BACKGROUND

### *3.1 – The Parties*

The Parties are both Trustees of the OCDSB, newly elected as of the October 2022 municipal election. I find the following background information relevant for context.

The Complainant is a Black woman. She experienced tragedy in her life when her son, a talented University athlete, was shot and killed by an assailant outside of an Ottawa nightclub. She has since started a charitable organization in her son's name which provides social and athletic opportunities, guidance, and support for racialized youth.

The Respondent is a Jewish woman and practicing medical doctor who holds a Ph.D. in medical anthropology. She has appeared in various media in recent times discussing issues related to the COVID-19 pandemic and advocating for strong public health measures for which she has become well-known.

### *3.2 – Background*

This Complaint arises from circumstances at the start of the current term of office. The Respondent, an advocate for the return of COVID-19 public health measures such as masking, sought to raise the issue of re-introducing facemasks in the OCDSB following her election to office. Around the Fall of 2022 there had been reports of rising incidence of COVID-19 infection. The Respondent has attracted significant attention for her unwavering stances in support of COVID-19 safety measures but has also been the target of significant public backlash – including anti-Semitic messaging and graphic threats of violence – resulting from expressing her views and attempting to introduce such policies to the Board.

The Board held a Special Meeting on Tuesday, November 22, 2022 dealing with the question of reintroducing a mask mandate. That meeting was disbanded due to an unruly crowd that was creating a safety risk, so the meeting was continued virtually two days later on November 24, 2022. Prior to the meeting, and more particularly prior to its November 24, 2022 continuance, the Respondent engaged in political persuasion activities hoping to garner support for her resolution. During that time, she commenced a text message exchange with the Complainant in an attempt to secure her support for the motion. The Complainant found certain remarks the Respondent made during this text message exchange personally offensive. This serves as the basis for the Code of Conduct Complaint.

## 4.0 EVIDENCE OF THE PARTIES

### 4.1 – The Complaint

The Complainant submitted her formal Complaint on or around February 13, 2023, but advised that she raised her concerns with the Chair several times previously, including shortly after the text messages in question. After several discussions over a period of months, and with the understanding, communicated by the Chair, that the Respondent did not feel an apology was warranted, the Complainant filed this formal Complaint.

The Complainant provided supporting evidence that she received multiple text messages from the Respondent that were “attempting to persuade me to vote for her mask mandate motion.” She felt the Respondent was “at first reasonable in her approach,” but that her comments “...became increasingly racist and abusive as the vote nears, when I told her that I intend to vote as my constituents wish, which was not in favour of her motion.” She further alleged that the Respondent Trustee wrote “disrespectful comments about several other board members,” which the Complainant found to be “defamatory and disrespectful” towards those members.

The Complainant alleged that in so doing, the Respondent breached the following sections of the Code:

- 3.17 When expressing individual views, Board members shall respect the differing points of view of other Board members, staff, students and the public.
- 3.18 Board members shall, at all times, act with decorum and shall be respectful of other Board members, staff, students and the public.

There were numerous text messages between the Parties leading up to the meetings in question; I include below a selection of some of the messages that I believe were the most relevant:

#### **November 12, 2022**

**Respondent:** *Good morning, Donna. Heads up, in case you didn't see this. I hope you'll support it. This is a health and safety issue and it is also an equity issues – the children most likely to end up in hospital are disproportionately Black, Indigenous, live in multi-generational households (with vulnerable babies and grandparents), live in City of*



*Ottawa housing, their family have to work in jobs that don't allow for sick leave, they have asthma, diabetes, they are our most vulnerable populations. We will distribute masks to schools for children who cannot afford them, like we did before. Accessing masks isn't the problem. Getting people to wear them, without a mandate, is the problem. Nobody will advocate for those children or their families when they get sick. [...]*

[The Respondent included the wording of the proposed motion.]

**Complainant:** Yes.

**Respondent:** *Thank you. We need to work together.*

**Complainant:** Yes

*I agree*

**Respondent:** [Heart Emoji]

### **November 17, 2022**

**Respondent:** *Please make sure you attend the special meeting about masks – we need your vote in favour of protecting children – you can attend virtually rather than driving in.*

**Complainant:** *When is it?*

**Respondent:** *There was an email sent out today – either Monday or Tuesday next week (5:30 start). You need to respond to the quorum email from [Staff Name].*

*I spoke with the chief of staff of CHEO this morning. She says, yes, masks are needed and will make a difference, even if only schools do this.*

**Complainant:** *I did just got off the phone, yes I will be there. I requested Tuesday*

**November 19, 2022**

**Respondent:** *Good afternoon, Donna. I just need to know that you will still support this temporary mask mandate. To be in this place in our society is dismal. Surely someone cares that the lack of masks actively harms all students and educators, including (especially those with disabilities and their families and people who live in poverty). And it leads to disability in the form of long-COVID. And it is leading to preventable deaths. Ugh.*

**Complainant:** *Hi Nili, I very much respect you and I appreciate your position on masks. It is therefore with very mixed feeling that I have decided not to vote for the mask mandate. My final decision was influenced by the wishes of my constituents. They have overwhelming indicated that they do not want a mask mandate. As their representative, I feel that I must respect their wishes. I would support the board issuing a statement that encourages the wearing of masks and advises people that a mask mandate could be put in place if deteriorating conditions warrant it. I look forward to supporting you on future actions that you propose.*

**Respondent:** *Donna, you are only hearing from angry people, not the thousands of people who are in support. The anti-mask crowd has mobilized to send out letters. Many of those people aren't even Ottawa families. This disproportionately affects the very people whose families are poor, who cannot miss work or school, who are most likely to end up in hospital. I beg you to reconsider.*

*We were counting on your support.*

*It is harder to do what is difficult, what makes some people angry (A very small number of them, but they are loudest), but this is truly about equity, about advocating to keep all students safely in school and out of hospital. There is no truth to all the statements that masks are bad for children. Getting sick, younger siblings struggling to breathe and dying, that is bad. And we can help prevent it. Public health wants us to mask, and the children's hospitals wants us to mask, but it has not resulted in people listening. We are the only ones who can help. This is hard, but it is a way to help children in Ottawa to stay in school. Blackburn doesn't care if Black and Indigenous children get sick. Scott doesn't care if children in poverty get sick. Lee doesn't care if children with disabilities and immunocompromised family members can't safely go to school. We should all care.*

*[An image from an abusive and threatening email from someone opposed to mask mandates was copied into the text chat]*

*This is who will rejoice if you vote against masks. I will ignore the nastiness from these anti-mask people because our role is to address health and safety for actual parents whose children are getting sick at school.*

*Often people just do what's easiest. The majority of children and educators do not mask because they assume if it was important it would be required. Well, the head of CHEO is going to come to the meeting on Tuesday and she's going to tell us again that it is necessary. It will make a difference. Right now, children who do mask are bullied and pressured by others. That's so sad. This is important period. So it needs to be temporarily required.*

**November 23, 2022** *(Following the disbanded November 22, 2022 Special Board Meeting)*

**Respondent:** *The people who organized tonight are white supremacists. The main woman there is named [Anon]<sup>3</sup>. She is cofounder of Freedom Fighters Canada, a transphobic anti-vaxxer racist organization. The people who organized letter writing campaigns do not care about poor families or anyone else that gets sick. I am very sad that you said a week ago that you would support a mandate and now you do not.*

*Your own constituents are trying to reach you. Real people, parents whose children are at risk because of the lack of masks. One of the members of the Equity committee wrote to you to ask you to support masks.*

**November 24, 2022** *(As reconvened virtual Special Board Meeting was taking place)*

**Respondent:** *You should abstain.*

*Don't vote with white supremacists.*

**Complainant:** *Leave me alone*

**Respondent:** *Don't talk to me about equity then.*

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<sup>3</sup> Anonymized for privacy.

**Complainant:** *I don't not talk to you about it because you don't care about it.*

**Respondent:** *That's very disrespectful*

*Maybe, read the e-mail from the equity committee. The children who are most at risk are Indigenous and black and poor.*

*In the future, treat your colleagues with respect.*

In describing this exchange, the Complainant wrote:

"I am a black trustee and in one of trustee Kaplan Myrth's text messages she insinuates that by voting against the mask mandate I am voting in support of "white supremacist ". I find this comment to be extremely insensitive, insulting and disrespectful. It is of such egregious nature that I cannot simply let it pass. No reasonable person in a position of authority that had a sense of propriety would accused [sic] a peer of this, in writing, never mind a black person."

She further referred to the Respondent's earlier texts concerning other Trustees and their alleged lack of concern for various groups that might be impacted most severely by the spread of COVID-19, asserting that those comments also violated the Code. She concluded:

"I do understand that trustee Kaplan Myrth feels embattled because of her social media stance on several issues. Nevertheless she has never recognized that her comments were hurtful. I would like to see a public apology to not only myself but also to the other trustees which she disparaged."

#### *4.2 – Interview with Complainant*

The Complainant voiced her incredulity at the Respondent's texts towards her. She noted that she is a Black woman and grandmother, the mother to a murdered son, and the first Black Trustee in 27 years at the OCDSB. She discussed her charitable work in response to her son's death, through which she works with many marginalized and racialized youth. She took real, personal offence to the Complainant's words, stating: "She is telling a Black person and a grandmother that she does not know how to be Black, how to be poor, how to be a parent or grandparent," and that the Respondent's treatment of her was "very disrespectful." She further asserted that her "whole reason for being here [as a Trustee] is the empowerment of students," in furtherance of her charitable work.

The Complainant believed that the Respondent's comments about the mask mandate being an equity issue did not square with her subsequent comments that "belittled" the Complainant on race-related grounds. She indicated that her mental health has suffered from the messages she received, stating:

"I pride myself at not looking at colour, race, or anything. I want us all to be equal – to be the best we can be. [T]o be questioned and told that I don't care...it makes me question 'Why am I here?' I am here to benefit the youth, then I have someone tell me I don't care. You have to re-evaluate yourself, and wonder 'What did I do wrong?' I don't think I did anything wrong."

The Complainant noted that the Respondent issued a letter of apology after the formal Complaint was filed – however, she did not accept this apology because it came so long after the incident, and because she felt the Respondent showed limited contrition while continuing to attempt to justify her actions.

The Complainant also voiced concerns about the process that led up to this formal review. She said she raised the issue with the Board's Chair very shortly after the incident occurred but did not realize her concerns were not then considered a "formal complaint". Only after until several further conversations in January and early-February was the Complainant informed she should file a formal written Complaint if she wanted the matter to be considered by the Board. During t time, the Complainant said she was informed that the Respondent was receiving abusive and discriminatory messages from some of the public, and it was proposed that she enter into an informal mediation process with the Respondent to resolve her concerns. She was also informed that the Respondent had so far refused to apologize. The Complainant declined and preferred a formal review process; she voiced considerable concern that her Complaint has not been taken seriously.

#### *4.3 – Evidence and Legal Arguments of the Respondent*

The Respondent took part in an interview accompanied by her legal counsel, who also provided a written memorandum outlining the Respondent's view of the case. The legal considerations advanced by the Respondent will largely be for the Board's consideration of this matter.

##### *4.3.1 - Interview with the Respondent*

The Respondent did not refute the content of the text messages but believed that her messages were not improper or a breach of the Code.

She noted that the first meeting at which her motion was considered was disbanded for security issues, and her November 23 text respecting the political make-up of the protestors was something she had already said publicly.

On the night of the November 24 meeting, after that day's texts were sent, the Respondent received a message and phone call from the Board's Chair indicating that the Complainant was upset about the Respondent sending her text messages, although the content of the messages was not discussed. The Respondent apologized for the act of sending text messages.

A further discussion was also held with the Board's "Integrity Officer" (a position unknown to me but identified by the Respondent) sometime in the days immediately following, during which it was communicated to the Respondent that she should not have sent a text message to the Complainant. The Integrity Officer also raised the fact that the Respondent had texted that the "anti-maskers were white supremacists," to which the Respondent replied "they are" – noting that the "convoy" people were involved with white supremacist movements, and some of the same people were protesting at the Board. The Respondent additionally noted to me that she had been receiving daily death threats at the time the Integrity Officer reached out to her about sending text messages.

On the basis of these two above-described discussions, the Respondent was not aware of or otherwise did not understand the extent of the offence felt by the Complainant.

The Respondent indicated that she has "not had two words exchanged with Trustee Dickson since the text exchange," and that the Complainant "will turn her back on me (literally – swivel her chair to have her back at me)." The Respondent indicated that she has "continued to advocate as I am wont to do, because I am a physician," but noted that she has never publicly criticized the Complainant for her about-face on the mask mandate resolution.

She also argued that on occasions since, the Complainant has "repeatedly dismissed anti-Semitism", and allegedly dismissed the threats against the Respondent, many of which are anti-Semitic, stating "If certain people didn't talk about issues on social media, those certain people wouldn't be getting death threats."<sup>4</sup>

On February 17, 2023, nearly three months after the incident, the Respondent received an email from the Chair indicating that this complaint had been received.

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<sup>4</sup> The Respondent's allegations about the Complainant have not been tested and are not formally matters at issue.

The Respondent then wrote a letter to the Complainant, which was sent out on February 19, 2023 and copied to all Trustees – after which the Complainant was informed that other Trustees had not yet seen the Complaint to which the Respondent was responding – they received the Complaint several days later.

#### *4.3.2 – The February 19, 2023 Letter*

The Respondent's February 19, 2023 letter was four pages long. I have opted not to reproduce it in full, as Trustees have already seen it, but I will summarize and quote from it as appropriate.

The Respondent denied the characterization of her text messages to the Complainant as “abusive” and/or “racist”. She noted that she exchanged text messages with the Complainant leading up to November 22 in an attempt to solicit her support for the mask mandate resolution, which was something the Complainant initially agreed to support before changing her mind. The Respondent indicated that she was “speaking as an expert – as a physician – and I hoped that each of the trustees, including Trustee Dickson, would listen to the science and social science.” She indicated that she was “under the impression that we were supposed to lobby our colleagues to support motions,” and “naively believed that when trustees said they would support a motion they wouldn't change their minds.” She stated: “If it had been clear that there were insufficient votes for the motion to pass, I would have proceeded differently.” She accepted that the vote did not go her way.

Respecting the content of her text messages, the Respondent stated (in part):

“As a Jewish woman speaking to a Black woman, I was not racist when I said that the people yelling and disrupting and bombarding us with letters prior to our meeting and during the board meeting were tied to white supremacy. It is well documented that white supremacist and far-right ideology underpin antivaccine and anti-mask movements, globally.

[...]

These are the people who organized to send hundreds of letters to us prior to our vote to convince trustees to vote against masks. These were not our constituents. They sent us hundreds of letters to drown out the letters from people supportive of masks (including the emails that Trustee Dickson admitted she did not get a chance to read from members of the Advisory Committee on Equity, supportive of masks).

It is not racist to point out that the anti-vaccine, anti-mask movement is fueled by racism. [...]

If we had been sitting side by side, Trustee Dickson and I could have talked about these issues, respectfully, in person, as colleagues. I tried to speak with her while our board room was erupting in chaos and she literally turned her back to me. If our board had not needed to phone the police to evacuate the room, if we had not needed to move to a virtual meeting because of the disruption, if we had still been sitting side by side, Trustee Dickson and I could have spoken about our experience of the evening.

I sent Trustee Dickson text messages when we were in a virtual setting because we were no longer together, sitting side by side, to speak. Chair Lyra let me know afterward that I should not send text messages to anyone during a meeting. I immediately apologized, as I did not know there was a protocol about how to communicate if we were not in a room able to speak to each other."

The Respondent discussed the numerous egregious threats she has received as a result of her advocacy, indicating that she never imagined her advocacy would lead to her life being threatened, but she has continued to do it anyway.

She apologized for an aspect of her "private text" to the Respondent, specifically:

"...that our colleagues do not care about Indigenous people, Black and racialized people, people with disabilities. I was wrong to have said that to her, and I am sorry for saying it. I regret saying it privately, and I want those people to know that I believe that they do care. What I meant was that they were not willing to put themselves on the line to advocate for those populations, that they were misled by the misinformation contained in the hundreds of letters we received from organized anti-maskers. What I meant was that the most vulnerable people in our community needed their help, and I was disappointed that they would not support a temporary motion that would help to prevent some of those people from becoming sick."

With respect to the "white supremacists" text message, the Respondent wrote:

"I commented to Trustee Dickson, 'Don't vote with white supremacists.' I was absolutely not referring to the other trustees as white supremacists. I was following up on my conversation with her, when we were in the room, when



I said that the people with Canada flags draped over their shoulders yelling at us were linked to a cause that is championed by white supremacists.”

The Respondent then acknowledged that she should have apologized for the misunderstanding and for continuing the discussion after the Complainant replied: “Leave me alone”. She apologised again for replying “Don’t talk to me about equity then,” though she also noted that the Complainant’s reply (“I don’t talk to you about it because you don’t care about it”) was dismissive of the Respondent’s lived experiences as a Jewish woman, and her “lifetime of work dedicated to addressing issues of equity and diversity.” She indicated that she declined to pursue her own Complaint about these comments, because she believed the situation was a misunderstanding and she did not want to cause any harm to the Complainant.

The Respondent again referred to the threats of violence aimed at her and asserted that there was no justification for this Complaint now except to cause her further harm. She indicated that a “public trial” would put her back in the spotlight of those abusive individuals, and she felt there was a “pattern at the OCDSB of trustees using the Code of Conduct without justification,” effectively weaponizing the Code against one another for political reasons. She continued:

“Again, I was not racist or abusive at any point in my interactions with Trustee Dickson. I regret using text messages as a form of communication and will not do so again. I regret the misunderstanding about my comments and that Trustee Dickson felt harmed by my communication with her. I have not sent a text message to Trustee Dickson since November. I regret my private comments about whether the other trustees who voted against the temporary return to masks care about the health of vulnerable populations. I have reached out, in good faith, to try to build relationships. That has not been acknowledged or reciprocated by Trustee Dickson.”

The Respondent concluded her letter by again pointing out the potential damage that would likely arise from pursuing a formal review of this matter and indicated a hope that “we can work together, respectfully, to build our relationship.”

#### *4.3.3 – Legal Arguments*

The Respondent’s counsel believed there were various contextual matters which could explain certain nuances. In his view, the question the Board must consider is a legal one:

*“Do these issues violate the Code of Conduct when the Code is understood in its full context and application?”*

The Respondent’s Counsel argued that the Complaint was frivolous and vexatious – a position previously rejected by the Board’s Chair – and was concerned that it creates further opportunities for abuse to directed at the Respondent. He argued that nothing in this matter should be a public discussion, and it should have been dealt with informally in private. He argued that neither of the fundamental issues in the complaint (i.e., in his view whether the Respondent called the Complainant a racist, or used insulting words against other Trustees), were tenable at law.

Counsel argued that:

*“Telling a person of colour not to associate with racists is not racist; it would be the same as telling a Jewish person not to associate with anti-Semites or telling a person from the LGBTQ community not to associate with anti-LGBTQ people. [It is] not calling that person racist; [it is] not saying they are a white supremacist, or anti-Semite, but pointing out [that] those people are there and saying: ‘don’t associate with them’. [This] is not an offence.”*

He stated that the Respondent had an earnest belief about the political motivations for the other Trustees taking the positions they took, and he argued that the “fair comment” defence under the law of defamation applies. He further argued that “qualified privilege” applied – i.e., that the Respondent had a right and duty to express herself respecting the matter at issue, and the Complainant had a corresponding right and interest in receiving those expressions based on her position as a fellow Trustee.

Counsel also raised the case of *Groia v. Law Society of Upper Canada*<sup>5</sup> in which the Supreme Court of Canada considered the conduct of a lawyer who “repeatedly though incorrectly accused another of misconduct during a trial [...]” Counsel, in his own words, stated that the Supreme Court of Canada held:

*“[...] the proper balance between the important value of respectful and civil behaviour among lawyers and a lawyer’s expressive freedom in fulfilling their duty to defend their client fearlessly, meant that statements made in good faith and on a reasonable factual basis cannot be the basis of a finding of misconduct.”*

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<sup>5</sup> *Groia v. Law Society of Upper Canada*, 2018 SCC 27

He accordingly argued that the Respondent's statement was made in good faith, and even if based on a mistaken belief in the truth, could not be subject to a Code of Conduct finding. He further argued that the Respondent, as a delegate of her constituents, had a right to express her views related to a policy before the Board for its consideration.

Counsel observed that the Code exists to promote a respectful environment within the Board and in the community as a whole, but the Complaint was not designed to do those things. He said the comments were made privately, not in the context of debate, and were incapable of bringing disrepute to the Board because they were not public comments. They were intended as political persuasion, as part of carrying out a basic democratic function – the words were an act of political expression from one elected representative to another. Counsel argued that the Canadian Charter of Rights and Freedoms protects against unreasonable incursion upon the freedom of expression, and that any infringement must be demonstrably justifiable – such as to protect some other constitutional principle. He stated that, “it would be ridiculous to think that the Code of Conduct authorizes Trustees to censure someone for exercising their constitutional rights unless it were demonstrably justifiable to do so in a free and democratic society.”

Counsel noted that the Respondent has been open to discuss the matter (such as through mediation), and that she wrote a “conciliatory letter” (i.e., the February 19<sup>th</sup> letter) in which she expressed her regret, to which she received no response from the Complainant. Counsel observed that the Complainant knew of the harassment campaign against the Respondent and must also surely know of the “inevitable consequence” of pursuing this private matter publicly.

#### *4.3.4 – Allegations of Collusion / Complaint Brought for an Improper Purpose*

The Respondent and her Counsel further advised that they became aware of a campaign by at least one other Trustee to dig up evidence to manufacture complaints against the Respondent. Given the seemingly curious timing of this Complaint (being raised three months after the incident), they wondered whether this matter was being encouraged by other parties, and perhaps brought for an improper purpose. They suggested that I might speak to other possible witnesses which may help to determine whether this is true.

I spoke with two other witnesses, and while they both corroborated the claim that some other individuals were essentially plotting against the Respondent, neither established any clear link to this particular complaint. It is my own opinion that the “curious timeline” for this Complaint is explained by the procedural misunderstandings between

the Complainant, Board Chair, and senior staff documented in this Report. To protect the goodwill and functioning at the Board as a whole, I am declining to name the two witnesses with whom I spoke.

## 5.0 ANALYSIS AND FACTUAL FINDINGS

### *5.1 – Credibility*

I found both Parties credible. Both were forthright in expressing their views and presented reasonable explanations for their actions and interpretations.

The Complainant appears genuinely upset by the words communicated by the Respondent, and I reiterate that she attempted to have the issue addressed immediately and several times subsequently.

The Respondent acknowledged her words, and referred to her February 19<sup>th</sup> letter in which she made certain admissions, provided explanations, and apologized and expressed regret for her actions. It appears she was not fully aware of the extent of the offence her words caused until she was presented with the written Complaint on February 17<sup>th</sup>.

### *5.2 – Factual Findings*

I reiterate again the restrictions of my present mandate. The Respondent, through her legal counsel, offered several legal interpretations about the applicability of the Code of Conduct, which I have documented herein for the Board's consideration, but there is little I can do with them in the context of this fact-finding exercise. The question of the Code's basic applicability may well be dispositive of the matter as a whole. It is appropriately left to the Board to decide.

However, the basic facts of this case are these:

1. The Respondent sent a series of text messages to the Complainant soliciting her support for a temporary mask mandate at the Board;
2. The Complainant indicated some support for the policy as of November 12, 2022, but later changed her mind;
3. The Respondent then engaged in attempts to persuade the Complainant to return to her previous supportive position;
4. While doing so, the Respondent made several comments about the political and moral convictions of several of their colleagues; and,

5. The Respondent eventually asked the Complainant to “abstain” rather than “vote with White supremacists,” to which the Complainant took offence, for reasons elaborated herein.

The Complainant interprets the words about fellow Trustees as “defamatory”, while the Respondent argues that they were “fair comment”, subject to “qualified privilege”, rooted in earnestly held opinion, and expressed for a legitimate and good faith purpose. This defence to these comments is almost entirely one of legal interpretation. It does not change whether these messages were communicated, nor whether they were disrespectful. The specific words that the Respondent used are established by the evidence, and the Parties have clear differences in how they interpret their intent and affect. I note that the Respondent has since attempted to clarify her intent and apologized for making these comments.

The Complainant interprets the words “Don’t vote with white supremacists” as a racist remark. These words that the Respondent used are not debatable – they are a matter of evidence. However, I find it unlikely that this interpretation reflects the Respondent’s intent, and she more likely made the remark to suggest that certain White supremacists would (in her view) welcome the result of a defeated mask mandate resolution. This notion was clearly communicated poorly, and the Respondent has since attempted to clarify her intent and expressed regret for making this remark and for the harm it caused the Complainant.

The Board can determine whether the Respondent had a right to make her comments, and what effect, if any, her explanation and apology may have *vis-à-vis* the question of Code applicability.

#### *Final Commentary to the Parties*

I would lastly observe the following concerning this matter.

The Complainant has demanded a “public apology” to herself and to the other Trustees named in the text messages to resolve her Complaint. As an independent third party, I found the remorseful words in the Respondent’s letter, published to all Trustees, to be sincere. My own opinion is it was an earnest attempt by the Respondent to explain where she thought she went wrong, coupled with words of apology and conciliatory messages respecting ongoing and future relationships. My own experience, as the Integrity Commissioner for two major Ontario-based school boards and numerous municipalities, is that the Respondent’s explanations and apologies in her February 19,

2023 letter go well beyond the usual kinds of submissions made to defend a Code Complaint. These apologies / expressions of regret were not forced.

It is plainly unfortunate that this matter came to this point. It seems there could have been ample opportunity to attempt an earlier informal resolution, but circumstances of miscommunication and misunderstanding conspired against that. I assign no blame for this, but I would encourage the Parties to reconsider attempting any kind of informal resolution, even at this late juncture. My personal opinion is there might remain the possibility of the Parties resolving this matter amicably among themselves and avoiding further deterioration of relationships. It is clear they have many things in common on which they could work collaboratively. It is also plainly a certainty that at least one of them will be disappointed by the outcome of the Board's eventual decision.

I thank the Parties and other witnesses for their participation in this formal review process, and the OCDSB for appointing me to conduct it.

Yours Truly,

A handwritten signature in blue ink, appearing to read 'M. Maynard', followed by a long horizontal flourish.

Michael L. Maynard  
ADR Chambers Inc.