

OVERVIEW

1. Trustee Donna Blackburn appeals from the determination by the Board of Trustees of the Ottawa-Carleton District School Board (the “Board”) that she breached sections 3.08, 3.15 and 3.18 of the Board Member Code of Conduct (the “Code”) as a result of her interaction with SL on March 27, 2020.
2. Trustee Blackburn also appeals from the decision of the Board relating to the sanctions imposed by the Board for the alleged breaches.
3. Trustee Blackburn’s appeal is based on breaches of natural justice and the rules of procedural fairness, breaches of the Code, errors and omissions in the facts contained in the Final Report and the lack of proportionality in relation to the sanctions imposed.
4. From the filing of the Complaint against Trustee Blackburn, through the investigation, preparation of the Final Report and the Special Meeting itself, the Code process against Trustee Blackburn has been deeply flawed and unfair to an extent that would shock most Ontarians who believe that our administrative decision making processes comply with the basic tenets of the rule of law.
5. Trustee Blackburn recognizes that the Board is in a difficult position. The traditional media and social media stories about the March 27, 2020 encounter between Trustee Blackburn and SL told a negative story. Unfortunately, the media stories were at best second and third hand accounts with no information directly from either SL or Trustee Blackburn. Those stories did not reflect reality. However, the stories did attract significant negative attention for the OCDSB. Trustee Blackburn is aware that trustees have received difficult emails from members of the community who have followed the media version of the story. Trustee Blackburn’s own inbox has been full of hate messages, such as variations of “you are a racist c*nt” as well as at least one overt death threat.
6. When combined with current events such as the story of Amy Cooper and the tragic death of George Floyd, as well as troubling accounts of public education in Ontario disadvantaging Black students, the OCDSB undoubtedly feels pulled to take a strong public stance against racism. In fact, Trustee Bell stated directly that the Board had a “duty” to build back the trust of the Black community at the Special Meeting held June 29, 2020.
7. However forceful the pull to speak out against racial discrimination, the Board’s sanction of Trustee Blackburn cannot become the OCDSB’s symbolic atonement for all the wrongs suffered by racialized people at the hands of the OCDSB and Ontario public school system at large.

Trustee Blackburn has consistently been part of the solution for racialized Ontarians. She has also faced that racism in her advocacy for her own daughter, including within the OCDSB, which is in part what motivated her to first get involved in parent councils and ultimately run to be a trustee. She is a true ally.

GROUNDS OF APPEAL AND ARGUMENT

A. Breaches of Natural Justice and Procedural Fairness

a. The Right to Be Heard

- B.** The Code itself is inconsistent with natural justice. Specifically, the Code violates the right of the trustee to be heard in section 4.33 (b) which stipulated that Trustee Blackburn could not participate in the deliberations. Trustee Blackburn had an inherent right to tell her story to the Board and the public directly (not through the filter of the investigator) given the serious consequences that were at stake and the profound impact on her reputation and career. The Board did not have the authority to remove this right when instituting the Code.
- C.** Further, given the process prescribed by the Code and adopted in the Special Meeting itself, Trustee Blackburn was not given a meaningful opportunity to provide any input or information whatsoever through the investigator or otherwise that would have been relevant to the sanctions stage of the assessment.

b. The Complainant had an Alternate Agenda

- D.** The Code creates an impossible situation where the Trustee-Complainant is a witness, an advocate for the Complaint during the deliberations and ultimately a judge against the trustee complained of. A trustee is entitled to a fair and impartial hearing under the rules of natural justice. This heavily slanted dynamic created by the Code was made worse in this case where the Trustee-Complainant had a publicly pronounced political agenda to displace Trustee Blackburn from office. Natural justice requires that Trustee Boothby should not have been permitted to lodge the Complaint in the first place, participate in the deliberations and / or vote on the outcome of the Complaint given her past public statements that she wanted Trustee Blackburn removed from the Board for reasons unrelated to the events of March 27, 2020. In August 2018 she approached a political opponent in her own zone to step down so that she could be acclaimed. She told the *Ottawa Citizen* she wanted to clear up time to campaign against Trustee Blackburn.

c. The Investigator was not even-handed

11. The investigation was broadened by the investigator beyond the scope of the original Complaint which the rules of procedural fairness do not permit. The Complaint that was filed by Trustee Boothby pursuant to Section 4.33(b) of the Code was not the complaint that formed the basis for the investigation. Significantly, the original Complaint contained no allegation of racism.
12. Instead of investigating the original Complaint, the investigator formulated his own 13-point complaint during the investigation based on information he received from SL. This is akin to a fishing expedition. Trustee Blackburn was entitled to know the case against her at the outset of the complaint, not partway through the investigation. The decision of the investigator to make his own complaint was also a violation of s. 218.3 of the *Education Act*.
13. The investigator received the evidence of a witness, Mr. Robin Browne, whom he knew (and identified in the Final Report) was biased against Trustee Blackburn. He had no firsthand knowledge of the events in question. In fact, Mr. Browne has a tab on his website titled “Bye Bye Blackburn” which was not mentioned in the Final Report. He also has a blog post from June 2020 where he describes white women as terrorists. The evidence of Mr. Browne should not have been received by the investigator who, as far as Trustee Blackburn has been made aware, had no mandate to consider the views of the Black community. If that had been part of the mandate, certainly speaking to a single Black man from a single group would not have been enough.
14. Trustee Blackburn was not provided with the substance of the interviews with witnesses interviewed by the investigator despite requesting those interviews. Specifically, Trustee Blackburn had no opportunity to respond to whatever evidence Mr. Browne or Trustee Boothby may have provided.
15. The investigator relied on a statement from Trustee Lyra Evans in his Final Report who has no firsthand knowledge of the events in question and who publicly stated that she prejudged Trustee Blackburn’s guilt.
16. SL and Trustee Blackburn were treated unequally by the investigator in a manner that presumed Trustee Blackburn’s guilt. SL provided an undated, unsigned statement that the investigator did not challenge in any material way. In fact, there is no evidence provided to Trustee Blackburn or the Board that SL wrote his own statement. The copy of the statement provided to Trustee Blackburn has a handwritten signature “Kedroe” across the top. Was the statement written by SL’s father? That question was not answered.

17. Even when the investigator learned that certain allegations in the SL statement were patently false, he skirted the issue. This is an example of a patently false utterance in the statement of SL. SL **alleges** in his statement that during her phone call with Susan Carkner, Trustee Blackburn stated:

“He told me he’s in grade twelve, if I have anything to do with it, I’ll make sure that he won’t graduate this year. And if he does, I’ll be there at the ceremony to trip him as he passes me onstage.”

The investigator spoke with Susan Carkner during his investigation. The investigator opined that Susan Carkner was credible. He also opined that Susan Carkner’s version of events corroborated Trustee Blackburn’s version of events which was that that statement was never made. The investigator protects SL by failing to state clearly in the Final Report that Trustee Blackburn did not threaten to interfere with SL’s graduation or to trip him as he crossed the stage

18. The failure of the investigator to point out this false statement in SL’s statement is significant. For example, in her comments made at the Special Meeting, Trustee Jennekens incorrectly noted that Trustee Blackburn “threatened that [SL] would never graduate”. Because the investigator beat around the bush instead of stating directly that SL’s statement was not truthful on this point, Trustee Jennekens and likely others, did not understand that allegation was false.
19. The investigator fails to highlight other internal inconsistencies in SL’s statement. For example, at one point in the statement SL states: **“I gave her my name.”** Then, in answer to the investigator’s follow up questions:

Q. Did she ever ask you for your name?

A. Yes I didn’t give it to her”

20. The Board was very interested in issues of credibility judging by the questions posed to the investigator at the Special Meeting. Why was this important information not provided to the Board and the public?
21. Failure to consider and provide the complete context for the facts found in the Final Report was a failure of natural justice. Trustee Blackburn testified before the investigator that as of March 27, 2020 she had concerns about COVID-19 and its potential impact on users of the park. Earlier in the day she had asked 5 people to leave the park and they had. Her concern extended to SL and the 5 additional people who attempted to join him on the basketball court during the time

Trustee Blackburn and SL were present in the park that afternoon. Trustee Blackburn testified that she had two friends who had been diagnosed with COVID-19 as of March 27, 2020. She testified that she was concerned about the impact a spread of the virus would have on the schools. There is nothing to suggest that these concerns were frivolous or raised by Trustee Blackburn for any improper purpose and certainly not for a racial purpose. Instead of providing this context, the investigator tried to undermine the legitimacy of the context by pointing out that the park ban rule was new which was a red herring.

22. The investigator failed to emphasize SL's own description of the encounter with Trustee Blackburn as friendly. SL describes in his statement:

"She came towards me with a smile on her face. I thought that she was going to compliment my dog or maybe my jump shot."

23. Trustee Blackburn did in fact approach SL in a friendly way and was trying to cajole him into doing the right thing which was to leave the park given the new rule. SL admitted this in his own statement when SL states:

"she told me I was putting people at risk by playing ...I don't know this woman so wasn't going to just blindly listen to some random lady off the street."

24. Trustee Blackburn was trying to convince SL to leave the park for his own good and the good of the community. SL's response was belligerent which is clear from his own statement where he states:

"I said 'That's okay. I'll leave if someone with authority tells me to do so, I don't listen to Randoms."

SL's own admission that he wanted to hear from someone with authority is important context for Trustee Blackburn's inquiry about calling his basketball coach.

25. As other community members came to join SL at the basketball court, increasing the risk to the community, Trustee Blackburn sought the help of ByLaw and her City Councillor to protect her community. However, she was told they were very busy and would come as soon as they could. Given Trustee Blackburn's understanding of the urgency of the COVID-19 situation, and SL's refusal to leave, she stayed at the park to dissuade any other potential basketball players which she did successfully.

- 26.** Contrary to the assertions of both Trustee Boothby and Trustee Penny during the Special Meeting, Trustee Blackburn was not at the park for an hour questioning SL or interacting with SL. She was at the park for an hour talking to people to ensure they were aware of the rule and that the community was safe. During that hour, she made three phone calls and spoke to five other people at the park. Her interaction with SL was limited and intermittent over the hour.
- 27.** One witness who was interviewed by the investigator described Trustee Blackburn's conduct in the park as "positive community engagement." That is certainly an interpretation that is available on these facts.
- 28.** In his Final Report, the investigator also failed to provide the full context of the comment about Innes Road which was required in order to provide an impartial analysis of the interaction. Trustee Blackburn explained to the investigator both during her interview and in writing that her comment about Innes Road was made as a result of her past career experience as a practising social worker and her work with the John Howard Society and other organizations involving individuals of all races who were in conflict with the law. Her life experience supports a view that people of all races who do not care about breaking rules or interacting with law enforcement may ultimately end up in conflict with the law. That context for the comment is missing.
- B.** Similarly, the investigator failed to provide the context he had been given which was that while trying to convince SL to leave the park, Trustee Blackburn told him she would call Bylaw if he did not leave and he responded that he did not care. She then told him that there was a big fine and again he said he did not care. The investigator failed to provide this context that SL specifically stated that he did not care about the rules, the pandemic, the risk to others, a possible fine and law enforcement.
- B. The Investigation Breached the Code of Conduct**
- 29.** The Final Report also violated the Code itself. For example, the Final Report violates Section 4.24(a) and (c) of the Code because Trustee Blackburn did not receive all the evidence relied upon by the investigator in order to be able to respond to the evidence during her interview or in writing. She should have received notes from each witness interview so that she could understand what was said and respond.
- 30.** The Final Report violates Section 4.24(b) of the Code because the investigator considered social media posts, traditional media posts and a social media statement by Trustee Lyra Evans who

was recused due to bias and information provided by Mr. Browne who was not present on March 27, 2020.

- 31.** The Final Report violates Section 4.26 of the Code because the investigator did not limit the Final Report to findings of fact but also gave his opinion in the text of the Final Report including where he concludes that Trustee Blackburn made a statement that was “racially insensitive” and that his findings “did not support a conclusion of positive community engagement.”

C. The Special Meeting Breached the Code of Conduct

- 32.** The Special Meeting convened in relation to the Complaint was conducted in violation of the Code. By inviting the investigator to answer questions in person, there was a breach of section 4.26 of the Code because the investigator expressed his opinion on several issues during the meeting. In fact, in his opening remarks he identified that there was “no doubt in his mind” that there was conduct by Trustee Blackburn that was “concerning” and that the comment about Innes Road was “inappropriate.” Given that Trustee Blackburn was only permitted to have her version of events told through the investigator, it is simply wrong that he filter the evidence through his own opinions.
- 33.** By inviting the investigator to attend and answer questions, there was a breach of section 4.30 of the Code which requires that the Board shall consider only the findings in the Final Report when voting on the decision and sanction. No supplemental information or interpretation ought to have been considered by the Board.
- 34.** The investigator also failed during the Special Meeting to answer questions posed of him in a fair and even-handed way. For example, Trustee Fisher asked the investigator whether he had any proof that Trustee Blackburn had in fact completed a racial sensitivity webinar. The investigator answered that the only proof was that Trustee Blackburn told him she had done so. However, in fact, Trustee Blackburn had described the content of the webinar to the investigator during her interview. Her counsel also provided the investigator with a link to the webinar after the interview. Once the investigator was made available to answer questions (which he should not have been) he had an obligation to answer those questions fairly and accurately.
- 35.** Similarly, Trustee Fisher asked the investigator whether the Libel Notice would have created a chilling effect on the ability of SL to answer the investigator’s questions. The investigator was not permitted by the Chair to answer this question when there was a straightforward answer that SL’s evidence to the investigator would have been covered by qualified privilege. Trustee

Blackburn's counsel had expressly raised this protection for SL during a discussion with the investigator and had given an assurance that she would treat it as an instance of qualified privilege. There was in fact no legal reason for SL to avoid testifying. The Board should have had this information so that they could have considered whether SL was avoiding impeachment.

- 36.** By holding part of the meeting *in camera* while excluding Trustee Blackburn, the Board violated s. 4.32 and 4.33(a) of the Code. Trustee was entitled to be present for the entire meeting including all deliberations. There was no authority to exclude Trustee Blackburn from any part of the meeting. It is hard to imagine any proceeding in Ontario where it would be acceptable for the complainant and the decision makers to meet privately without the target of the complaint.

D. The Trustees Violated the Code of Conduct in their Deliberations

- 37.** In reaching their individual decisions on the breaches and sanctions, many of Board members expressly acknowledged that they had violated section 4.30 of the Code which requires that they consider only the findings in the Final Report. For example:
- a.** Trustee Hough described that she was impacted by the emails she had received relating to the complaint. Those emails were not provided to Trustee Blackburn for a response. They were not part of the Final Report. They ought not to have been factored into her decision making. Community members' opinions about what happened in the park that day when they were not present and are simply responding to media reports that are replete with inaccuracies cannot form the basis for reasonable outcome.
 - b.** Trustee Jennekens relied on the false allegation that Trustee Blackburn threatened to interfere with SL's graduation and misstated the evidence about the Innes Road comment.
 - c.** Trustee Penny described that Trustee Blackburn never said she was sorry which is factually incorrect. His assertion also ignored that Trustee Blackburn was facing the same challenge the other trustees were facing in that they were told they could not speak out in the face of the allegations.
 - d.** Trustee Boothby described that SL "felt discriminated against" and "shamed" in her analysis of the alleged breach the Code. However, the investigator expressly found that SL was not discriminated against. Moreover, SL knew that three white people had been asked to leave the park while he was there because he would have seen them himself. He could not reasonably have felt discriminated against in that circumstance.

The investigator failed to disclose in his Final Report that SL specifically told the investigator that **SL has never seen the Facebook post**. SL saw the photo of himself playing basketball but did not see the words posted. SL told the investigator that he believed that the Facebook post contained his name and stated that he was playing basketball with other people in the park. (Neither of those statements is correct.) SL indicated in his statement to the investigator that he was angry because [Trustee Blackburn] lied [about him playing with other people] to make him look bad.

The investigator omitted the fact that SL never saw the Facebook post from his Final Report. It is highly unlikely that SL felt “shamed and discriminated against” by a Facebook post he never saw.

- e. Trustee Bell rejected the findings of the investigator that Trustee Blackburn did not intend to discriminate or single out SL and that the Innes Road comment was racially insensitive. Trustee Bell offered the opinion that “racially insensitive” was not a term “coined in the dictionary” without any evidentiary support for that statement. She then secured the support of the Board to amend the motion relating to sanction to include a finding of “racism” which was not consistent with the findings of the Final Report.

E. The Sanctions were disproportionate to Conduct Complained of

- 38. The sanction delivered by the Board was arguably the harshest sanction available under the Code. The sanction is not proportionate to what occurred and strongly suggests that the sanctions have been used for an alternate political purpose.
- 39. Trustee Blackburn has admitted and apologized for the Facebook post which she genuinely regrets. She acknowledges that she ought not to have made the post. However, the severity of the sanction does not factor in:
 - a. The Facebook post was removed very shortly after it was posted, before Trustee Blackburn was aware of any of the aftermath that would arise from it. The post was certainly removed in less than an hour. Trustee Blackburn believes it was removed in less than 30 minutes but cannot be certain. While acknowledging that the post represents a lapse in judgment, it was very brief.
 - b. The investigator found as a fact that that Trustee Blackburn’s decision to post SL’s photo on Facebook was not racially motivated. It was posted because SL was the only person who did not agree to leave the park when asked.

- c. Trustee Blackburn told SL she was going to post his photo on Facebook in advance. SL told her to “go ahead.” A 17-year-old does have capacity to consent to the posting of his photo on Facebook.
 - d. The apology.
40. Trustee Blackburn has admitted and apologized for the comment about Innes Road that she did make.
41. However, the Innes Road comment has been misstated many times through this process. Trustee Blackburn did not say that SL would be incarcerated for playing in the park. She did not tell SL “people like you end up at Innes” as Trustee Jennekens asserts. She did not say that SL would be incarcerated at all. What she did say, in the context of a conversation spanning several minutes during which SL stated he did not care about the park ban, ByLaw attending or a potential fine is that people **who do not care about rules** end up at Innes Road. There is a qualitative difference between what Trustee Blackburn said and what has been attributed to her.
42. Trustee Blackburn did not make the Innes Road comment because SL is Black and, in fact, no-one from the members of the Board to the investigator has suggested that there was an intention to hurt or otherwise mistreat SL because of race.
43. To impose the most severe sanction available under the Code in the context of what actually happened on March 27, 2020 is an error in principle.
44. The wording of the censure to include reference to an “**act of racism**” is not consistent with the findings of fact in the Final Report or reality, including Trustee Blackburn’s own personal reality as a mother of a Black daughter who has dealt with anti-Black racism against her daughter for the past 22 years.
45. According to the ***Policy and Guidelines on Racism and Racial Discrimination*** issued by the Ontario Human Rights Commission:
- “Definitions of racism all agree that it is an ideology that either explicitly or implicitly asserts that one racialized group is inherently superior to others.”**
46. There is nothing in the evidence described in the Final Report that leads to a conclusion that Trustee Blackburn was acting in accordance with an ideology that she, as a White (lesbian) woman was **inherently superior** to SL because he was Black. In fact, she had made the very same request to leave the park to a white man and a white woman and child during the very same hour she interacted with SL.

47. Trustee Blackburn admitted where she made mistakes during this interaction and apologized for those mistakes. She immediately acted on her errors by attending the webinar to raise her own awareness of issues of race.
48. The approach to sanctions by the Board in this case create a strong disincentive for Trustees, and all members of the OCDSB community, to own their mistakes and to come forward and apologize. The sanctions imposed will weaken, not strengthen, the Board since its members are discouraged from having the integrity and humility to admit mistakes.
49. Most importantly, the effect of the sanctions as imposed is to prevent Barrhaven-Knoxdale-Merivale from having a vote on the 2020-2021 budget and representation on important committees. There is no connection between the disenfranchisement of this part of the population and the behaviour complained of, which suggests that the sanction is being imposed for some reason other than to correct Trustee Blackburn.

CONCLUSION

50. With this appeal the Board has an opportunity to revisit a miscarriage of justice. While it may be tempting to use this Code process as a vehicle to show that the OCDSB is committed to the needs of the Black community, it is quite simply not fair and not in keeping with the Board's commitment to social responsibility.
51. This appeal provides the Board with a chance to:
 - a. Open an important dialogue about legal rights, fairness and process within the OCDSB
 - b. Create an environment of responsibility and trust
 - c. Turn a negative story into a learning opportunity.

July 8, 2020

Brenda Hollingsworth
AUGER HOLLINGSWORTH
PROFESSIONAL CORPORATION
1443 Woodroffe Avenue
Ottawa, ON K2G 1W1
613 233-4529
Brenda@ottawalawfirm.ca

Lawyer for Trustee Donna Blackburn