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Re: Powers, Process and Enforceability of Ombudsman's Recommendations in relation to School Boards

1. Background and Instructions

As you are aware, effective September 1, 2015, the Ontario Ombudsman (the "Ombudsman") is able to take complaints pertaining to the province's 73 school boards. The expansion of the mandate of the Ombudsman was granted under the provisions of Bill 8, the *Public Sector and MPP Accountability and Transparency Act, 2014*, which was proclaimed on March 16, 2015. Under the Ombudsman's expanded mandate, anyone with an unresolved concern about a school board, including parents, family members, school staff, trustees, teachers or special interest groups, can contact the provincial Ombudsman and file a complaint.

You have asked us to provide you with an opinion with respect to the role of the Ombudsman in complaints against school boards, and the legal status and enforceability of the Ombudsman's recommendations in relation to school boards.

We have set out our analysis below, as well as recommendations with respect to best practices.

2. Summary Conclusions

- The Ontario *Ombudsman Act*, R.S.O. 1990, c. O.6 provides the Ombudsman with broad powers to investigate complaints, including to issue summonses with respect to any officer or employee of a school board, require evidence under oath, and inspect premises.
- Ombudsman investigations result in reports setting out recommendations.
- The Ombudsman's recommendations are not legally binding on school boards. However, there are a number of practical reasons to endeavour to comply with such recommendations, including mitigating the risk of legal action or human rights application by the complainants.
- We recommend that principals become familiar with the powers and procedures of the Ombudsman, as well as local school board dispute resolution processes. Once a complaint has been launched or an investigation commenced, principals should assist

appropriate school board coordinators in responding and meeting their obligations at all stages of the process.

3. Analysis

Powers and Process

The jurisdiction and powers of the Ombudsman, and the processes followed by the Ombudsman are set out in the Ontario *Ombudsman Act*, R.S.O. 1990, c. O.6 (the “Act”).

Pursuant to subsection 14 (1) of the Act, the function of the Ombudsman is to:

investigate any decision or recommendation made or any act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his, her or its personal capacity.

In the school board context, the above-noted mandate means that the Ombudsman may investigate complaints about the administrative conduct of school boards that have not been resolved by local complaint mechanisms or appeals processes. These may include concerns about special education supports, school and school board policies, customer service provided by board staff, or other matters within the authority of individual school boards.

Notably, pursuant to the Act, the Ombudsman cannot do any of the following:

- Overturn decisions of government bodies, including those of school boards;
- Issue penalties, as his recommendations are not binding; or
- Investigate private corporations, decisions of courts, the federal government or municipal police.

In summary, the process pursuant to which the Ombudsman resolves a complaint involves 5 main steps:

1. The Ombudsman assesses all complaints and refers them to local officials for quick resolution, wherever possible.
2. If local mechanisms are unsuccessful, the Ombudsman may attempt resolution and may contact the school board for more information.
3. If an investigation is necessary, the school board will receive written notice and will be required to provide relevant information and documents.
4. If the Ombudsman makes recommendations, the school board will have a chance to respond before any report is made public.
5. The Ombudsman follows up on all recommendations to ensure they are implemented and have the desired effect.

Under section 19 of the Act, the Ombudsman has significant investigation powers, which he may implement during his investigation into a complaint, including the authority to issue summonses with respect to any officer or employee of a school board, require evidence under oath, and inspect premises. Under the Act, all school boards are required to co-operate with the Ombudsman’s office at all stages of responding to a complaint. The Act provides that it is an offence to mislead the Ombudsman or obstruct an Ombudsman investigation.

Pursuant to subsection 18 of the Act, upon commencing an investigation, the Ombudsman will inform the Director of Education of his intention. The Ombudsman may also, at his sole discretion, at any time during his investigation into a matter, consult the Director of Education.

Under subsection 18(6) of the Act, if during or after an investigation, the Ombudsman is of the opinion that there is evidence of a breach of duty or of misconduct on the part of any officer or employee of a school board, the Ombudsman may refer the matter to the appropriate authority.

Pursuant to section 21, following his investigation, the Ombudsman may produce a report setting out “any recommendations as he or she thinks fit”. The Act provides that the Ombudsman may provide a report and recommendations in a wide range of circumstances, particularly where he is of the opinion that the decision, recommendation, act or omission which was the subject-matter of the investigation:

- (a) appears to have been contrary to law;
- (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory;
- (c) was based wholly or partly on a mistake of law or fact; or
- (d) was wrong.

The Act provides the Ombudsman with the discretion to issue a report in a wide range of circumstances. The Ombudsman’s report may include a number of different types of recommendations, including the following:

- (a) that the matter should be referred to the appropriate authority for further consideration;
- (b) that the omission should be rectified;
- (c) that the decision or recommendation should be cancelled or varied;
- (d) that any practice on which the decision, recommendation, act or omission was based should be altered;
- (e) that any law on which the decision, recommendation, act or omission was based should be reconsidered;
- (f) that reasons should have been given for the decision or recommendation; or
- (g) that any other steps should be taken.

As such, the Ombudsman has the power and discretion to tailor his recommendations to what he deems appropriate in the specific case at hand.

Under the Act, the Ombudsman is required to provide a copy of his report to the appropriate Director of Education and inform the complainant of the results of his investigation.

Notably, the Ombudsman has the discretion not to investigate a complaint. In making this decision, the Ombudsman may consider, among other things, the age of the complainant, if the complainant has sufficient personal interest in the subject matter, whether or not there is an alternative remedy for the complaint, if the complaint is considered frivolous or vexatious or if the matter involves a broader public policy issue. Each complaint is assessed on a case-by-case basis to determine if an investigation is warranted. Additionally, the Act provides a twelve month bar on complaints which arise out of events of which the complainant has been aware for more than twelve months prior to the complaint.

There is no charge to complain to the Ombudsman and a school board that is the subject of a complaint will not be reimbursed for the costs incurred in responding to an investigation.

Under the Act, all complaints, including the identity of the complainant are confidential and investigations are conducted in private. However, depending on the nature of the complaint, it may be necessary for a person to consent to being identified to the specific school board so that his/her complaint can be thoroughly reviewed and investigated.

We note that under Bill 8, section 207 of the *Education Act* has been amended with respect to school board meetings that are held in private. The new provision requires that a meeting of a school board be closed to the public when the subject matter involves an ongoing investigation under the *Ombudsman Act* respecting the board.

Of note is the fact that the Bill 8 amendments specifically provide that the Ombudsman is to exercise his authority with respect to school boards in a manner that is consistent with and respectful of the rights and privileges granted under section 93 of the *Constitution Act, 1867* and section 23 of the *Canadian Charter of Rights and Freedoms*. It remains to be seen how complaints involving denominational rights will be resolved.

Legal status and enforceability of Ombudsman Recommendations

Pursuant to the Act, Ombudsman recommendations are not binding. As such, school boards have no legal obligations to accept them. However, we note that the Ombudsman offices' own records provide that almost all of the Ombudsman's recommendations over the past decade have been accepted by the entities subject to the complaints.

Where appropriate, there are likely a number of reasons that school boards may wish to comply with Ombudsman's recommendations. For instance, compliance with the Ombudsman's recommendations might mitigate the risk that the complainant will commence legal action or human rights application against the school board in question. Furthermore, under subsection 21(6) of the Act, the Ombudsman may make his reports and recommendations publicly available.

As noted earlier, the Ombudsman follows up on all recommendations to ensure they are implemented and have the desired effect. Notably, there appears to be no case law on the issue of whether the Ombudsman can pursue any further steps against the entity subject to his recommendations in the event that they are not implemented. The Ombudsman can, however, release further reports setting out the degree of compliance or non-compliance with his recommendations. Arguably, the Act empowers the Ombudsman to make these follow-up reports publicly available as well.

The Act provides that the Ombudsman's decisions are reviewable only in very specific circumstances, namely, where it can be shown that the Ombudsman has made a jurisdictional error, or that he has acted in bad faith. There is almost no case law which has considered such reviews of the Ombudsman's recommendations. The most helpful decision on the matter is *Tieguang Gao v. Ontario WSIB*, 2014 ONSC 4962 (CanLII). In that decision, the plaintiff, who had been injured in a workplace incident and had been denied benefits, brought an action against the Workplace Safety and Insurance Board (the "WSIB") and the Ombudsman. It is not clear from the decision whether the Ombudsman conducted an investigation into the WSIB's decision.

The court noted as follows with respect to the ability to challenge decisions of the Ombudsman:

Section 23 of the *Ombudsman Act* provides that no decision of the Ombudsman can be challenged, reviewed, quashed or called into question in any court, except if the Ombudsman makes a jurisdictional error. This language is unambiguous in prohibiting persons from bringing decisions by the Ombudsman before a court except in the case of jurisdictional error. The plaintiff has not made such an allegation.

Further, s. 24 of the *Ombudsman Act* bars an action against the Ombudsman for anything they may say or do unless the party can establish the Ombudsman acted in bad faith. The plaintiff has made bald allegations of deceit and fraudulent conduct. However, he has provided no particulars of such a claim as he is required to do under Rule 25.06(8).

... The court lacks jurisdiction to address the plaintiff's claims against the Ombudsman and the WSIB. Hence there is no legal basis for the plaintiff's claims and I must dismiss his action against both defendants.

4. Best Practices Recommendations

Although the Bill 8 amendments have expanded the Ombudsman's powers over school boards, the Act intends for the Ombudsman to be an office of last resort, and that issues be resolved locally, wherever possible. Therefore, it is of increased importance that principals are familiar with and utilize school boards' own complaint and accountability mechanisms.

In this regard, we recommend that principals follow their respective school boards' complaint or appeal processes in place for parents, students, staff or third party complainants.

We also recommend that principals work with designated school board personnel to co-ordinate the response to a concern or complaint received by the Ombudsman's office. To that end, it is imperative that principals be aware of the relevant provisions of the Act, the investigation and disclosure process under the legislation, and the scope and authority of the Ombudsman. Where an investigation is necessary, principals should assist respective school board coordinators, if required, in preparing a timely response, which may include the provision of relevant information and/or documents. Ideally, principals should work in concert with school board personnel in developing an appropriate response to relevant concerns or complaints raised by the Ombudsman.