Keel Cottrelle LLP
www.keelcottrelle.com

Toronto — 36 Toronto St. Suite 920 Toronto ON M5C 2C5
416-367-2900 fax: 416-367-2791

Mississauga — 100 Matheson Blvd. E. Suite 104 Mississauga ON L4Z 2G7
905-890-7700 fax: 905-890-8006

Education Law Newsletter

— September 2014 —

IN THIS ISSUE —

French-language *Charter* rights do not entitle door-to-door busing

In *Clermont c. Consortium de transport scolaire d'Ottawa*, [2014] O.J. No. 657, parents of four children, ages 7, 6, 4 and 3, applied to the Ontario Superior Court (Court) for a declaration that the French Catholic School Board's decision not to provide door-to-door busing to their four children constituted a breach of the parents' rights under the Canadian *Charter of Rights and Freedoms* (*Charter*) to educate their children in French.

The children previously attended the coterminous English Catholic School Board, where the students had received door-to-door busing at the request of the parents. Following the students' transfer to the French Catholic School Board, the new board declined to provide door-to-door busing as the parents requested, but instead were picking up the children 60 metres from their home and dropping them off 150 metres from their home.

The Board's policy provided for door-to-door service only in cases of medical challenges, or for students identified with special needs who required adapted

transportation. Any other demands for door-to-door service would be automatically refused. The Consortium applied this policy.

The Court was required to determine whether the *Charter* applied to the Consortium's decision regarding the bus stop placement and, if so, whether there was a *Charter* breach.

The Court found, firstly, that the Consortium's activities are subject to *Charter* scrutiny, as the Consortium performs a government function. The Court explained that for the parents to prove a *Charter* breach, they would need to establish that the gap between the English Board's discretion to bus door-to-door and the French Board's discretion to drop-off and pick-up a distance from the home had an impact on the right to French instruction.

The Court concluded that: [translated] *"The inconvenience caused by the necessity to accompany one's children a distance of 60 metres so they could take the bus, instead of having a bus stop in front of one's home does not constitute, according to any objective standard, an obstacle to teaching French language guaranteed by the Charter"*.

In its decision, the Court also found that despite the family's concerns about safety, the evidence did not lead the Court to conclude that the boarding or disembarking of the bus posed an objective safety risk.

There were no other grounds to challenge the pick-up and drop-off policy of the French Board. As a result, the parents were unsuccessful in their Court challenge.

It is interesting to note that the Court in this Decision held that the *Charter* did apply to the Consortium. This is interesting since this issue has not yet been definitively defined. The Supreme Court of Canada has always approached cases involving Schools on the assumption that the *Charter* applied, but without determining that the *Charter* applied.

In any event, this case confirms that the *Charter* guarantee relating to French-language must involve an issue with respect to education in the French-language. ■

Court deals with extent of exemption from religious programs for non-Catholic, open-access students

In *Erazo v. Dufferin-Peel Catholic District School Board*, 2014 ONSC 2072, the Ontario Superior Court of Justice (Court) had to determine whether liturgies and religious retreats were programs in religious education and subject to exemptions for non-Catholic secondary students.

The case involves ss. 42(1) of the *Education Act*, which deals with "open access" as between a public secondary school and a Catholic secondary school. Section 42 was implemented in 1985 as part of the extension of full funding to Catholic School Boards at the secondary level. Ss. 42(13) provides for exemptions from *"any program or course of study in religious education"* for non-Catholic students attending a Catholic secondary school as a result of the "open access" provisions.

Oliver Erazo and his son were non-Catholic. Erazo enrolled Jonathon in Notre Dame Secondary School (Notre Dame), a Roman Catholic Secondary School under the Dufferin-Peel Catholic District School Board (Board). In accordance with ss. 42(13) of the *Education Act* (set out below), Jonathon had already been exempted from taking courses of study in

religious education. Erazo requested that Jonathon be exempted from mandatory attendance requirements for liturgies and religious retreats. Erazo relied on ss. 42(13) of the *Education Act*, which states:

"no person who is qualified to be a resident pupil in respect of a secondary school operated by a public board who attends a secondary school operated by a Roman Catholic board shall be required to take part in any program or course of study in religious education on written application to the Board of … the parent or guardian of the person."

When the Board refused Erazo's request, Erazo brought an Application for Judicial Review to challenge the decision. In his Application, he claimed that:

"*Liturgies and religious retreats at Notre Dame are stand-alone programs in an educational setting and have religious observance and education as their fundamental purpose … These activities are programs in religion education*."

The Board claimed that the mandatory attendance requirements were part of their policy, which required:

"*all students enrolled in our high schools will take a religion course and participate in a retreat each year from grade 9 through grade 12 … All students will participate in the prayer and the liturgical life of the school ... Non-Catholic students are expected to participate to the extent that they can. At a minimum, non-Catholic students will attend and maintain respectful silence at all religious observances*."

This policy and the Board's religious expectations were included in the registration package Erazo received upon enrolling his son in the school. The Board claimed that, for safety and community reasons, the entire school was required to participate in these events rather than allow certain students to not attend.

The Court reviewed the dictionary definition of "program", finding it to mean "*A planned series of future events, items, or performances*." In the Court's view, the planned liturgies and retreats were correctly viewed, either separately or together, as falling within this definition. "*They are a series of events, somewhat different from each other in some ways, but having as their central purpose the provision of religious experiences and education to the students who attend them*."

This interpretation was found to be consistent with the purpose of ss. 42(13); to give relief to students who may respect many Catholic principles and observances, but do not wish to participate in a Catholic form of worship, in any form. The Court held that no Catholic school system that is required by law to admit non-Catholic students should have the right to require such participation from their students.

This Decision clarifies the interpretation of *"program or course of study in religious education"* for the purpose of the exemption for non-Catholic students. Catholic School Boards continue to take the position that there is no such exemption for Catholic students at the secondary level. ■

Court of Appeal finds reasonable apprehension of bias by Trial Judge

In *Langstaff v. Marson*, 2014 ONCA 510, the Hasting and Prince Edward District School Board (Board) appealed an earlier decision of the Ontario Superior Court of Justice in *Langstaff v. Marson*, 2013 ONSC 1448 (Trial Decision), which found that the Board was vicariously liable for the

wrongful acts of its former employee (Marson) towards Langstaff when he was a student of the Board. In this appeal, the Board sought to admit fresh evidence before the Ontario Court of Appeal, which it believed would show there was a reasonable apprehension of bias on the part of the Trial Judge.

The facts of the Trial Decision are set out in our March 2014 Newsletter (see *School board vicariously liable for sexual assault of student by teacher over 30 years earlier* on page 5). Marson had been Langstaff's grade 7 and 8 science teacher at Harry J. Clarke School in Belleville, Ontario in the 1970's. No one disputed that Marson had assaulted Langstaff. The allegations of abuse did not arise though until 2006, and in 2008 Langstaff brought an action against Marson and the Board for damages and a finding that the Board was vicariously liable. The Trial Decision found that the Board had been negligent and was therefore vicariously liable for Marson's actions. Langstaff was awarded general, special and punitive damages.

What was not addressed in the first trial was that another former student, Mead, had also brought an action against Marson and the Board for the assault committed on him. The facts, timeline, and allegations were almost identical to Langstaff's action. The Board even had the same legal counsel. Through inadvertence, when the Board's counsel passed on her files to new counsel, the new counsel scheduled the Langstaff trial before reviewing the Mead file, and was unaware of the overlap in these actions.

The fresh evidence that the Board sought to introduce was that the Trial Judge in the Langstaff action had already attended a pre-trial in the Mead action. As the Trial Judge had a pre-existing relationship with Mead and his family, he disqualified himself, but only after hearing all the facts and rendering an opinion. The Langstaff action relied on almost identical facts. The Board's new counsel admitted that had he read the Mead file and realized this, he would have asked the Judge to recuse himself from the Langstaff Trial.

The Court dealt with two issues: was this fresh evidence admissible, and if so, did it disclose a reasonable apprehension of bias.

Where the evidence sought to be admitted is not directed at a finding made at Trial, but instead challenges the very validity of the trial process, the evidence will be admissible. The Court found this requirement was met.

For the second issue, the Court applied the *"reasonable apprehension of bias"* test. The test asks, would an informed person viewing the matter realistically and practically, and having thought the matter through, conclude the existence of any bias? Would he or she think that it is more likely than not that the Judge, whether consciously or unconsciously, would not decide the matter fairly?

The Court found that the Trial Judge gave an opinion on a key issue of liability during a pre-trial in a related matter. He withdrew from that pre-trial because he had an association with Mead and his family. He then conducted a Trial (the Langstaff action) in a mirror-image matter and rendered a decision on the same key issue of liability. This decision, consistent with his earlier opinion, was favourable to the parties with whom he had an association (the Meads). The Trial Judge felt sufficiently compromised by his association with the Mead family that he recused himself during a pre-trial when no binding decision would be rendered. He then rendered a decision, consistent with his opinion at the pre-trial,

which favoured the family that he was associated with. Based on these facts, the Court found that a reasonable person would conclude there was a reasonable apprehension of bias. The appeal was allowed and a new Trial was ordered, with the Board being awarded $40,000.00 for costs in the appeal.

This Decision reaffirms the significance of the principle of "*reasonable apprehension of bias*". Unfortunately, both Langstaff and the Board were involved in a lengthy and costly Trial which has now been set aside. A new Trial will also be lengthy, costly, and traumatic for Langstaff. Nevertheless, the Board is entitled to an unbiased Court. ■

Court clarifies privilege of OSRs

In *Robinson v. Northmount School for Boys*, 2014 ONSC 2603, Robinson appealed the decision of the Superior Court of Justice, made by Master Muir, to deny her motion for an Order that would have required the School's personal representative to answer certain questions put to him while he was being examined-for-discovery on the School's behalf. Justice Lederer, also of the Superior Court, reviewed the decision of Master Muir.

In our September 2013 Newsletter, we included a summary of Robinson's motion (please see *Court confirms privilege of OSR documents* on page 6). Robinson was a teacher at Northmount when allegations she had assaulted a student were made against her. They were unsubstantiated, but her employment contract was not renewed. She brought an action for breach of contract against Northmount, and libel against the parents of the student who alleged the assault. Master Muir, in *Robinson v. Northmount School for Boys*, 2013 ONSC 1028, followed an earlier decision of the Court, and held that the names and contact information of students who were non-parties to the action were privileged and inaccessible by virtue of ss. 266(2) of the *Education Act*. The section was interpreted to mean that since some of the information requested was within the student's Ontario Student Records (OSR), it could not be disclosed without appropriate consent. The OSR was not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding. Section 266(9) and (10) extended the privilege to cover testimony in respect of an OSR and the requirement that anyone who learns of the content of such must preserve its secrecy.

After reviewing Master Muir's decision, the Court identified that the OSR is "privileged" for use by educational professionals only "*…for the improvement of instruction and other education of the pupil*". He determined that if information was put in the OSR for some other reason, and it could not contribute to the instruction or education of the child, it should not be in the OSR and was not subject to the privilege.

The issue was then whether the information requested by Robinson was properly included in an OSR. This question was not addressed by Master Muir. The plaintiff conceded the documents were privileged, but not the information they contained. She was not seeking production of the documents, but the names and contact information of non-party students and parents who may have had information relevant to the matters in issue in the action. The Court held that any documents and information with information about parents, investigator reports, or invitations to and attendance at meetings, did not properly belong in an OSR and its privilege did not extend to them. In the absence of any indication that the information sought was

related to improving the instruction of a student or was specifically referred to in the Guideline, the Court determined it was not privileged.

As for the names and contact information of students, despite there being a purpose to their inclusion in the OSRs, this information was made public through a handbook distributed to all students. Enclosing information in an OSR could not make confidential something that was publicly available. The names of the students were in the OSR to assist the individuals referred to in s. 266(2) for the improvement of instruction and other education of the pupil, but the Court held that they were not privileged when they originated in other documents used for other purposes.

The Court granted the appeal and ordered the Board to answer Robinson's questions. Unlike Master Muir, he was not bound by the precedent of the case the Master felt obligated to follow. Robinson was granted $4,500 for the costs of the motion.

This decision clarifies the extent of privilege for documents contained in the OSR. ■

IPC clarifies role of Trustees with respect to *MFIPPA*

In *Order MO-3031* (April 7, 2014), the issue before the Information and Privacy Commissioner of Ontario (Adjudicator) was whether communications sent exclusively between named trustees of the York Region District School Board (Board) were in the custody and control of the Board and subject to an access request.

The Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (Act) for access to certain records relating to the selection and appointment of a new school board trustee. The request included "*All written communications including emails, letters, memos, reports, etc from or addressed to [seven named trustees] between [two specified dates] concerning the subject of the selection of a new trustee to replace [a named trustee]. Emails are to include the entire email thread*." The Board decided email communications that were sent and received by the named trustees were private, constituency records of the named trustees and beyond the Board's custody or control.

The Requester appealed the decision. He argued that the requested records relating to the appointment of a trustee to fill a vacancy, including records of discussions amongst trustees regarding this issue, are in the Board's custody or control, because these records relate to the trustees' formal responsibilities in the selection process for a new trustee.

The Adjudicator found that records held by trustees may be subject to an access request under the Act in two situations: (1) where a trustee is acting as an "officer" or "employee" of the Board, or is discharging a special duty assigned by the Board, such that they may be considered part of the "institution"; or (2) where, even if the first situation does not apply, the Trustee's records are in the custody or under the control of the Board on the basis of established principles.

The Adjudicator found that trustees were not acting as "officers" or "employees" of the Board. The fact these individuals are required to act within the Board's by-laws and comply with certain legislative requirements did not make them officers or employees. Similarly, the fact that they were paid an honorarium (treated by Revenue Canada as a salary) did not mean they were employees of the Board. Their duty to appoint a qualified person to fill the Board

vacancy might have been a particular type of duty not usually placed on the trustees, but it was not a special duty assigned to them, such that they were to be considered part of the "institution."

The Adjudicator held that the email communications were also not in the custody or control of the Board for the purposes of the Act. All of the records at issue in this appeal consisted of email communications exclusively between various trustees; they were not sent to the Board's senior staff or employees. The Board did not regulate the content, use or disposal of these communications. The Board did not rely on the communications. The communications had not been provided to or integrated with records held by the Board, regardless of whether they were received or created by the trustees using their board or personal email addresses. Although the content of communications may have related broadly to matters in the Board's mandate, and trustees may have communicated with each other about these matters, this did not mean that the records were necessarily within the Board's custody or control. The private communications at issue related to the trustees expressing their personal views to other trustees about an issue, or attempting to persuade each other about a particular position. For emails that existed within the Board's office (i.e.: on the board server), the Adjudicator found that records stored on institutional computers are not necessarily in the institution's custody. The Board did not assert control over what records the trustees created, how they maintained these records (i.e.: in their office, on the Board server, or on their personal electronic devices), or what they chose to do with these communications afterwards (including the right to destroy them if they wished). As a result, although some emails were clearly within the possession of the Board, such possession amounted to "bare possession" and was not considered in the custody of the Board on that basis. ■

Court confirms consultation with First Nation on school closures

In *Snuneymuxw First Nation v. Board of Education -- School No. 68*, 2014 BCSC 1173, the British Columbia Supreme Court (Court) heard a petition by the Snuneymuxw First Nation (SFN) for an order to quash bylaws passed by the respondent (Board). The Board passed three bylaws, which provided for the closure of the Cedar Secondary School, the Woodbank Elementary School, and the North Cedar Intermediate School. SFN claimed it was not consulted meaningfully in the decision to do so.

SFN provided funding to the Board for children who were resident on its reserve but attended schools in the Board's jurisdiction, including those that were closed. SFN and the Board entered into Local Education Agreements (LEAs) with each other to address funding and the education of SFN children. The LEAs required cooperation, consultation and meaningful engagement between the parties and SFN was to be afforded an opportunity to participate in the education of its children.

The bylaws were the result of the Board undertaking a study to develop a Ten Year Facilities Plan in accordance with its Strategic Policy Governance Model. Consultants were hired and proposals for school amalgamations and closures were considered. The Board provided invitations to stake holders in the community, including SFN, for public consultation meetings, but SFN council members did not meaningfully attend or participate. The Board attempted, unsuccessfully, to schedule a meeting with SFN's chief, and advised him that though it was going to make decisions on the

proposed plan, the decisions would merely be a preliminary step and further consultation with SFN was desired. However, those preliminary steps resulted in the bylaws that closed the three schools before the Board met with the SFN council.

SFN claimed that this was a breach of the Board's common law duty of fairness and its legislative obligations as SFN was not consulted meaningfully in the decision to close the schools. SFN also claimed that it was owed a greater duty of fairness, similar to the duty imposed on the Crown to consult with First Nations in making decisions that will affect them.

The Board claimed that the bylaws represented a legitimate exercise of its duty under British Columbia's *School Act*, and its associated orders and policies. It claimed its common law duty was to the public at large, and that while it owed no duty of fairness to SFN at any stage in the process of consultation and deliberation leading to the passage of the bylaws, it did provide members of the public with a variety of opportunities to influence the decision-making process.

The Court undertook an analysis to determine the duty of fairness required by the Board. It looked at the nature of the statutory scheme, the nature the process followed and of the decisions made, the importance of the decisions made, the legitimate expectations of SFN, and the choices of procedures made by the Board. The Court noted that the Board is not under the same duty to consult with First Nations as the Crown does, despite it being a public body.

The Court found that even if SFN was owed a relatively robust duty of procedural fairness, based on all the circumstances of the case, the duty was not one that would require the level of consultation argued for by SFN. The statutory scheme permitted the Board to determine its own process for school closures. While affected individuals were entitled to the requisite level of procedural fairness, the procedure by which the Board would comply with that duty was largely to be decided by the Board itself.

The Court found SFN was appropriately consulted, despite the difficulties it had in having its position heard by the Board. The Board provided opportunities for consultation which fulfilled its obligations to SFN and met their legitimate expectations. Despite not meaningfully attending the public consultations, the views of SFN had been communicated to the Board, and the interests of SFN were not the only interests that had to be considered. There was a well-publicized effort at public consultation and adequate opportunity for SFN, and any other interested persons, to respond to the proposal to close the schools.

This case confirms that the duty to consult by school boards includes First Nations impacted by school closures. The facts demonstrated that consultation took place, but the principles need to be considered by any school board considering school closures. ■

Tribunal orders parent(s) to consent to release of OSR

In *B.O. (Litigation Guardian of) v. Northwest Catholic District Board*, 2014 HRTO 360, the Human Rights Tribunal of Ontario (Tribunal) dealt with a Request for an Order During Proceedings from each party. The respondent (Board) was seeking an order that would direct the Applicant's next friend/parents to provide written permission for the Board to use, disclose and submit into evidence information and documents from the Applicant's Ontario

Student Record (OSR). The OSR is privileged pursuant to section 266 of the *Education Act*. Section 266 effectively prevented the Board from using the OSR without the Applicant's parent's permission. The Applicant requested an order requiring the Board to produce records of complaints regarding his former teacher and the school from former students.

The Applicant was diagnosed with Attention Deficit Hyperactive Disorder (ADHD) and possible Autism Spectrum Disorder (ASD) and was identified as a special needs student on registration with the Board. The Applicant alleged that the Board failed to adequately accommodate his disability related needs. The Board claimed it was not aware of the Applicant's condition until the Applicant's mother inquired about an Individual Education Plan (IEP) for him. The Board claimed it was not informed of the Applicant's needs when he was first registered. It argued his OSR contained relevant documents that addressed the accommodation it provided to the Applicant and the interactions between the Applicant, his parents and the Board.

The Tribunal found that any documents in the Applicant's OSR which related to any accommodation provided by the Board, also related to the interactions between the Applicant, his parents and the Board. As such, they were arguably relevant. Section 266 of the *Education Act* restricted how documents in an OSR may be used and required parental consent before such documents could be used as evidence in a proceeding. Without access to these records the Board might have been unable to make full answer and defence to the Application. In these circumstances, it was appropriate to require the Applicant's parents/next friend to provide written permission to the Board to use, disclose and submit into evidence information and documents from the applicant's OSR.

As for the Applicant's request, the Applicant was seeking evidence of similar behaviour, to that allegedly experienced by the Applicant, directed towards other students by the Board, especially his former teacher. Complaints about how the teacher dealt with other students with disabilities were arguably relevant to the Applicant's allegations and were ordered disclosed. However, the Tribunal found that complaints against the school could have been for any number of reasons, most of which would have had no relevance to the issues in the application. Complaints against a school could involve staff members who had no connection to this matter. The Tribunal declined to order the Board to produce these.

This decision implements an effective method of access to an OSR for litigation purposes. ■

Court awards damages for bullying

In *Karam v. Ottawa-Carleton District Board*, [2014] O.J. No. 2966, Winston and Vania Karam (Plaintiffs) brought a Small Claims Court action against the Board seeking damages for negligence. They claimed the Board failed to exercise the required duty of care towards Winston, which is that of a reasonably prudent parent. Winston was a student of the Board and allegedly a victim of bullying. The Plaintiffs claimed the Board failed to respond adequately to their complaints.

When Winston enrolled with the Board, he became friends with two other male students at the School, but the relationship became problematic. Winston was a victim of theft and property damage, and was injured in

aggressive "play-fighting" when he was placed in choke-holds by the two other male students. When Vania, his mother, suggested he end the friendship, the two other male students called him names and used racial epithets.

The Plaintiffs claimed that Winston continually complained to the Principal and Vice Principal of his School about his property being damaged or stolen and the abuse he suffered from the two other male students. The abuse culminated in Winston eventually suffering an episode of difficulty breathing and non-responsiveness in class following an argument with the two other male students. People described his reaction as similar to a seizure. His doctor, who diagnosed his reaction as a panic/anxiety attack, suggested that he consider removing himself from the School, and eventually his mother arranged for him to be home-schooled before eventually enrolling him in a new school.

The Plaintiffs claimed that, although the School staff had responded to individual incidents of theft or "play-fighting", the Plaintiffs claimed it should have done more to help Winston foster new relationships and work on social strategies with him. They believed the lack of documentation, and the School's failure to request an ambulance when he had his panic attack, were evidence that the school was ignoring Winston.

The Principal claimed that he believed that all reported incidents had been dealt with. Neither he nor any of the teachers had received any reports of Winston being choked. The teachers described certain problematic incidents between Winston and the two other male students, but in each case the teachers believed the boys remained friends and resolved any issues between them. The teachers denied having received any complaints about bullying. The Board attempted a resolution with the Plaintiffs to facilitate Winston's return to the School, but his mother was not satisfied with the offered solution.

The Court considered whether this case was appropriate for damages based on the standard of care, alleged negligence in meeting that standard of care, and whether, but for the alleged negligence, Winston would not have suffered damages.

The Court confirmed that the standard of care owed to a student was that of a careful or prudent parent. The Court found that Winston had complained about little incidents to the Vice Principal, who should have been aware of the situation. However, it would not have been apparent to the students, other than the two other male students, or to the rest of the teachers or the Principal that Winston felt bullied, because he continued to sit near, plays sports, and associate with the Bullies. On the face of it, they still appeared to be friends. However, following Winston's panic attack, it became apparent to everyone he was a victim of bullying. At that point it was necessary to separate Winston from the two other male students, and home schooling was appropriate.

The Court awarded $5,000 in damages to Winston. The Court awarded $1,950 for home schooling, $780 for transportation, and $336 for self-defence classes to enhance self-confidence. The Court considered these to be reasonable expenses and the Board was ordered to reimburse the family.

This Decision is not significant in terms of monetary impact, but liability for failure to respond to bullying is a significant result which Boards should be aware of. ■

Court awards damages for fall at school

In *Paquette (Litigation guardian of) v. Surrey School District No. 36*, 2014 BCSC 205, the British Columbia Supreme Court (Court) had to decide whether the defendant (Board) was liable to the Plaintiff for injuries he suffered when he fell off the roof of his school. The Plaintiff admitted he was partially liable, but claimed the Board was negligent and breached its duties under British Columbia's *Occupiers Liability Act* and was held liable for 60-75% of his injuries.

The injury occurred after school had let out for the day and there was no supervision of the playground or outside areas. The Plaintiff was twelve years old at the time, and he and another boy climbed a cherry tree near the school and then on to the school's roof. The Plaintiff admitted he knew he would get in trouble if he was caught doing so.

The Plaintiff ran across the roof of the school. The Vice Principal heard him running across the roof but when he went to investigate, the Plaintiff became concerned with not getting caught. He attempted to get down by dropping onto a wire fence ledge, but he lost his grip on the wall, landing on the cement surface about 20-21 feet below the rooftop.

The Principal of the school testified about numerous occasions where students climbed on to the roof, including one incident where students partied on the roof over a weekend. He had facilitated the removal of some trees and had barriers installed where he believed students were accessing the roof, but admitted incidents were still occurring. The Plaintiff's father provided photos of numerous potential access points to the roof, in addition to the cherry tree.

The Court reviewed the law on occupier liability. It stated that an occupier is not held to a standard of perfection; it is not an insurer against any possible risk of harm. The test is whether the Board's actions were reasonable in all the circumstances; not whether anything at all could have been done to prevent injury. The general class or nature of the harm suffered in the circumstances must have been reasonably foreseeable, although the exact type of injury suffered need not have been foreseen.

The Court found the evidence demonstrated that if the Board took any action in response to knowing youth had been on the roof, it was only reactive and *ad hoc*. This was despite the fact that there were numerous possible access points to the roof. The numerous incidents the Principal could recall confirmed that this problem was known to the Principal, teachers, maintenance workers, students and their families and others. Despite this, there was no evidence that the Board required anyone to turn their mind to whether any trees were growing too close to the school roof and providing the access that allowed for this problem to persist. Taking into account all the circumstances of this case, it was unreasonable that the Board allowed the cherry tree to grow so close to the school's roof. Reasonable people foresee that children can and often do careless things that are dangerous even when they know they should not. The Court found the Board liable for not taking reasonable actions to prevent children from accessing the roof via the cherry tree.

In apportioning liability between the parties, the Court stated that the critical factor to consider is "fault" or blameworthiness. Apportionment must be made on the basis of the degree to which each person was at fault. For not preventing children from accessing

the roof via the cherry tree, the Board was 75% liable for the Plaintiff's injury.

This case confirms the duty of care with respect to property. Query whether the Decision in this case would have been different if there had not been a persistent problem of students accessing the roof. ■

Tribunal upholds accommodation plan for parent

In *Klassen v. Toronto District Board*, 2014 HRTO 191, an application was brought before the Human Rights Tribunal of Ontario (Tribunal) alleging that the Respondent (Board) discriminated against the Applicant in breach of the *Human Rights Code* (*Code*) when it refused to allow him to communicate with his children's teachers by email. The Applicant had a speech impediment that made phone calls for him stressful. He claimed he needed to be able to communicate with his children's teachers by email to accommodate his needs. The Board's policy did not allow parents and teachers to directly communicate through email.

The Board offered to allow the email communication on a trial basis as an exception to its policy, but it affirmed that it would not permanently change the policy. The Board advised that it appreciated that the Applicant keep this accommodation to himself. The Applicant responded that he was unable to accept direct email communication with his children's teachers under the condition that "*he would not be able to inform other parents of this fact*."

The Tribunal accepted the teachers' evidence that passing notes between parents and teachers through the students was a preferable method of communication, with a faster response time. Teachers were unable to access and respond to emails in a timely manner during the school day. The teachers testified that they frequently saw and spoke to the Applicant when he was dropping off and picking up his children, and face to face meetings could be arranged as needed.

The Tribunal found the Applicant's speech impediment was a disability under the Ontario *Human Rights Code*. However, the Tribunal did not find that the Applicant established that the Board's policies and practices concerning parent communication with teachers resulted in discrimination against him on the basis of his disability. The Applicant failed to establish that he was adversely affected as a result of the communication policies and practices. The Tribunal found that the Applicant had not established that the forms of communication available to him, such as writing a note for his children to deliver to their teachers, or emailing the Principal or Office Administrator instead, were insufficient.

The Tribunal was not convinced, on a balance of probabilities, that the Applicant was disadvantaged on the basis of his disability by the Board's communication policies and practices. It was not proven that his difficulty with having phone conversations adversely impacted his ability to communicate with his children's teachers in a timely and effective way in light of the available and acceptable alternatives.

This case confirms that reasonable accommodations can be sufficient to comply with the *Code*. ■

Professional Development Corner

October 20, 2014

Osgoode PD - Advanced Issues in Special Education Law

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October 24, 2014

KC LLP Professional Development Session

Special Education / School Operations / Student Discipline Session
at Dufferin-Peel Catholic District School Board

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Keel Cottrelle LLP provides Negotiation and
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For information on the above, contact Bob Keel: rkeel@keelcottrelle.on.ca

KEEL COTTRELLE LLP

100 Matheson Blvd. E., Suite 104
Mississauga, Ontario L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP
www.keelcottrelle.com

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Nicola Simmons - Contributing Editor

Contributors —
The articles in this Newsletter were prepared by
Jennifer Trepanier and Buck Sully, who are associated with
KEEL COTTRELLE LLP.