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

— March 2017 —

IN THIS ISSUE —

Partial victory in B.C. for minority-language education rights

In *Conseil-scolaire francophone de la Colombie-Britannique v British Columbia (Education)* (2016 BCSC 1764), the British Columbia Supreme Court (Court) recognized that Conseil Scolaire Francophone de la Colombie Britannique (CSF), British Columbia's sole Francophone school board, was treated differently than the English majority in a number of instances. Although the Court found that the *Canadian Charter of Rights and Freedoms* (*Charter*) was breached, it was justified in 13 out of 17 communities. The judgment set a precedent, but was only a partial victory for the plaintiffs. How minority-language education rights are to be exercised and what they entail will vary depending on the circumstances of each case. As French-language education continues to grow, the exercise and scope of minority language education rights will likely continue to be challenged and developed.

The plaintiffs were parents who were exercising their children's right to receive minority language education, CSF, and a non-profit organization representing interests of Francophone parents. The plaintiffs brought an action for a declaration that the defendants, the Queen in Right of British Columbia (Province) and Minister of Education (Ministry), failed to provide British Columbia's Francophone linguistic minority with the resources and facilities required under s. 23 of the *Charter*. Section 23 guarantees minority-language education and requires governments to provide the linguistic minority with educational facilities where the numbers so warrant. The plaintiffs claimed that they were entitled to increased funding for facilities and transportation, and to space for early childhood education. The plaintiffs also sought new or improved schools and amenities in 17 communities, and funding for a school board office.

The Court identified three categories of rightsholders that were entitled to have their

children attend minority language schools: those who were rightsholders because of 1) their mother tongue; 2) their education; or 3) their children's education. The Court stated that "the scope of appropriate facilities to which the minority is entitled falls on a sliding scale depending on the number of children likely to participate in the programme". The Court found that governments "must make expenditures out of public funds" and "act promptly to prevent assimilation" to ensure that, in accordance with s. 23, appropriate minority-language educational facilities are available where the numbers so warrant. However, this duty is limited by the words of s. 23, which the Court held "set a baseline requirement of services that the government must provide". While it is open to the government to exceed those standards, nothing requires it to do so. This case also focused on jurisdiction. The Court recognized that s. 23 requires the Province to "cede its broad and plenary jurisdiction over education to the minority in limited circumstances to allow the minority to exercise a measure of control over matters going to the minority language and culture".

The Court denied the plaintiffs' claim for a new school board office. Considering CSF's enrolment, rightsholders were entitled to the highest level of management and control province-wide, which gave them the right to board office facilities equivalent to those of the majority. The Court found that the Ministry had the jurisdiction, under s. 93 of the *Charter*, to fund CSF's office by way of a lease, instead of a capital project. This did not interfere with CSF's right to management or control and did not result in the rightsholders receiving less than what they were entitled to. The CSF board office was opulent and provided rightsholders with greater amenities than were warranted based on its enrollment numbers.

The Court found that the facilities in seven communities were appropriate. Educational facilities were substandard in Pemberton and Victoria, but the rights breach was justified. The only pleaded deficiency regarding the Mission community was in respect of its gymnasium, replacement of which would cost an estimated $1.6 million. The Court held that regardless of whether or not the facility was substandard, if s. 23 was breached, it would be reasonably justified as the negative impact of an inferior physical education experience for a small number of students was outweighed by the benefit provided by funding more pressing capital needs in the province. In a few communities, minority language educational facilities were non-existent or substandard, but the defendants were not responsible, and in some cases the plaintiffs were found to be partially responsible. For example, in Squamish, the Court found that CSF incited fear among parents and made one of the elementary schools in question appear to be an unattractive option to parents.

In four communities, the Court found that the minority did not have adequate facilities and the breach was not justified. In Sechelt, Penticton and Abbotsford, rightsholders lacked "access to appropriate minority language educational facilities, contrary to s. 23 of the *Charter*". In Vancouver (West), the school afforded to the minority was "substandard compared to those afforded to the majority, contrary to s. 23 of the Charter" and the defendants' policy requiring CSF to identify available sites for acquisition materially contributed to the situation. None of these breaches could be justified.

The Annual Facilities Grant (AFG) is a targeted funding envelope provided to school boards by the Ministry to maintain school facilities. The plaintiffs alleged that the AFG failed to account for CSF's unique needs and had flaws in respect of how it had been calculated for CSF. The Court held that the fact that CSF held some of its educational facilities by way of lease was not presumptively contrary to s. 23 of the *Charter*. The plaintiffs failed to show that CSF was disadvantaged by the way in which the AFG was calculated. However, the Court found that the Ministry's policy of not funding school expansion

between 2005 and 2011 was contrary to s. 23 of the *Charter*. Additionally, the Ministry's policy of evaluating CSF's need for capital projects against those of majority school boards with more capital to give to projects failed to ensure that minority language educational facilities were provided where the numbers so warranted. The Ministry failed to address CSF's expansion needs, thereby breaching s. 23. These policies were not reasonably justified. As a remedy, the Province was ordered to establish a new separate long term budget envelope for CSF to guarantee financing for CSF's infrastructure needs.

The Court held that CSF's right to management and control included the right to make decisions about how to spend its operating funding, and that the Ministry's system which left transportation funding decisions to CSF enhanced CSF's ability to exercise management and control. CSF's transportation system, however, was chronically underfunded, which resulted in some children, as young as four and five, including those living close to school, having to spend over an hour on the bus every day. The Court held that the "lack of transportation funding had a real impact on children's day-to-day lives, and prevented CSF from compensating for the distances between students' homes and schools to the extent that is possible". The Court held that since CSF operated an inefficient transportation system, the government should not be liable for the entire deficit, which was between $6 million and $14 million. The Court found that a $6 million award for *Charter* damages was appropriate.

The Court found that the right to minority language educational facilities in s. 23 did not guarantee CSF space for early childhood programming in all of its schools. It only required the Province to ensure that baseline educational services were provided to preserve and promote minority language education. As a result of the structure of the education system in British Columbia, baseline educational services do not include early childhood education. However, the Court did recognize that "where the minority has a right to equivalent facilities and comparator schools offer early childhood services, the presence or absence of early childhood services will inform the analysis of whether rightsholders are receiving appropriate facilities".

The action was allowed in part. The Court ultimately ordered that:

- the Province must create a long-term, rolling Capital Envelope to provide CSF with secure funding to address its need for capital projects across the Province;

- the Province and/or the Ministry must craft a policy or enact legislation to either resolve or ensure the Ministry's active participation in the resolution of issues concerning CSF's need for space and the types of disputes that arise between CSF and majority school boards; and

- the defendants must pay CSF $6 million in *Charter* damages over 10 years to compensate it for the chronic underfunding of CSF's transportation system.

With respect to the community claims, the Court made a declaration wherein it specified what jurisdiction CSF has in each community and what entitlements rightsholders under s. 23 have in each community. The results in each community were specific to the evidence and the in-depth individual analysis that the Court undertook of each case. ■

School boards must hold expulsion hearing within 20 school days of suspension unless clear and informed waiver

Under the *Education Act*, the Child and Family Services Review Board (CFSRB) has the power to

hear expulsion appeals. *Appellant v. Toronto District School Board, 2016 CFSRB 59* dealt with an appeal brought by a student's mother (Appellant) of the Toronto District School Board's (Board) decision to expel the student from all schools of the Board. The Appellant challenged the Board's compliance with s. 311.3(8) of the *Education Act*, which reads: "The board shall not expel a pupil if more than 20 school days have expired since the pupil was suspended under s. 310, unless the parties to the expulsion hearing agree on a later deadline".

The challenge was heard at a preliminary hearing held before the CFSRB. The student was allegedly involved in an incident in May of 2016 on school property with an adult who was not a student or a staff member. The student attended school the next day but was asked to leave by the principal. The principal called the Appellant to inform her that the student had been asked to leave. The principal subsequently sent the Appellant two letters advising her that the student was under a "Refuse to Admit" notice sent pursuant to s. 265(1)(m) of the *Education Act*. The second letter advised that the principal was waiting until the police completed their investigation to conduct their own.

The Appellant met with the principal on June 6, 2016 after receiving a voicemail on June 3, 2016 in which the principal informed her that the school was going ahead with the expulsion. During the meeting the Appellant said she thought a suspension had to precede an expulsion. The principal said that a letter dated May 31, 2016 had been sent home suspending the student, which the Appellant denied receiving. The principal provided another letter dated June 3, 2016 stating that the student was being suspended for 20 school days, effective June 2, 2016. The Registrar of the Board's discipline committee gave evidence that he advised the Appellant of the 20 school day rule in s. 311.3(8) and that the Appellant provided her availability for a hearing on dates past the 20 school day deadline. The Appellant gave evidence that she was not aware of the rule and did not waive the requirement.

The CFSRB was required to determine whether the Appellant waived the application of the 20 school day deadline in s. 311.3(8) of the *Education Act*, and on what date the suspension began.

If the suspension began on May 12, 2016, the CFSRB held that it was clear that the Appellant did not waive the 20 school day deadline as the evidence indicated that during that time the Appellant had not even been told that a suspension had been imposed.

The CFSRB then considered whether the parties agreed to waive the 20 school day deadline if the suspension began on June 2, 2016. The CFSRB held that s. 311.3(8) requires "that there be a clear and informed waiver and that the party seeking to rely on the waiver must establish its existence." The Registrar sought to support the position of the Board that there was a waiver based on the evidence that he brought the 20 school day rule to the Appellant's attention by using correspondence in which he wrote to the Appellant "Notwithstanding the requirements of s. 311(8) of the *Education Act* …" however, the Registrar incorrectly referenced the *Education Act* as there is no s. 311(8). The CFSRB held that the Board failed to establish that there was clear consent to waive the deadline. The Appellant, upon having obtained legal advice, wrote to the Registrar on the 19th school day that she did not waive the 20 school day deadline.

The CFSRB ultimately found that the suspension began on May 12, 2016, as that was when the student was first prevented from attending school. The Board was unsuccessful in arguing that the student's absence from school was a "refusal to admit" rather than a suspension. The CFSRB thus found that the Appellant did not consent to waive the 20 school day deadline. The Board's decision to expel the student from all schools of the Board was quashed and the

CFSRB ordered any record of the expulsion to be amended accordingly.

Boards should ensure that a waiver of the 20 school days limit is clear and based on informed consent. ■

Court nixes parent screening of curriculum

In *E.T. v. Hamilton-Wentworth District School Board*, (2016 ONSC 7313), a parent (ET) brought an application for accommodation and a declaration that he had final authority over the education of his children. ET was a member of the Greek Orthodox Church and the father of two children who attended elementary school in the public education system. One of the tenets of ET's religious beliefs was that he had an obligation to protect his children from false teachings. According to ET, various aspects of the public school curriculum constituted false teachings. As a result he sought accommodation that the Board provide him with information, in advance, as to specific curriculum areas being taught to his children, and an order that he be permitted to withdraw his children from certain classes, lessons or activities that conflicted with his religious beliefs. ET argued that without such accommodation his freedom of religion would be breached. Following negotiations the Board decided not to accommodate ET's request. The Board took the position that it was not appropriate or possible for an accommodation to be given that would satisfy ET's concerns. The court held that ET's authority over his children and their education did not supersede the law.

The Board's decision not to accommodate ET in this case was reasonable because the Board proportionately balanced the applicable *Charter* protections to ensure that any limitations were constrained no more than was necessary. The Board was required to support the statutory requirements of the *Education Act*, and their policies were directly related to concerns about racism, religious intolerance, homophobia and gender-based violence in schools. The court held that the Board's statutory requirements were consistent with and arguably required by the *Charter*-protected values of equality and multiculturalism. The list of objectionable subject matter provided by the applicant was extensive. It would be extremely difficult for teachers to be sufficiently familiar with the variety of concerns raised by parents for individual students so as to advise in advance of their mention in lessons. The court felt that the Board's choice to support the values of inclusion and equality over individual religious accommodation had proportionally balanced the competing *Charter* protections. The Board's obligation was to ensure that the impingement of a *Charter* protection was as minimal as possible in the circumstances. The Board's decision was reasonable and the application was dismissed. ET was sincere in his religious belief and he demonstrated that his religious tenets were significantly at odds with numerous aspects of the Board's Equity Policy. However, it was not possible to say that ET's accommodation request should have trumped the other *Charter* values at play in the circumstances. ET failed to establish that the Board's administrative decision was unreasonable. ■

Court rules that compensation is available in civil courts for victims whose intimate images have been published without their consent

In *Doe 464533 v. N.D.,* (2016 ONSC 541) the Ontario Superior Court for the first time provided a plaintiff who had been the victim of the publication of an intimate video an award for damages.

The plaintiff and the defendant dated in their senior year of high school and continued to see each other romantically for a short period of time after the relationship ended. By the Fall both parties were 18 years old and the plaintiff had moved to another city to go to university but they kept in touch over the internet. In August of 2011 the defendant began requesting an intimate video from the plaintiff. He sent her numerous images of himself and claimed that she owed him a video in return. She refused for a few months but relented based on the defendant's representation that no one else would see the video.

That representation turned out to be false. The plaintiff later learned that the defendant had posted the video on a pornographic website on the same day she sent it to him. Further, he had shown the video to some of the plaintiff's old high school classmates and eventually some of her friends became aware of its existence.

The plaintiff was devastated and distraught when she discovered the truth. She reached out to the defendant's mother who confirmed that the defendant had posted the video and assured the plaintiff that the defendant had removed it after it was online for about 3 weeks. It was not clear how many times it had been viewed or downloaded. The police were called but declined to pursue an investigation because the plaintiff was not a minor.

The victim was shocked by the betrayal and suffered serious consequences in both her personal and school life. She engaged in counselling but still fell into a depression including bouts of panic attack like symptoms. Even four years later, the victim was concerned that the video may resurface and impact her life in the future.

The court noted the mounting prevalence of incidents involving the publication of intimate images and stated that the law was lagging behind and failing to provide protection for victims of online bullying and privacy infringements. While the protection of the criminal law has been available to victims in the past, the court found no reported decisions where a victim whose intimate images were distributed received a civil award for compensation. However, the court held that there is a basis to award compensation in such circumstances based on the torts of breach of confidence, intentional infliction of mental distress and invasion of privacy.

The court found that the plaintiff's decision to send the video was based on the belief that the defendant would not share the video. When he did, it was a clear breach of the terms upon which he received it. The intimate video qualified as confidential information, and the way it was communicated created an ongoing obligation of confidence over the material, and its disclosure caused harm to the plaintiff. Thus the court felt that the tort of breach of confidence was met.

The court also found that the defendant's conduct was flagrant and outrageous, calculated to produce harm and caused the visible and provable injury of psychological harm. As such, the defendant had also committed the tort of intentional infliction of mental distress.

Finally, the court held, that by posting a private and personal intimate video of the plaintiff, the defendant made public an aspect of the plaintiff's private life and that a reasonable person would find the unauthorized public disclosure of such a video to be highly offensive. The court was also clear that there was no legitimate public concern which might alleviate the guilt of the defendant's conduct. The court concluded that the tort of invasion of privacy had also been made out.

The court noted that there were no cases dealing with a similar issue so there was no guidance in regard to the amount of damages to be paid to the plaintiff. Consideration was given to damages awarded in cases of sexual battery where the victim experienced psychological

harm. While in this case there was no actual physical contact, the plaintiff's psychological harm was similar to that suffered by victims of sexual battery. The court noted that this case was in many ways analogous to a sexual assault and that the damages award should reflect that the plaintiff's rights had been violated.

The court awarded $50,000 in general damages, $25,000 in aggravated damages, $25,000 in punitive damages, and ordered the defendant to immediately destroy any and all intimate images or recordings of the plaintiff in whatever form they may exist that he had in his possession, power or control. He was also prohibited from publishing any such images of the plaintiff. Further, the defendant was to have no contact with the plaintiff or any members of her family.

This case set a precedent and provided a new avenue of legal relief and compensation for victims whose intimate images have been shared without their consent. Offenders are liable for the damage they cause and may be forced to compensate their victims. ■

Court rules that the rights of the victim outweighed the adverse effects of a conviction regarding the publication of intimate images of a minor

In *R. v. Zhou*, (2016 ONCJ 547) the Ontario Court of Justice explored the conflicting factors of the rights of the victim compared with the offender's potential for rehabilitation and the impact of a criminal conviction in a sentencing hearing.

The accused, Mr. Zhou, began a relationship with the complainant when he was 16 years of age and she was 14 years of age. Three years later, Mr. Zhou asked the complainant to take revealing photographs of herself and upload them to a private website which was only accessible by the complainant and Mr. Zhou. Unbeknownst to the complainant, Mr. Zhou did not keep the pictures private. Instead, he downloaded them from the private site and without the complainant's consent uploaded 10 photos, which included images where the complainant's face was visible, to a public pornographic website. Further, Mr. Zhou invited viewers of the images to rate them and leave explicit comments. The images were viewed over 1,000 times before they were eventually discovered by the complainant and taken off of the website.

The impact of the crime was psychologically crippling on the victim. She experienced an extreme breach of trust coinciding with a period of emotional turmoil described as a "downward spiral". The court explained that the complainant found herself unable to leave her room or attend class, she engaged in self-destructive behaviours, and experienced feelings of darkness and emptiness. She became depressed, anxious, and terrified by the knowledge that over 1,000 people had seen the images and that they might reappear impacting her life or career in the future. At the time of trial, the complainant was still feeling the effects of the trauma. The court noted that the complainant continued to experience difficulties with relationships based on an inability to trust stemming from her feeling of betrayal and that she was expected to suffer indefinitely.

Mr. Zhou was not unscathed by the events himself. He pled guilty to a charge of criminal harassment but was originally charged with child pornography offences which were later dropped. Despite the eventual outcome, word spread quickly on campus that Mr. Zhou had been charged with child pornography. He was severely stigmatized within the school community. Mr. Zhou attempted to rationalize his behaviour as a form of bragging with no intent to harm. The court found this difficult to accept, especially since the photos had been accompanied by objectifying remarks which were described as an unacceptable hurtful affront to the complainant's human dignity.

However, the court did consider that Mr. Zhou had cooperated with police and expressed remorse. Further, despite the stigmatization that accompanied the original child pornography charge, he maintained a solid support system of peers and family. The court also acknowledged that the consequences of a conviction may disproportionately impact the accused compared to a typical offender. For example, the Associate Dean of Mr. Zhou's music program explained that, in the arts, a vulnerable persons check is often required and that a conviction for criminal harassment could have very negative employment consequences in Mr. Zhou's future.

This was a case where the court had significant discretion in terms of the sentence, as the available sentence for criminal harassment on summary conviction ranged from an absolute discharge, which Mr. Zhou was seeking, to 6 months imprisonment. The court recognized the need for proportionality in the sentence as well as the need to take into account mitigating factors such as the accused being a person of generally good character despite his criminal conduct. Without disregard to those factors, the court also noted the prevalence and heightened public awareness of shared intimate photos online. The court explained that there is a disparate impact on young females who are the victims of privacy breaches involving intimate images, and that they are a class of vulnerable persons in need of the court's protection. As such, the court found that the gravity of the offence in this case was high. The degree of responsibility of the offender was also high as the photos were online for an extended period of time and, among other factors, Mr. Zhou's behaviour could not be considered an isolated incident. Further, the need for general and specific deterrence of this type of crime was of great importance. Yet the offender had also taken steps to rehabilitate himself by admitting his crimes and receiving counselling. The court felt that his future rehabilitation potential was promising.

After weighing all the factors the court did not see a need to separate Mr. Zhou from society. Further, based on his promising music career, the court felt that a conviction would have an above average impact on his life. Despite these concerns, the court was not willing to allow Mr. Zhou's behavior to go unpunished.

The court ruled that the additional hardship that would be incurred by Mr. Zhou should the court convict him did not outweigh the gravity of the offence, the degree of responsibility, and the need for denunciation and deterrence in this case. A short period of custody was appropriate but the sentence was suspended based on time served and a 12-month probationary period was instituted in its place.

The case demonstrates the need for attention by both courts and educators to an emerging issue among youth in today's society. Whether termed as "sexting" or child pornography, the sharing of intimate photos between young persons is becoming more common along with the unauthorized distribution of these images. This case presented a particularly difficult balance for the court which weighed the effect on Mr. Zhou's future as well as several mitigating factors against the breach of the privacy and dignity of the complainant. The court ultimately ruled in favour of the protection of not just the complainant but of the class of vulnerable young women whose privacy has been or may be violated by the publication of private intimate images. ■

Professional Development Corner

October 16, 2017

Osgoode Law School Professional Development

Advanced Issues in Special Education Law

February 26-27, 2018

Osgoode Law School Professional Development

Complete Guide to School Law for K-12 Education Professionals

For information on the above, contact Bob Keel: rkeel@keelcottrelle.ca

KEEL COTTRELLE LLP

104 - 100 Matheson Blvd. East
Mississauga ON L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

920 - 36 Toronto Street
Toronto ON M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP
Education Law Newsletter

Robert Keel - Executive Editor
Jennifer Trépanier - Managing Editor
Nicola Simmons - Contributing Editor
Kimberley Ishmael - Contributing Editor

Contributors —
The articles in this Newsletter were prepared by
Renata Antoniuk and Daniel Hastie who are associated with
KEEL COTTRELLE LLP.