



Keel Cottrell LLP
Barristers & Solicitors

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 2009 —

IN THIS ISSUE —

Novel claim for sexual grooming dismissed	1
Tribunal reaffirms principles re “generalizations”	2
Student confidentiality protected by HRTO	5
Court refuses to hear Human Rights matter	6
Tribunal upholds self-contained placement	7
Student prohibition from attending Prom upheld by Court	8
Amalgamation continues to create legal disputes	9
Court upholds school division decision on transportation	12

Novel claim for sexual grooming dismissed

In *Giroux v. Dore*, [2009] O.J. No. 690, a family brought a claim against a teacher and the two school boards who employed the teacher at the relevant times, for damages for intentional infliction of mental and emotional harm, negligence, defamation, breach of fiduciary duty and the novel tort of “grooming”. The plaintiffs’ claimed against the school boards for negligence, breach of trust and vicarious liability.

The plaintiff parents’ alleged that the defendant teacher manipulated and “groomed” their younger daughter, who was his student, in order to gain access to and information about their older daughter who was a student in the school he was teaching at, although not in one of his classes. At the relevant time, the father of

the two girls was also a teacher in the same school. Shortly after graduating high school, the older daughter began dating the defendant teacher and the two were later married and commenced living together. The family also alleged that as a result of the teacher's actions they suffered from depression and emotional harm.

The defendants brought a motion seeking a dismissal of the action on various grounds including: (i) that the action was frivolous, vexatious and an abuse of process; (ii) that the Court lacked jurisdiction to hear the action; and (iii) that the claim disclosed no cause of action.

Although rejecting the defendants' allegations that the action was frivolous, vexatious and an abuse of process and that the Court lacked jurisdiction to hear the matter, the Court ultimately dismissed the claim on the ground that it disclosed no cause of action. The Court characterized the alleged actions of the defendant teacher in facilitating his introduction to the older daughter through the younger daughter as flagrant, but not sufficient to satisfy the threshold for actionable mental suffering. Additionally, the novel tort of "grooming" was found to be a tort relating to the preparation of a child for the purpose of assisting with the sexual abuse of that child, which was not alleged in this instance.

The Court acknowledged that the possibility remained that the allegations, if proven, could substantiate a breach of fiduciary duty on the part of the defendant teacher; however the damage and depression suffered by the family as a result were found to be not foreseeable and therefore not actionable. The claims

against the school boards were similarly dismissed due to the lack of evidence and remoteness of the damages.

This was indeed a novel attempt to expand the concept of "grooming". However, the decision appears to be the right decision for the right reasons. There is no legitimate basis for an expansion of the legal principle. On the other hand, the Court did confirm that there is the possibility of an action for "grooming" in appropriate cases.

—

Tribunal reaffirms principles re "generalizations"

One of the transitional applications in the new human rights process was recently heard by the Human Rights Tribunal of Ontario in *Abdallah v. Thames Valley District School Board*, [2008] O.H.R.T.D. No. 247. Originally filed in 2004, the complainant (now called "Applicant" in the new human rights system) alleged discrimination in the provision of services on the basis of race, place of origin, ethnic origin and citizenship, contrary to sections 1 and 9 of the Ontario *Human Rights Code*.

The complainant was an adult English and a Second Language (ESL) student who alleged that his ESL teacher accused him of cheating and gave him a consequent zero grade; and made disparaging remarks about him because he was an immigrant and not born in Canada. Further, he alleged that the school board failed to

properly investigate and adequately respond to his concerns and subsequently denied him teaching opportunities as a result of the human rights complaint.

The respondent Board acknowledged that the personal respondent made certain remarks relating to the complainants immigrant status, but maintained that in the context of the circumstances the comments did not constitute discrimination. The Board also refuted the allegations of an inappropriate investigation, submitting that the Board's investigation and response to the complainant's concerns were reasonable and proper.

Following a review of the evidence relating to the allegation of cheating, the Tribunal concluded that the complainant failed to establish a prima facie case that the accusation of cheating was discriminatory. The ESL teacher had reasonable grounds to suspect cheating due to suspicious behaviour by the complainant in the computer lab on more than one occasion, as well as the complainant's ability to complete work in unreasonably shorter periods of time and with higher grades as compared to his peers. The complainant failed to substantiate that he was accused of cheating because of a *Code*-protected ground and thus no discrimination was found.

Similarly, the teacher's decision to give the complainant a zero grade was not found discriminatory. The Tribunal determined that the decision was based on the information provided indicating that his scores were highly questionable. Based on the evidence the Tribunal found

no breach of section 1 of the *Code* in respect of the cheating accusation and the zero grade.

With respect to the allegedly disparaging remarks made by the personal respondent, to the effect of, "*I am sick and tired of immigrants crying discrimination when they don't get what they want. You cheated. You're getting zero like everyone else*", the Tribunal held them to be discriminatory. The respondents, although acknowledging the statement was made, maintained that the complainant was not treated differently than any other student caught cheating and that the comment must be examined in the specific factual context. The respondents submitted that the factual context suggested that the comment was made out of frustration and provocation by the complainant's threats to charge the personal respondent with discrimination as a result of the accusation of cheating.

The Tribunal disagreed, recognizing that although the circumstances were hostile and confrontational, the comment made by the ESL teacher during the course of delivering educational services to the complainant student was contrary to section 1 of the *Code*, because it constituted a derogatory generalization or a negative stereotype about immigrants. The Tribunal noted that the status of being "an immigrant" engaged the *Code*-protected grounds of place or origin, ethnic origin and citizenship and connected to the ground of race. The impugned remark was determined to have associated the negative tendency of "crying discrimination" with "immigrants", and branded the complainant with the label.

With respect to the complainant's allegation that he was denied teaching assignments because of reprisals, the complainant claimed that the Board deprived him of the opportunity to earn wages as a supply teacher as a result of the human rights complaint. To the contrary, the evidence indicated that the complainant notified the Board about his allegations regarding the discriminatory remarks after his complaints regarding employment opportunities and therefore a claim of reprisal could not succeed.

The complainant further alleged that the respondent Board failed to adequately investigate and respond appropriately to his concerns of discrimination about the personal respondent's remarks. The Board's efforts included consultation with the Superintendent of Adult and Continuing Education, Superintendent of Human Resources, and an investigation of the matter led by the ESL teacher. The Tribunal concluded that although the allegations were addressed promptly and the appropriate members of the Board were aware of the alleged discrimination, the Board conducted a flawed investigation by not adhering to its own discrimination and harassment procedures; by omitting human resources supervision; and by permitting the personal respondent, who was in a clear conflict of interest with the complainant, to be assigned primary carriage of the investigation. Further, the Board did not adhere to its policy of interviewing the student to obtain a comprehensive understanding of the allegations and/or concerns. As a result, the Board's investigation was held to have fallen below the standard of what would be expected under its own policy and under the *Code*.

In weighing the damages suffered and the appropriate quantum of the award, the Tribunal considered the complainant's suspicious behaviour leading up to the impugned exchange. The Tribunal concluded, that "*although the complainant did suffer some injury to his dignity and self-respect because of the personal respondent's demeaning remarks, an award of general damages should reflect the fact that the complainant himself bears some responsibility for the hostile tenor of the culminating incident.*"

Given the single incident and the complainant's participation in the hostile exchange, the Tribunal awarded \$1500.00 as compensation for the impact on his dignity, feelings and self respect. The complainant's request for a public apology was denied.

With respect to public interest remedies, the Board was ordered to review and amend its human rights procedures to clarify the role and responsibility of Human Resources Services in managing investigations as well as to incorporate a conflict of interest provision into its human rights procedures to ensure neutrality in the investigation process. In addition, the Board was ordered to provide a copy of the Tribunal's decision to all staff and administrations with investigative authority under its human rights policy and procedures and to disseminate the human rights policy and amended procedures to the attention of all its employees and students.

This decision reaffirms the potential risks with respect to "generalizations". In addition, the public interest remedies are consistent with other decisions. Such

public interest remedies can have significant implications for any Board, including the allocation of resources for the implementation of the remedies.

Student confidentiality protected by HRTO

In *J.B. v. Toronto District School Board*, [2009] O.H.R.T.D. No. 1002, an interim decision was issued by the Ontario Human Rights Tribunal regarding a joint request by the parties for a confidentiality order pursuant to Rule 5.11. The original matter before the Tribunal was a suspension of the Applicants. Criminal charges were also laid by police with respect to the events that formed the grounds for the suspension. The Applicants sought an order from the Tribunal to maintain confidentiality of their personal information because they were over the age of 18 and did not fall under the applicable privacy protection laws available for minors.

The parties jointly requested a confidentiality order pursuant to Rule 5.11 of the Tribunal's Rules of Procedure for Transitional Applications. The interim motion requested the substitution of all Applicant and witness names with their respective initials, that all documentation and verbal communication within the Tribunal and anyone conversing with the Tribunal be cautioned in terms of disclosing the Applicants' names and lastly, that no identifying information be provided by the Tribunal or the parties to anyone outside of the participants, their

legal counsel and members of the Tribunal.

The Tribunal made reference to both the *Youth Criminal Justice Act (YCJA)* and the *Education Act* when making its decision regarding the privacy of information of the Applicants.

The matter was within the *YCJA* because, at the time of the offence, the Applicants were minors.

The confidentiality of the Applicants' Ontario Student Records was also at issue. Pursuant to section 266(2) of the *Education Act*, the OSR is a privileged document. Exceptions to the privilege include where the parent or guardian or adult student provide written permission. Section 266(10) further enhances the privacy of the document by requiring any person with knowledge of the contents of an OSR to "preserve secrecy" by withholding communication about the document.

Citing the privacy provisions under the *YCJA* and the *Education Act*, the Tribunal found that confidentiality should be granted in this case. In making the interim decision, the Tribunal referred to the principle of openness of legal proceedings and the right of freedom of expression and freedom of the press and balanced this with the intention of the legislature to afford privacy protection to young persons, found in the above statutory regimes. After balancing the varying objectives, the Tribunal made an order to substitute all names with initials, to restrict disclosure of information to only those individuals involved in the case, and to restrict the Tribunal staff and the parties

from disclosing the identity of the Applicants.

This specific Decision is consistent with a growing trend among Tribunals to ensure that privacy of individuals is protected. The substitution of initials for names of persons who are not parties to the proceeding or parties who are minors is not uncommon for any Tribunal where the Decision may be made public.

Court refuses to hear Human Rights matter

In *Ahmed v. Edmonton Public School Board and Yaniv*, 2008 ABQB 351, [2009] A.J. No. 809 (Q.B.), Mr. Ahmed appealed the decision of the Alberta Human Rights and Citizenship Commission that Old Scona School had not been biased against his daughter on the ground of religion when she was denied admission to the school.

Mr. Ahmed's youngest daughter had applied to the school. Admission was based on merit. Specifically, their grade nine spring term progress report average, their score on a standardized general cognitive abilities test, and a character assessment completed by the principal or councillor. The students' aggregate scores were then ranked from highest to lowest and the 110 students with the highest scores were admitted. Mr. Ahmed's youngest daughter's score was not among the top 110. In fact, there were 33 students with aggregate scores higher than the appellant's daughter who were also not accepted.

Mr. Ahmed wrote letters to the principal and the Superintendent, requesting that they reconsider the decision, and urging them to take other factors into account, specifically that his daughter was bilingual and that her two older siblings already attended the school. The school and Board refused. Mr. Ahmed then withdrew his older daughter from the school and enrolled her, with her younger sister, in a different school of the Edmonton Public School Board.

Mr. Ahmed subsequently filed a complaint with the Commission alleging that his daughter was denied admission to the school because her older sister wore a Muslim headscarf, a *hijab*, and therefore, the school assumed that the younger daughter would also wear a *hijab*. He alleged that his older daughter believed that the rejection of her sister was based not on merit but rather on wearing a *hijab*. Mr. Ahmed had not previously raised these concerns with school or Board administration.

The Commission found no direct evidence of bias and found that the circumstantial evidence, specifically the previous admittance of Mr. Ahmed's other two children to the school and the multicultural nature of the school, further contraindicated religious bias.

Mr. Ahmed appealed to the Court of Queen's Bench of Alberta (the "Court") to overturn the Commission's decision and decide the issue of bias, as well as to award him damages for religious bias and costs. The Court denied Mr. Ahmed's appeal on all grounds.

The Court exercised its discretion and refused to undertake a judicial review of

the Commission's decision, noting that this was proper given that there was no possibility of success in the appeal. The Court followed the recent decision of the Supreme Court of Canada in *Honda Canada v. Keays*, 2008 SCC 39, [2008] S.C.J. No. 39, as authority for the proposition that “*courts have no jurisdiction in matters of discrimination within the exclusive domain of human rights commissions*” and that “*discrimination is not an independent actionable wrong*”. Mr. Ahmed's complaint was, therefore, properly a matter for the Commission and it would be improper for the Court to take jurisdiction to decide the matter of religious discrimination. The Court further declined to amend Mr. Ahmed's pleadings to reflect a proper request for judicial review as Mr. Ahmed's materials did not indicate any actionable grounds.

This decision reiterates the jurisdiction of Tribunals.

Tribunal upholds self-contained placement

The Ontario Special Education (English) Tribunal heard an appeal in *J.K. v. Toronto District School Board* (March, 2009), by a parent who did not agree with the Board's decision to place her child in a self-contained class. The student had been identified by the Identification Placement and Review Committee as exceptional: “Communication Autism” and “Intellectual Developmentally Disabled”. The IPRC placed the student in a self-contained special education class. The Appellant requested that the student be

placed in a regular class with additional support and accommodations. The Board maintained that the special education class was appropriate. At the time of the hearing the student was not attending school, because the parent had withdrawn the student due to safety concerns.

The Tribunal reviewed the student's behaviour, social and academic needs when making its decision.

Evidence was heard from both parties concluding that the student's current behaviour raised a safety concern for staff and other students. The student's anger arose from frustration and there were between seven and thirteen weekly episodes, involving aggressive behaviour towards and hitting of other students. The Tribunal held that the student did have behavioural issues and a safety plan needed to be developed with parental input. Although the parent acknowledged that the student was pulled from school for these reasons, the Tribunal found this was not an adequate solution to the problem.

Although attendance in regular classes would encourage social development, the Tribunal found a regular class would impede the student's learning ability because of the existing behavioural concerns. A more structured classroom setting was needed for the development of academic skills.

The student's current level of academic functioning was unidentified. The Tribunal held that an educational assessment needed to be conducted to determine a suitable academic program for the student.

The Tribunal held that, considering the student's behavioural, social and academic

needs, the self-contained class was the most appropriate placement. Rejecting the placement in a regular class, the Tribunal found that the student had experienced little success and increased behavioural problems in that setting. The self-contained placement provided the student with a more stable environment to develop, with a capable support team and a peer group with parallel objectives. Integration into a regular class setting was to be considered once the student proved ready for the change and the issues relating to the student's behaviour, socialization, and academic program had been addressed.

The Tribunal's decision reflected the student's best interests. The Tribunal also commented on the importance of a relationship between the Board and the parents being developed, to ensure a collaborative effort and a common understanding of the student's strengths and needs. Further, the Tribunal expressed that protocols should be developed within the school for transitioning students between self-contained and regular classes to assist students with the changes and decrease frustration.

Student prohibition from attending Prom upheld by Court

The Ontario Superior Court of Justice heard an urgent judicial review of a suspension in *Roczniak v. Hamilton-Wentworth District School Board*, [2009] O.J. No.2177. A student had been issued a 10 day suspension. In addition to the

suspension, the student was prohibited from attending the prom. The suspension was not appealed because the prom was being held that evening.

The Applicant argued that attending the prom was "an integral part of the educational experience".

The Respondent, the Hamilton-Wentworth District School Board, argued that the decision prohibiting the Applicant's attendance at the prom was not reviewable, and if it was to be reviewed, the Court should apply the standard of reasonableness.

The Court held that attendance at prom was a privilege, not a right. However, the Court held that the privilege should not be denied on a capricious basis, which would not withstand review.

However, the Court found that the decision could not be subject to judicial review because the principal's decision was determined to be an administrative decision, and not an exercise of statutory power, and the application was dismissed. The Court, however, commented that had the decision been reviewable, the reasonableness standard would apply. The Court indicated that the decision was reasonable because it was made with reference to other relevant details. For example, the principal relied on the facts of the suspension and statements from supervising teachers asserting that they would not be in attendance if the student was admitted to the prom.

This case highlights the expansive scope school administrators have with respect to student discipline and the removal of privileges.

Amalgamation continues to create legal disputes

Conseil Scolaire de District du Nord-Est de L'Ontario v. Near North District School Board, [2009] O.J. No. 3290 involved a dispute between Conseil Scolaire de district du Nord-Est de L'Ontario (“Nord-Est”) and the Near North District School Board (“Near North”) over which Board was responsible for paying retirement gratuities to Conseil Scolaire de district Catholique Franco-Nord (“Franco-Nord”) for teachers who had transferred from the public school system (the former Nipissing Board of Education and its French language section) to the separate school system and now worked for Franco-Nord. There was no dispute that, based on the facts and s. 135 of the *Education Act*, monies for the retirement gratuities were owed to Franco-Nord. Rather, the dispute was over the percentage of the gratuities Nord-Est and Near North were each responsible for, and whether an earlier agreement between Nord-Est and Near North made pursuant to s. 135(26.1) of the *Education Act* was enforceable.

In 1998 and 1999, after paying retirement gratuities to several transferred teachers, Franco-Nord sought and received reimbursement from Near North for over \$300,000. However, when Franco-Nord sought reimbursement from Near North in 2000 and 2001 for over \$220,000 in additional retirement gratuities that had been paid out, Near North refused to pay and claimed that it was not liable for the gratuities pursuant to s. 135(26) of the

Education Act. Franco-Nord then approached Nord-Est for reimbursement. Nord-Est also refused to pay and claimed that it had reached an agreement with Near North, pursuant to s. 135(26.1) of the *Act*, and that Near North had agreed to assume primary responsibility for the payment of retirement gratuities for transferred teachers.

To break this stand-off and to recoup the money it was owed, Franco-Nord issued a Notice of Application against Nord-Est in August 2003. An order was made in October 2003, on consent, to add Near North as a defendant to the action, and to adjourn the matter for a trial of an issue. The two issues before the trial judge were as follows:

- (a) In 1998, during the distribution of assets and liabilities required under the *Education Act*, did the respondents [Nord-Est and Near North] conclude a valid and enforceable agreement within the meaning of subsection 135(26.1) of the *Education Act*, to share the liability for paying to the Applicant [Franco Nord] the retirement gratuities of the Applicant's [Franco Nord's] teaching staff in relation to the period prior to 1986?
- (b) If so, what were the proportionate shares provided for in that agreement?.

The agreement between Nord-Est and Near North was negotiated after the *Education Act* was amended effective January 1, 1998 and many school boards were amalgamated into today's existing “district” school boards. The agreement was based on an estimated liability of \$252,231, which had been calculated by one of Near North's predecessor boards. The facts show that Nord-Est and Near North did not make further inquiries into

the accuracy of the estimate. The Education Improvement Commission oversaw the process of reorganization, including the transfer of assets and liabilities from former school boards to new district school boards. Near North submitted a Joint Request, which was approved by Nord-Est, to the EIC regarding the transfer of assets and liabilities from the former school boards, including an agreement “*to bear their proportionate share of the cost of any retirement gratuities assumed by the former Nipissing Board of Education*”. On August 31, 1998, the EIC issued an order that gave effect to this Joint Request.

Although the trial judge held that the agreement between Nord-Est and Near North **did not constitute an agreement pursuant to s. 135(26.1) of the Act, she found that there was an agreement** between those Boards outside of s. 135, and that Near North was liable to Franco Nord. The agreement between Nord-Est and Near North was not an agreement pursuant to s. 135(26.1). Nevertheless, there was a valid and enforceable agreement between Nord-Est and Near North to share liability for the public portion of retirement gratuities for employees now working with Franco Nord. In accordance with the terms of their agreement, Near North was liable for the retirement gratuities. Near North’s contractual obligation extended until the last teacher who transferred in 1986 had retired, and was not limited to the gratuities owing when the agreement was made.

Near North appealed the trial judge’s decision. The following issues were before the Court of Appeal:

(1) Did the trial judge err by deciding the dispute on the basis of a new issue not raised by the order directing the trial of an issue?

(2) Did the trial judge err in finding that there could be a legally binding agreement for the payment of retirement gratuities that does not fall within s. 135(26.1) of the *Education Act*?

(3) Did the trial judge err by finding that there was *consensus ad idem* between the parties and in refusing to find the agreement was vitiated by mutual mistake?

(4) Did the trial judge err by refusing to limit Near North’s liability for future liability for retirement annuities to \$252,231, the figure estimated at the time the agreement was made?

The first issue was a key issue for the Court of Appeal to determine. The Court held that **the trial judge did err** by deciding an issue that was not raised by the order directing the trial of an issue. Despite the fact that the parties did not make submissions about whether an agreement that was beyond the scope of s. 135(26.1) was legally enforceable, the trial judge found that it was, and in doing so, expanded the scope of the issues before her. However, on appeal, the parties had an opportunity to make submissions on this point. As a result, despite the trial judge’s error, and based on Near North’s concession that it had a full opportunity to argue the issue on appeal, the Court held that Near North would not suffer any prejudice if the Court decided all of the issues based on the record before it. The Court also held that it was in the interests of justice for the Court to deal with all of the issues raised on appeal, rather than

remitting the matter to Superior Court, which would be added expense for the parties and the administration of justice.

On the second issue, the Court did not accept Near North's argument that the *Education Act* precluded Boards from making an agreement outside of s. 135(26.1). On the contrary, the Court found that s. 135(26.1) introduced flexibility for Boards in the allocation of assets and liabilities. Also, the Court found that there was nothing in the *Education Act* that specifically prohibited Boards from making agreements other than those specifically contemplated by the Act: "*Certainly, there is nothing in the Education Act that expressly precludes agreements other than those specifically contemplated by the Act to be made between the changing array of school boards that have existed from 1986 to the present. In our view, to imply such a restriction would introduce an unwarranted and undesirable degree of rigidity into a complex area of school administration that would impede the accommodation of varying local circumstances*". It can be argued that this decision by the Court might apply to other situations, such that school boards would have the ability to enter into agreements not clearly contemplated by the Act.

On the third issue, Near North argued that "*it operated under the belief that it was legally required to assume part of the liability for retirement gratuities payable to Franco Nord and that, but for this mistake, Near North would never have entered into the agreement*". The Court of Appeal reviewed the trial judge's findings of fact on this issue and found that the trial judge had considered the issue and Near North's arguments, and had rejected them.

The Court of Appeal found no basis for interfering with the trial judge's decision on this issue. In particular, the Court of Appeal noted that the trial judge had found no evidence of abuse of authority or oppression in the way Nord-Est and Near North reached their agreement, and she also held that ignorance or a mistake with respect to the effect of s. 135(26) was not sufficient to render void the entire agreement. The Court of Appeal also relied on the trial judge's finding that the Board staff responsible for reaching the agreement, although not lawyers, were experienced administrators who "*had a sophisticated understanding of the functioning of school boards, and their legislative underpinnings*".

On the fourth issue, the Court of Appeal upheld the factual findings of the trial judge and rejected Near North's argument that its liability should be limited to 94.23% of the estimated amount (\$252,231), which was the basis of its agreement with Nord-Est and the order of the EIC. The Court emphasized that the estimate was not drawn up by Near North or Nord-Est, and that neither Board verified the estimate. Also, due to a number of variable factors, the actual amount of retirement gratuity payable for each teacher cannot be known until the teacher retires. The Court held that the trial judge did not err by refusing to fix the liability based on the estimate.

Accordingly, the Court dismissed Near North's appeal, with costs payable to Nord-Est as agreed to by the parties.

This decision reflects the complexity of the changes to school boards in 1998. It also demonstrates the time delay in pursuing such actions. Perhaps the most important aspect of the appeal decision is

the comment noted above about the power of boards to enter into agreements not specifically authorized by the *Education Act*.

Court upholds school division decision on transportation

The responsibility to provide transportation to and from school was raised in *Loffler v. Board of Education of the Prairie Valley School Division No. 208*, [2009] S.J. No. 248. The Applicant was seeking a declaration that the Prairie Valley School Division breached the duty of fairness owed to students and an order requiring the Board to provide transportation of a student to the Applicant's school of choice.

As a result of the restructuring of public education in Saskatchewan, in which several school divisions were amalgamated and schools throughout the province were closed, including the student's school, students were assigned to and offered transportation to new schools. In addition, the school division implemented an open attendance policy allowing parents to register their children at any school in the jurisdiction, subject to adequate resources, space and programming for the student, and the caveat that, transportation for schools beyond designated boundaries would become the responsibility of parents.

As part of the process, the school division permitted parents to request a review of the administration's assignment of transportation services. The Applicant

appealed the administration's decision to the Trustees, but was denied a hearing because the Trustees had already heard and rejected five appeals from families in the same school area, and a year had already passed since the school was closed. The Applicant appealed the decision not to hear their appeal to the Saskatchewan Court of Queen's Bench.

The Court held that the duty to provide transportation rests with the school division, but did not include an obligation to transport students to any school a family determined to be appropriate. The Court also found that the duty of fairness owed by the school division to parents and students was not breached because complaints regarding the assignment of transportation could be raised with the Trustees, and the Applicants delayed their appeal. The Court found that the Trustees had fulfilled their duty and had offered valid reasons, including limited funding, in determining transportation routes. The Application was dismissed.

Although it was the school division's responsibility to ensure access to school, it was not obligated to provide transportation to any school desired by a student. In Ontario, school boards have discretion to provide transportation pursuant to s. 190 of the *Education Act*; however, the mandatory attendance provisions of the *Act* functionally require that transportation be provided depending on distance. Arguably, the school board may also determine to which school a student will be transported, subject to any duties of the school board arising from the *Human Rights Code*.

Professional Development Corner

Keel Cottrelle LLP "Special Education Session"
Toronto Airport Marriott Hotel, Toronto
Friday, October 23, 2009

Keel Cottrelle LLP "Student Discipline (Bill 212) Session"
Toronto Airport Marriott Hotel, Toronto
Friday, October 30, 2009

Keel Cottrelle LLP "Human Resources Session"
Hilton Toronto Airport Hotel, Toronto
Friday, November 6, 2009

Osgoode Professional Development "School Law for K-12 Education Professionals"
Osgoode Professional Development Centre, Toronto
November 30 & December 1, 2009

For information on any of the above, contact Bob Keel:
905-501-4444 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

The information provided in this Newsletter is not intended to be professional advice, and should not be relied on by any reader in this context. For advice on any specific matter, you should contact legal counsel, or contact Bob Keel or Nadya Tymochenko at Keel Cottrelle LLP.

Keel Cottrelle LLP disclaims all responsibility for all consequences of any person acting on or refraining from acting in reliance on information contained herein.



Keel Cottrelle LLP Education Law Newsletter

Robert Keel - Executive Editor
Nadya Tymochenko—Managing Editor

Contributors —

The articles in this Newsletter were prepared by **Nicola Simmons, Kate Waters, Kimberley Ishmael and Jennifer Asnani, who are associated with KEEL COTTRELLE LLP.**