March 2003
Volume 1, Issue 1

Edu-Law Consulting Services Limited

Inside this issue:

Edu-Law Re-Launches Newsletter	1
Supreme Court confirms same-sex instructional books	1
Court restrains elimination of special education jobs	3
B.C. Court re-affirms responsibility of Boards for sexual harassment or bullying	4
Two courts assess and re-affirm principles of liability for school boards	5

Edu-Law Re-Launches Newsletter

Edu-Law is pleased to announce the re-launch of its Education Law Newsletter after a hiatus of a number of years. During those years, developments in Education Law were dealt with through the Edu-Law Bulletins. Through arrangements with the various Associations, it is hoped that this Newsletter will be widely disseminated throughout the Education Sector. There is no charge for the Newsletter, and recipients are welcome to provide copies to colleagues. However, as noted below, Edu-Law retains the copyright and does not consent to changes or amendments to the content. Edu-Law also welcomes submissions from any Educator on relevant Education Law issues. If you wish to publish an article or synopsis of a case, kindly contact either Bob Keel (905-501-4444) or Nadya Tymochenko (905-501-4455). The Editors and Contributors hope that you will find the Newsletter helpful. Edu-Law also welcomes any comments or suggestions with respect to the format or content of the articles.

Edu-Law Consulting Services Limited

Edu-Law is managed by

Keel Cottrelle LLP
Barristers and Solicitors
100 Matheson Blvd E
Suite 104
Mississauga, ON
L4Z 2G7

Edu-Law Newsletter —

Executive Editor:
Robert G. Keel

Managing Editor:
Nadya Tymochenko

Copyright — While Edu-Law retains the copyright for this Newsletter, reproduction and distribution is permitted. Alteration of the format or the content is expressly prohibited. — **Edu-Law**

Supreme Court confirms same-sex instructional books

In *Chamberlain v. Surrey School District No. 36* ([2002] S.C.C. 86), the Supreme Court of Canada reviewed a resolution of the Surrey School District No. 36 refusing to authorize three books for classroom instruction on the ground that they depicted same-sex parental families.

The question before the court was whether the resolution was valid. The court approached the question in two steps. The first question asked was whether the school board was acting outside the mandate prescribed by the B.C. *School Act* and, if not, the next questions was whether the resolution violated the *Canadian Charter of Rights and Freedoms*. The majority of the court found that the school board did not act in accordance with the *School Act* and that, therefore, the issue should be remitted back to the school board for consideration on the proper basis. As a result of the finding regarding the first question, the majority did not proceed to consider the issue of whether the school board had violated the *Charter*.

The *School Act* confers on the Minister of Education the power to approve basic educational resource materials and confers on school boards the power to approve supplementary educational materials appropriate for the community in which they are to be used. The supplementary resources would then be available to teachers if they choose to use them in their classroom. Without the school board's approval, these resources could not be used in the classroom.

The school board passed the following resolution: *Therefore be it resolved that all administration, teaching and counselling staff be informed that resources from gay and lesbian groups such as GALE or their related resource lists are not approved for use or redistribution in the Surrey School District.* The resources in question were to be used for the family life curriculum in kin-

(Continued on page 2)

(Continued from page 1)
dergarten and grade one. It was the school board's position that, given the age of the students, parental views were very important, and the school board was concerned about the potential for cognitive dissonance if different views on same-sex families were communicated at home and at school. As well, the school board did not consider the subject matter to be age-appropriate. The Supreme Court found that the resolution was passed by the school board without an inquiry being made into the possibility that there were children from same-sex parented families whose family models would not be explored in the kindergarten and grade one curriculum.

As a first step in its analysis, the court found that the appropriate standard on which to review the school board's decision was "reasonableness". The reasonableness standard may be classified as the "intermediate" standard of deference to be applied by the courts on judicial review. This standard was described by the court as follows: "**the decision will not be set aside unless it is based on an error or is not supported by any reasons that can stand up to a somewhat probing examination**". The reasonableness standard may be contrasted to the standard of correctness, in which case, the court will only apply minimal deference to the decision made and, therefore, the administrative body must have made the "right" or "correct" decision. The patently unreasonable standard accords the most deference to the decision, and a court will permit the decision to stand unless it is obvious that the court should intervene, or that the mistake made is apparent without any analysis.

The standard, which will be applied by a court, is dependent upon the discretion that is conferred by the legislation on the delegate; in this case, a school board. It is possible that the standard to be applied by a court with respect to a decision of a B.C. school board in a particular matter may be different than that applied in Ontario to a school board addressing a different issue. The standards applied in different cases do provide some guidance with respect to the standard that may be considered by an Ontario court in the future. Moreover, this is a decision of the Supreme Court which is a precedent in Ontario.

The Supreme Court in its analysis of the factors to be considered when determining the appropriate standard of review to be applied commented that "...this is not simply a case of the board balancing different interests in the community. This is a case requiring the board to determine how to accommodate the concerns of some members of the community in the context of a broader program of tolerance and respect for diversity. This question attracts court supervision and militates in favour of a stricter standard".

The court found that the School Act requirement of strict secularism required the school board to respect all members of the school community, it could not prefer the views of some.

The standard of "reasonableness" requires the decision to be overturned if it cannot withstand a "somewhat probing examination". The court identified three underlying issues in the appeal: (1) the meaning of the Act's insistence on strict secularism; (2) the role of the board as representative of the community; and (3) the role of parents in choosing materials for classroom use. The court found that the *School Act* requirement of strict secularism required the school board to respect all members of the school community, it could not prefer the views of some.

The court made the following comments with respect to the second, the role of the school board: "**Here the Act makes it clear that the Board does not possess the same degree of autonomy as a legislature or a municipal council. It must act in a strictly secular manner. It must foster an atmosphere of tolerance and respect. It must not allow itself to be dominated by one religious or moral point of view, but must respect a diversity of views. It must adhere to the processes set out by the Act, which for approval of supplementary materials include acting according to a general regulation and considering the learning objectives of the provincial curriculum. Finally, to ensure that it has acted within its allotted powers, the board is subject to judicial review in the courts**". (emphasis added)

Regarding the third issue of parental views, the court made the following comment: "**Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference**". (emphasis added)

The first error identified by the Supreme Court was that the school board had preferred the views of parents concerned about the morality of same-sex relationships without considering the interest or views of same-sex parented families. The court commented that if the provincial curriculum required a broad range of family models to be taught, the school board could not exclude a family model because some parents might find them morally questionable.

The second error by the school board identified by the court was the board's failure to consider the appropriateness of the resources for the school communities in question. As previously noted, the court found that no inquiries were made to determine the needs of students of same-sex families and if there were any.

Lastly, the court held that the board did not apply the appropriate criteria when making the decision. The board made the decision on the basis that, unless the curriculum expressly required that same-sex parented families be discussed, the school board should not inquire into the relevance of the books as learning materials. The court held that the school board's interpretation of the *School Act*, as well as its own general criteria, was erroneous and that relevance and not necessity was the appropriate consideration.

In conclusion, **the Supreme Court held that the school board's decision was unreasonable because it considered the religious views of a certain part of the school community over the need to show equal respect for all members of the community; it acted contrary to its own policies and Ministry direction regarding curriculum materials; and, it applied inappropriate criteria for approving supplementary resources**.

This case highlights the conflicting pressures that boards face from their communities. Many divergent interests must be accommodated and addressed by school boards. Most importantly, boards must respect the values of all members of their school communities, not just those that the school board may consider to be the dominant values. —

Court restrains elimination of special education jobs

In *Jimmo v. Ontario (Minister of Education)* ([2002] O.J. No. 4824), the applicants, parents of special education students under the jurisdiction of the Ottawa-Carlton District School Board, applied, on an emergency basis, for judicial review of a decision of the Supervisor of the Board appointed as a result of the board trustees' decision to pass a deficit budget. While the remedy is not completely clear, it appears that the court ordered that the status quo be maintained pending a review of the implications of the Supervisor's decision and compliance with Regulation 181/98, as well as a review of the impact of the announced increased funding.

On August 27, 2002, the Supervisor announced a number of budget decisions, including the reduction of funds available for special education. Prior to the decision to cut 3.7 million from the budget with respect to special education funds, neither the board nor the Supervisor consulted with parents of special education students.

The Learning Disabilities Association of Ontario was granted standing in the matter. However, the court questioned why the Ministry of Education was a respondent, as the court considered the Supervisor to be acting on behalf of the school board and not the Ministry of Education, despite the fact that the Supervisor was appointed by the Ministry and the board was under the supervision of the Ministry. The court failed to note that, pursuant to the *Education Act*, the Ministry of Education has the ultimate legislative responsibility for ensuring that students receive appropriate special education programming.

The court noted that the Rosen Report, analyzing the board's deficit budget, had reported that the board spent an excess of 11.6 million on special education. The Supervisor, after consulting with staff, reduced the budget allocation for special education by 3.7 million.

The court commented, "*No doubt, given his agenda and the timetable he was facing, the supervisor did not give much thought to the provisions of Regulation 181/98. As referred to earlier, the needs of exceptional children have to be met in accordance with the requirements set out in Regulation 181/98. ... That process involves hearings, participation of parents, rights of appeal, etc*.". It should be noted that Regulation 181/98 does not address the issue of program funding. It creates a process for special education identification and placement, as well as an appeal process for parents who do not agree with the Identification, Placement and Review Committee's decision regarding identification and/or placement. Further, it is not clear from this quote whether the court thought that the IPRC process is a hearing, which it is not. The IPRC must meet to determine the appropriate identification and placement; there is no requirement for a hearing at the IPRC stage under Regulation 181/98. However, there is a right to a hearing at the Tribunal stage.

The court continued, "*It is obvious that the status quo regarding exceptional children is not to be changed without following the procedure set out in Regulation 181/98. In other words, the resources established for the needs of exceptional children, determined in May and June 2002 are to be maintained, and among proposed changes, resulting from the reduction in expenditures, are to be implemented in accordance with the provisions set out in the Regulation. Therefore, the question to be asked is: In these circumstances, was the supervisor justified in making reductions to special education affecting exceptional children, without following the provisions of the legislation and Regulation 181/98*?".

The court continued, stating "*I am not aware, nor has it been brought to my attention that there are any provisions in the Education Act or Regulations which allow the board or the supervisor to make decisions affecting the needs of exceptional children, without complying with the Act or Regulation 181/98*". These statements presuppose that either the *Education Act* or Regulation 181/98 provides parents with the right to consult with the Board on matters of budget as it relates to their child. In the present case, the Supervisor was addressing budget issues. There is no evidence in the decision that the Supervisor unilaterally eliminated placements. In any event, had the Supervisor intended to eliminate placements, the board would arguably be required to hold IPRCs for those students affected and place them in a placement that would exist after the budgetary changes. It is questionable whether parents would have a right to appeal the change of placement pursuant to Regulation 181/98, although this was conceded by counsel for the board and supervisor, because a parent cannot create a placement that they desire; they must choose a placement that the board offers; the alternative would mean that every parent could create the placement they desire regardless of the pedagogical and/or budgetary effect on other students.

These passages suggest that, whenever a change is made to the budget for special education which impacts on resources, parents must be consulted and may appeal the Board's previous placement and/or identification decision. If this were the case, arguably, one parent could veto any budgetary decision to be made by the board of trustees or, as in the present case, a Supervisor appointed by the Ministry of Education. Surely, it could not have been the intention of the Ministry of Education to draft a Regulation that could hold hostage the board's entire budgetary process with one parent appeal of placement. Further, given the timelines for an appeal to the Special Education Tribunal, often a school year or more, the board would not only be required to stay the placement and identification of the student appeal, but also all special education students of the board. This is an absurd result.

The court continued, stating "*The whole philosophy of Regulation 181/98 is that the status quo established in May and June of 2002 is to be maintained until the processes, as set out in Regulation 181/98 are followed*". Again, the court has assumed that changes in placements would occur as a result of the cutback. However, the court outlined the changes resulting from the decrease of funds, it stated: "*In proceeding the way he did, the supervisor eliminated some 23.5 SELC, number of educational assistants, or E.A.s as we call them, the elimination of 21.5 SERTS*". The court did not comment on the impact to placements. If these were merely staffing issues, surely the court could not be suggesting that the board must conduct IPRCs for all of its special education students before cutting or, in the alternative, adding any special education employees?

The court proceeded, stating: "*Counsel for the supervisor and board of education have conceded that the parents of exceptional children, who are affected by the cutbacks, have their full rights of appeal. If they are correct and I don't have to make a decision on that issue, then in accordance with Regulation 181/98, the status quo should have been maintained until all of the processes set out in Regulation 181/98 have taken place, including the parents' right of appeal. Therefore, the obvious remedy is that the status quo, established in May and June 2002, is to be maintained until all of the provisions of Regulation 181/98 have taken place, including notice to the parents, hearings and appeal process*". Again, the court has failed to distinguish between budget and staff-

(Continued on page 4)

Court restrains ...

(Continued from page 3)
ing issues that affect placements, and those that impact on program. Since parents may not appeal program issues, arguably, there would be no right of appeal under Regulation 181/98. Only those placements scheduled for elimination would be required to be stayed pursuant to Regulation 181/98 until such time as the appeal process was exhausted; again, at best, the parent could argue before the Special Education Tribunal that the placement should be maintained. This, however, could have a profound effect if the student was seeking a self-contained placement, and no other students desired the same.

Perhaps a better approach for the Court would be to focus on the board's special education plan. The court might have concluded that the decision of the Supervisor had a dramatic impact on the plan, and the board did not comply with the consultative and approval process necessary to revise or amend the plan as required by Regulation 306. The focus on Regulation 181/98 is problematic since 181/98 primarily addresses individual rights and not generic issues. It is not clear from the decision that individual identifications or placements were impacted thereby triggering Regulation 181/98. The decision may have been the right one, but based on a flawed analysis of the Act and Regulation. In other words, the court may have decided that this was an appropriate situation for the court to intervene, and then looked to see how such intervention could be justified from a legal perspective. —

B.C. Court re-affirms responsibility of Boards for sexual harassment or bullying

A decision of the B.C. Human Rights Tribunal was recently reviewed by the Superior Court of B.C. on an application by the School District. The Tribunal found that North Vancouver School District No. 44 breached section 8 of the B.C. *Human Rights Code* by failing to remediate the sexual harassment of Jubran by other students.

In *North Vancouver School District No. 44 v. Jubran* ([2003] B.C.J. No. 10, (B.C.S.C.)), the Superior Court allowed the application and found that, given that the Human Rights Tribunal found that Jubran was not a homosexual and that the students did not believe him to be a homosexual, the harassment suffered by Jubran was beyond the scope of section 8 of the *Human Rights Code* and should not have been the basis of the Tribunal's decision. As a result, the decision of the Human Rights Tribunal was flawed and should be quashed.

Jubran, throughout his attendance at Handsworth Secondary School, was bullied by fellow students. The students called him names, which included "homo", "queer", and "gay". The epithets and labels used by these students also included words such as "dork" and "geek", which do not have a sexual connotation. Jubran was not homosexual and the Tribunal found that the students responsible for the bullying did not believe Jubran to be a homosexual. Their conduct fell within the scope of section 8 of the B.C. *Human Rights Code*.

The Tribunal found that the school board breached section 8 of the *Code* as a result of its responses to the harassing conduct. Although the school administration disciplined students for every reported incident of harassment, made teachers aware of the concerns, spoke to students in Jubran's classes about the issues of sexual harassment, and even though most of the students disciplined by the administration did not re-offend, the actions of the administration were found to be insufficient.

The court reviewed the Tribunal decision on the standard of correctness. The court reviewed the language of section 8 of the *Code* and stripped to its essential terms: "A person must not ... discriminate against a person or class or persons ... because of the ... sex or sexual orientation of that person or class or persons". The court held that, because Jubran was not homosexual, the bullying could not have occurred because of his sex or sexual orientation, and it was therefore beyond the scope of section 8 of the *Code*. Therefore, the court held that, as the conduct was beyond the scope of section 8, the School District could not have contravened section 8 of the *Code* by failing to adequately remediate the conduct.

Although the decision of the B.C. Human Rights Tribunal was reversed on appeal to the British Columbia Superior Court, it remains an important decision. The standard expected of the School District by the Commission in its original decision is significant and would arguably be applied in a case such as Jubran's where the student was in fact gay or lesbian or believed to be gay or lesbian by the students harassing him or her.

Although the school administration disciplined the students for every reported incident of harassment, and even though most of the students disciplined did not re-offend, the actions of the school administration were found to be insufficient. General anti-discrimination training for staff and students was expected of the school board. As well, the Commission expected that the school board would vigilantly impose anti-discrimination policies and complaints procedures.

The lesson to be gleaned from the Jubran case is that school boards must consistently address the risks of harassment on any discriminatory ground with the application of anti-discrimination policies and procedures and regular training for staff and students. —

Two courts assess and re-affirm principles of liability for school boards

The British Columbia Supreme Court and the Manitoba Court of Appeal have both recently dealt with personal injury claims in the school context. In one case, a teacher was the injured party; in the other case, a student. In each case, the plaintiffs claimed the school board was liable for the injuries suffered.

In *Freer (Guardian ad litem of) v. Okanagan/Skaha School District No. 67* ([2002] B.C.J. No. 2739), Kyle Freer brought an action for damages against Okanagan/Skaha School District No. 67. Kyle had broken his leg while skiing. Due to his injury, he could not actively participate in physical education classes. However, the Phys. Ed. teacher insisted that Kyle continue to attend classes to assist and also for the purposes of supervision. In the Spring, the Phys. Ed. class was moved outdoors to the soccer field and Kyle accompanied his class. The grass on the field was dewy, and Kyle slipped and fell. Notwithstanding that Kyle indicated he thought he had re-broken his leg, the Phys. Ed. teacher instructed him to walk back to the school and put some ice on it. Kyle's leg was in fact re-broken, and this time the injury was more severe.

The Court applied the "careful and prudent parent" standard of care to assess whether the Phys. Ed. teacher acted negligently in allowing Kyle to accompany the class outside, and in instructing Kyle to walk back to the school when he had obviously re-injured his leg. The court concluded that the only negligence was in instructing Kyle to walk back to the school when he was injured. No evidence was put forth to establish that walking back to the school on his injured leg had caused or aggravated the injury.

Nevertheless, the court held the school board vicariously liable for the Phys. Ed. teacher's negligence and awarded Kyle $1,500.00 damages for the pain and mental distress Kyle suffered by walking on his re-injured leg.

In *Johnson v. Webb* ([2002] M.J. No. 478), a teacher was injured during an after-school hockey match between the teachers and students of Fisher Branch Collegiate, which was part of the school's "Spirit Week" celebrations. The teacher brought an action against a student, who he claimed intentionally hit him during the match, in addition to a claim against the school division, for failing to provide him with a safe place to work.

The trial judge denied liability against the student, finding that the injury was not the result of an intentional act. As against the school division, the trial judge determined that, although the game was being played after school hours and off school property, a master / servant relationship existed between the appellant and the respondent school division. However, the school division had not breached its duty of care toward the appellant. Notably, the players had been advised orally of the rules of the game (no contact), who competent referees were hired, and the players were fully equipped.

The Court of Appeal dismissed the appeal, stating that the appellant was injured in an accident and the school division had no duty to make its workplace safe from such accidental injury.

Arguably, in the *Freer* case, sympathy and not law dictated the result of the case. Generally, where the plaintiff fails to prove that the "act" was the cause of the damages suffered, the defendant will not be found liable. In the *Freer* case, it appears the court was sympathetic to the pain the student endured when walking back to the school.

In *Johnson v. Webb*, the Manitoba Court of Appeal has confirmed that a board owes a duty of care to its teachers after school hours if they remain on school property. However, given that the court found that the student did not intentionally hit the teacher, and that the teacher was provided with appropriate equipment, the board was not responsible for the accident. The issue of providing a safe workplace raises other issues, and is a claim that must await future analysis in a more appropriate situation. —

Edu-Law Consulting Services Limited

c/o **KEEL COTTRELLE LLP**
100 Matheson Blvd. E., Suite 104
Mississauga, Ontario L4Z 2G7

Phone: 905-890-7700
Fax: 905-890-8006
Email: rkeel@keelcottrelle.on.ca

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.

www.**keelcottrelle**.com
www.**edu-law**.ca

Edu-Law Consulting Services Limited provides a full range of professional development for educators. Edu-Law is an accredited provider of the Professional Learning Program of the Ontario College of Teachers. In particular, Edu-Law provides Negotiation and Mediation Training Programs. In addition to the Newsletter, Edu-Law publishes bi-annually the Edu-Law Human Resources Digest.

Edu-Law is managed by members of KEEL COTTRELLE LLP.

For any information with respect to Edu-Law or the services provided by KEEL COTTRELLE LLP, please contact **Bob Keel** at **905-501-4444**, or at **rkeel@keelcottrelle.on.ca**, or visit our websites **www.keelcottrelle.com** or **www.edu-law.ca**.

Contributors

The articles in this Newsletter were prepared by Nadya Tymochenko, Bob Keel, and Kate Ferguson, who are associated with Keel Cottrelle LLP.

Professional Development Corner

March 31, 2003

Osgoode Professional Development Centre

"**Advanced Analysis of Legal Issues in Special Education**"

May 21, 2003

Keel Cottrelle LLP /

Edu-Law Consulting Services Limited

"**Special Education Issues**"

May 8-10, 2003

Edu-Law Consulting Services Limited /

York Region District School Board

"**Mediation & Negotiation Training Program**"

For information,
contact Robert Keel at
905-501-4444 or rkeel@keelcottrelle.on.ca