Keel Cottrelle 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

— March 2012 —

IN THIS ISSUE —

Supreme Court dismisses appeal from parents to exempt children from ethics and religious course in Quebec 1

Challenge to French-language funding in Halifax will proceed to Board of Inquiry under the Code 3

Human Rights Tribunal determines no discrimination in failing to provide bus transportation for disabled applicant's children 4

Court deals with interim issues on B.C. French-language challenge 5

Court confirms no right to transportation outside attendance boundary 7

Court rules against negligence claim for school-yard incident 8

Court interprets indemnity clause narrowly 8

SCC deals with information access issues 9

Supreme Court dismisses appeal from parents to exempt children from ethics and religious course in Quebec

In *S.L. v. Commission scolaire des Chênes* (2012 SCC 7), the Supreme Court of Canada (the "Supreme Court") dismissed an appeal concerning the refusal of the Commission scolaire des Chênes (the "School Board") to exempt the children of S.L. and D.J. (the "Appellants") from an Ethics and Religious Culture ("ERC") course.

The Appellants sought to have their children exempt from the ERC course, which was mandatory in Quebec schools and replaced Catholic and Protestant programs of religious and moral instruction. The Appellants were concerned that it caused serious harm to their children who were Catholic and interfered with their obligation to pass on their Catholic beliefs to their children. The Director of Education (the "Director") denied the exemption requests, as did the School Board's Council of Commissioners. The Appellants contested the

decisions of the Director and the Council of Commissioners to the Superior Court of Justice. The Appellants argued that the ERC Program infringed their freedom of conscience and religion under Section 2 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). They sought judicial review of the decisions of the Director and the Council of Commissioners and a declaration that the ERC Program infringed their right to freedom of conscience and religion, as well as the rights of their children. The Superior Court of Justice dismissed both the motion for a declaratory judgment and the motion for judicial review. The Appellants applied for leave to appeal the decision to dismiss the motion for judicial review to the Court of Appeal and also appealed the dismissal of the motion for declaratory judgment. The Court of Appeal dismissed the appeal of the motion for declaratory judgment, dismissed the motion for leave to appeal and also stated that the appeal had become moot since the Appellant's children were no longer required to take the ERC course. The Appellants then appealed to the Supreme Court of Canada.

The Supreme Court stated that its task was to determine whether the Trial Judge had erred in concluding that the Appellants had not proven that the ERC Program infringed their freedom of religion and that the School Board's decision had not been made at the dictate of a third party. The Supreme Court also had to determine whether the Court of Appeal erred in deciding that the appeal had become moot.

The Appellants were required to prove on a balance of probabilities that their rights had been infringed. In analyzing the Appellants' argument that the ERC Program had infringed on the Appellants' freedom of religion and that of their children, the Supreme Court considered whether an existing religious practice or belief had been infringed and not whether one believed that a religious practice or belief had been infringed. The Supreme Court stated that the Appellants did not show objectively that "*the ERC Program interfered with their ability to pass their faith on to their children*", as it was not enough for the Appellants to say that their rights had been infringed or that they had religious reasons for objecting to the ERC Program.

The Appellants argued that the ERC Program was not "neutral" or did not achieve "religious neutrality". The Supreme Court noted that absolute neutrality is difficult for any State to achieve, but that a realistic assurance of neutrality exists when a State shows respect for all religions (including non-belief in any religion), as well as when a State does not show favouritism towards or hinder any particular belief. The Supreme Court noted that the purposes of the ERC program did not appear to influence young people's beliefs and that exposing youth to a "*comprehensive presentation of various religions without forcing the children to join them*" did not infringe upon the Appellant's freedom of religion.

The Supreme Court also addressed the Appellant's argument that the exposure to various religions would confuse their children. The Supreme Court stated that the suggestion that such exposure infringes on children's religious freedom rights essentially ignored the State's responsibilities with respect to public education and rejected "*the multicultural reality of Canadian society*".

The Supreme Court ruled that there was no error in the Trial Judge's conclusion that the School Board's decision was not made at the dictate of a third party. Furthermore, the Supreme Court noted that despite the Court of Appeal's decision to dismiss the appeal for mootness, the question before the Supreme Court was significant and this justified hearing the appeal.

This decision reflects the challenges with respect to religious education in public schools, and confirms that the issue will continue to be brought forward by parents or other groups. The Courts will need to determine whether the teaching of religion or requirements with respect to the teaching of religion are and are seen to be "neutral" in public schools. The same issues do

not apply to the teaching of religion in Catholic District School Boards in Ontario.

—

Challenge to French-language funding in Halifax will proceed to Board of Inquiry under the Code

In *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission*) (2012 SCC 10), the Supreme Court of Canada (the "Supreme Court") dismissed an appeal arising from the decision of the Nova Scotia Human Rights Commission (the "Commission") to refer a parent's complaints of discrimination to a Board of Inquiry (the "Board") and to prohibit the Board from proceeding.

During the mid-1990s, the cities of Halifax and Dartmouth, the Town of Bedford and the county of Halifax were amalgamated to create the Halifax Regional Municipality (the "Municipality"). Their schools were also amalgamated at a later date to form the Halifax Regional School Board. Prior to the amalgamation, the cities of Halifax and Dartmouth provided supplementary funding to their respective school boards, but after the amalgamation, the Municipality was required by law to maintain supplementary funding to the schools that had received funding from the former cities of Halifax and Dartmouth. The Municipality raised this funding through taxation and provided it to the relevant school boards. The Province of Nova Scotia also created *Conseil scolaire acadien provincial* ("Conseil") around this same time, which was a province-wide school board that administered French-first-language schools and whose funding came entirely from the Province. Unlike other Nova Scotia School Boards, Conseil schools did not receive supplemental funding from the Municipality.

A parent, Mr. Comeau, filed a Complaint with the Commission alleging that funding arrangements for French-first-language schools in the Municipality were discriminatory in respect of their provision of a service or facilities towards both him and his children, on the basis of their Acadian ethnic origin. He also alleged that it was a violation of his section-15 equality rights under the *Canadian Charter of Rights and Freedoms* (the *"Charter"*).

Mr. Comeau filed the Complaint against the Municipality with the Commission and a similar complaint against the Province. The Commission appointed an investigator who found that "*Mr. Comeau's complaints would appear to establish a prima facie case of discrimination*". Five other parents of children in Conseil schools also commenced proceedings in the Supreme Court of Nova Scotia, contending that the funding scheme in the governing legislation violated the *Charter*. The Commission deferred Mr. Comeau's Complaints until the *Charter* challenge was heard, however, the challenge was adjourned pending negotiations and proposed legislative amendments. The Commission then requested that the Board handle Mr. Comeau's Complaints and the Board was appointed.

The Nova Scotia Human Rights Commission enforces and administers the *Human Rights Act*, R.S.N.S. 1989, c. 214 (the "*Act*"), and the *Act* gives the Commission considerable discretion as to how it carries out that mandate. When there is a Complaint that the *Act* has been violated, and the Commission is satisfied that an inquiry is warranted in all of the circumstances, it may set up a Board of Inquiry to look into the matter.

Meanwhile, the governing legislation was amended to provide supplementary funding for Conseil schools in the Municipality. The parties involved with the *Charter* challenge settled the matter and that action was dismissed. However, Mr. Comeau's Complaint remained outstanding and raised additional personal issues. The Municipality applied to the Supreme Court of Nova Scotia to quash the Commission's decision to refer the Complaint to the Board and to prohibit the Board from proceeding. The Application was granted and Mr. Comeau and the Commission appealed to the Nova Scotia

Court of Appeal, which allowed the appeal and reinstated the Board's appointment.

The Supreme Court first analyzed the standard of judicial review applicable to the Commission's decision to refer the Complaint to the Board. The Supreme Court held that the Commission's decision was a discretionary one, whereby the Commission plays an administrative role (and not that of an adjudicator), screening a Complaint and referring it to a Board where warranted. Since discretionary decisions by administrative bodies were normally subject to judicial review on a reasonableness standard, the Supreme Court applied the reasonableness standard to review the Commission's decision.

The Supreme Court then analyzed whether the Commission had made any reviewable error under the reasonableness standard of judicial review. The Supreme Court stated that the question to review was "*whether there was any reasonable basis on the law or the evidence for the Commission's decision to refer the complaint to the board of inquiry*". The Supreme Court held that it was not the role of the Court to assess the Complaint, and decided that the Commission, in light of all of the reports, surrounding circumstances and complexity of the Complaints, had a reasonable basis to refer the inquiry to the Board.

This decision demonstrates that French-language rights will continue to be an issue in many jurisdictions, particularly with respect to funding.

—

Human Rights Tribunal determines no discrimination in failing to provide bus transportation for disabled applicant's children

In *Contini v. Rainbow District School Board* (2012 HRTO 295), the Ontario Human Rights Tribunal (the "Tribunal") dismissed an Application for discrimination on the basis of disability. Loriann Contini (the "Applicant"), who had multiple sclerosis, alleged that the Rainbow District School Board (the "School Board") had discriminated against her because of her disability by failing to provide bus transportation to her school-aged children from their home.

The School Board filed a Request for Order During Proceedings requesting that the Tribunal dismiss the Application. The School Board argued that this matter was outside of the Tribunal's jurisdiction, since transportation was not a service that was provided to the Applicant herself. The Tribunal issued an Interim Decision (2011 HRTO 1340) stating that due to the School Board's policies on transportation, a service relationship existed between the Applicant and the School Board and, as such, the Application was allowed to continue. The Tribunal stated that the onus was on the Applicant to prove discrimination on a balance of probabilities and establish how the School Board's failure to provide transportation discriminated against the Applicant by having an adverse impact on her. (This Interim Decision was reviewed in the KC Education Law Newsletter, September 2011, "Transportation for students may be 'service' under the Human Rights Code".)

The Applicant provided written submissions to the Tribunal in which she stated that she had made requests to the School Board for several years for her children to be bussed to school, and that such transportation was provided until August 2009. The children's father, who was a teacher at the school, drove the children to school instead. The Applicant stated that she wanted to "*get her children ready for school and watch them get on and off the bus*" as part of a "*meaningful contribution*" to her family. The Applicant further stated that, according to the School Board, because she had a husband, she no longer had rights as her own individual person and that the School Board's policy was based on the average person, not a person with a given disability.

The School Board responded with written submissions stating that its transportation policies were based on a child's age and the walking distance between his/her home in relation to the school they were attending. The Applicant's children did not qualify for bussing transportation due to the age of the children and the proximity of their home to the school. The School Board noted that, while they were legally obligated to accommodate a child with a disability with respect to transportation, they were not obligated to do so for a parent of the child. Additionally, the School Board reiterated the fact that the children's father who taught at the school, was able to drive them.

The Tribunal analyzed both the possibility of direct discrimination and indirect discrimination. The Tribunal stated that "*direct discrimination occurs when an individual is treated adversely because of a personal characteristic*" that falls under the *Human Rights Code of Ontario* (the "*Code*"). In this case, the Tribunal stated that the Applicant was not subject to direct discrimination by the School Board, as the Applicant's disability was not a factor in the School Board's decision not to provide her children with transportation.

The Tribunal stated that indirect discrimination or "constructive discrimination" under s. 11 of the *Code* occurs when "*neutral rules that do not appear to be discriminatory have a disproportionate and adverse impact on a group identified by one of the personal characteristics covered by the Code*". The Tribunal noted that it would consider constructive discrimination even though the Applicant did not clearly address this in her Application. It further stated that the transportation policy was "neutral on its face" and that the Applicant was unable to demonstrate that she had been adversely impacted by the School Board's transportation policy. The Tribunal stated that the Applicant's involvement in getting her children ready for school did not "materially" differ based on the children's means of transportation and that there was no basis to conclude that the situation placed in her in a position "*where she could reasonably feel less worthy as a parent*".

The Application was dismissed.

This decision demonstrates the Tribunal's strict requirement that an Applicant alleging disadvantageous treatment must demonstrate a duty by the Respondent, as well as whether there was a true disadvantage and whether a ground enunciated under the *Code* had some part in causing this disadvantage.

—

Court deals with interim issues on B.C. French-language challenge

In *Conseil Scolaire francophone de la Colombie-Britannique v. British Columbia* [2011] B.C.J. No. 1705 (B.C.S.C.), the British Columbia Supreme Court allowed in part an Application of the Defendants (the B.C. Crown and Ministry of Education) to strike a Statement of Claim filed by the Conseil scolaire francophone de la Colombie-Britannique (the "CSF"), 33 individual parents, and a non-profit organization of parent's associations (the "Federation") on the basis of abuse of process. The Application further sought to remove the CSF and the Federation from the action for lack of standing, and sought leave to file a third party claim against the CSF.

The action alleged that the Province provided inadequate funding for the CSF's offices and for school transportation, sought several declarations pursuant to ss. 24(1) of the *Charter* (*Charter* remedies), including a declaration that the Plaintiffs had distinct capital funding needs and a declaration that the Plaintiffs were not being offered the standard of education, facilities and transportation offered to students in English language schools in the same areas. The Defendants argued that the allocation of funds was a complex policy decision that was beyond the Court's jurisdiction, and that the CSF and the Federation were not right holders and had no direct interest in the proceedings.

The Court allowed the Application in part.

Regarding the issue of justiciability, the Court stipulated that it was required to determine whether the question is purely political or whether there was a sufficient legal component to warrant the intervention of the judicial branch. The Court noted the *Charter* has given a legal component to certain questions that were formerly political in nature, and that questions relating to compliance by government with positive obligations were generally justiciable.

The Court determined that the Defendants' position regarding the matter not being justiciable was inconsistent with the jurisprudence and with the recognition that courts may grant declaratory relief and injunctive relief that involve the expenditure of public funds to remedy *Charter* breaches.

The Court held that in light of the Supreme Court of Canada decision of *Mahe v. Alberta* (S.C.C.) [1990] 1 S.C.R. 342, and subsequent case law, it could not be argued that a court usurps the legislature's role by adjudicating on financial obligations of the province under section 23 of the *Charter* (language rights). The State had a constitutional obligation to fund minority language education and the courts had an appropriate constitutional role to resolve disputes regarding the nature and extent of this obligation.

The Court held that it had jurisdiction to grant declaratory relief that required public funds to remedy *Charter* breaches. The Court concluded that although some of the remedies sought may have been inappropriate, the Defendants had not established that the Plaintiffs' claim was non-justiciable.

Regarding standing, the Court held that the CSF has a special and sufficient interest in the Province discharging its section 23 language-rights obligations. The Supreme Court of Canada has recognized that minority language boards, as representatives of section 23 rights-holders: "*ought to have powers of management and control 'conferred by s. 23 to the extent appropriate' on a sliding scale depending on numbers and other considerations*".

The Court held that the CSF should be granted public interest standing, rather than to have standing as of right, finding that the CSF was an appropriate party to speak to the public interest in the group rights conferred by section 23. The Court found that the CSF could reasonably be expected to advance any collective or group issues that individual parents could not effectively address themselves. There was not a more appropriate party to advance the claims made by the CSF. For example, there was no single rights-holder able to advance the claim that individual rights had been infringed due to global error by the Province (i.e. in assessing needs regarding transportation, or global capital requirements of minority language schools).

This latter factor (i.e. that no other person more directly affected could reasonably be expected to litigate the issues) was critical to the Court's decision to grant public interest standing to CSF and not to the Federation. The Court had found, without difficulty, that the pleadings raised serious and justiciable issues between the parties, and the province conceded that both the CSF and the Federation had a genuine interest in the outcome of the proceedings.

However, the Court rejected the Federation's argument that its participation in the litigation was essential to the parents, finding that the Federation could fulfill its role without acting as a Plaintiff. The Court, therefore, allowed the Defendants' application for an order dismissing the claim of the Federation.

The Court further granted leave to the Defendants to speak to the Application to amend the pleadings to advance a third-party claim against either the CSF or the Federation if they wished to do so after considering the reasons. The remainder of the Application was dismissed.

—

Court confirms no right to transportation outside attendance boundary

In *Grasdal v. Board of Education of the Regina School Division No. 4 of Saskatchewan* [2011] S.J. No. 684 (Q.B.), the Saskatchewan Court of Queen's Bench awarded the Board of Education of the Regina School Division No. 4 (the "School Board") summary judgment dismissing the Plaintiff's claim to require the School Board to provide transportation to her daughters to attend a school outside of the attendance boundary in which they lived.

Since 2009, the Plaintiff's two daughters had attended Wilfred Walker School in Regina ("Wilfred Walker"), which offered a single-track French immersion program. French was the only program offered at the school. The Plaintiff did not live within the boundary of Wilfred Walker; however, she lived within the boundary of a school ("Connaught School") that offered a dual-track French immersion program (English and French were both offered).

The Plaintiff brought an Application seeking a determination by the Court that the School Board was required to provide transportation for her daughters to attend Wilfred Walker, arguing that its single-track program was significantly different from the dual-track program at Connaught School. The School Board brought an Application for summary judgment dismissing the Plaintiff's claim.

The School Board took the position that, pursuant to the School Board's policies, a parent could send his or her child to a school outside the attendance boundary; however, the parent is wholly responsible for any transportation arrangements and costs resulting from this decision. In this regard, the Court noted that the School Board's Administrative Procedure 310 granted parents the option to send their children to a school outside of the attendance boundary where they live, noting that this provision exists despite section 85(1)(g) of *The Education Act, 1995*, S.S. 1995, c. E-0.2 which allowed a board of education to determine "*the school any of the children of the school division shall attend*".

Section 42 of *The Education Regulations*, 1986, S.S. 1986, c. E-0.1 Reg 1 ("the Regulations") stipulated that a board of education would have responsibility for the transportation of a pupil if: 1) there was no designated program appropriate to a pupil's grade level in the attendance area; or 2) the specific type of designated program in the attendance area was of a different type than the designated program in which the parent or guardian wished the pupil to attend.

The Court found that the Plaintiff had access to a school with a program in her attendance area of the same specific type as Wilfred Walker since they were both designated as Type B Immersion/Bilingual Programs under section 38 of the Regulations.

The Court rejected the Plaintiff's argument that the School Board should have changed its transportation policy and/or applied to the Lieutenant Governor in Council to change its destination from a Type B school to a Type A school after having declared Wilfred Walker a single-track school and after having recognized the school's unique character.

The Court further rejected the Plaintiff's position that her children were "*denied equal access to Wilfred Walker*" (or as rephrased by the Court: "*more to the point, she is denied equal access for assistance in transporting her children to school*") given that the Plaintiff did not tie her complaint to a denial of a recognized right to equal access.

The Court held that the Plaintiff's children clearly did not qualify for transportation in these circumstances. The Court, therefore, granted summary judgment dismissing the Plaintiff's claim.

Court rules against negligence claim for school-yard incident

In *Rollins (Litigation guardian of) v. English Language Separate District School Board No. 39* [2012] O.J. No. 646, the Ontario Court of Appeal (the "Court") dismissed an appeal by the plaintiff ("Rollins") of her action in negligence against the defendant (the "School Board") for an incident which occurred on the School playground in 1990.

The Trial Judge found as fact that when she was six years old in 1990, Rollins was struck on the head with rollerblades by a fellow student in the School playground at lunchtime, and that the incident was not reported to anyone at the School until several years later.

The issue on appeal was whether the Trial Judge erred in dismissing the negligence action, having found that the School Board did not breach its duty of care owed to Rollins.

Rollins argued that the absence of an incident report concerning the 1990 rollerblade incident necessarily meant that either there was no supervisor present on the school playground, or that a supervisor who was present did not see the incident. Rollins argued that either scenario compelled a finding that the School Board was negligent.

In dismissing the appeal, the Court reviewed the evidence put forward at trial, noting that there was very little evidence of the incident itself and of events leading up to and following Rollins being struck. There was only one eyewitness to the incident, who was also six years old at the time and who testified at trial in 2009, nineteen years later.

The Court held that the Trial Judge's finding of fact that the incident had not been reported until several years later could reasonably explain why no investigation or report had ever been prepared by the School. Further, the Court held that the failure of a supervising teacher to see an incident does not demonstrate there was no supervising teacher on duty, nor does it necessarily demonstrate negligence if there was in fact a teacher on duty who did not see the incident.

Rollins further argued that the School's policy with respect to rollerblades on school property had been breached, and that the Trial Judge had misapprehended the evidence of the School principal in this regard. In dismissing this argument, the Court noted that any misapprehension of the evidence regarding the School's policy against having rollerblades on school property was immaterial as "*it cannot be said that the mere fact that a student was in possession of rollerblades on school property, even if in contravention of school policy, established that the incident was caused by a failure to adequately supervise the playground and enforce school policies*".

While the failure to enforce a school policy could in some circumstances constitute negligence on the part of the School, the evidence in this case did not establish that such a finding was warranted.

—

Court interprets indemnity clause narrowly

In 2009, the Sons of Scotland Benevolent Association ("Sons of Scotland") hosted Highland Games on the property of the South Delta Secondary School (the "School"). During the Games, the plaintiff ("Shelton-Johnson") allegedly tripped on an irregular portion of sidewalk adjacent to the school's cafeteria. Shelton-Johnson subsequently initiated an action against the Sons of Scotland and the Board of Education of School District No. 37 (Delta) (the "School Board") for damages.

In a joint statement of facts, the Sons of Scotland and the School Board agreed it was known that individuals would have to make use of the sidewalk in order to access the interior

areas of the school which had been rented to Sons of Scotland for the Highland Games.

In *Shelton-Johnson v. Delta School District No. 37* [2011] B.C.J. No. 2154, the School Board brought an Application seeking an order that an indemnity clause contained in the rental contract between the School Board and the Sons of Scotland was applicable to Shelton-Johnson's action. The Sons of Scotland argued that the indemnity clause did not apply as it referred only to the portions of the School which were actually rented for the Highland Games and not to other external areas, including the sidewalk surrounding the School.

The British Columbia Supreme Court (the "Court") dismissed the Application, holding that the indemnity clause did not apply to the sidewalk as a result of the wording of both the clause and contract.

In reaching its decision, the Court cited the 1952 decision in *Canada Steamship Lines Ltd. v. Regem* as long-standing authority for the rule that "*where a party to a contract has been negligent, and seeks to make the innocent party liable for that negligence, the relevant indemnity clause must be unequivocally certain*".

The indemnity clause at issue was not unequivocally clear with respect to coverage of the sidewalk, as it used both the term "premises" and "facilities" and was disjunctive. The clause stated that the user agreed to accept the "premises" at his or her own risk, but that the user would only indemnify the School Board from any injury or damage to a person who used the School "facilities." The issue therefore was whether the sidewalk was a part of the "facilities".

The rental contract between the School Board and the Sons of Scotland set out the facilities rented as being a cafeteria, a classroom, and adjacent washrooms and changing rooms. There was no mention of sidewalks or any other area of the School or schoolyard. As a result, the Court held that it was not unequivocally certain that the sidewalk was within the "facilities" subject to the indemnity clause and therefore dismissed the Application.

This case demonstrates the need for precise inclusive language in contracts or permits.

—

SCC deals with information access issues

In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association* [2011] SCC 61, [2011] 3 S.C.R. 654, the Supreme Court of Canada (the "Supreme Court") provided a split decision, with three concurring sets of reasons.

The question before the Supreme Court was how a reviewing court can give deference to a Tribunal where a party raises an issue for the first time on judicial review. In such a circumstance, the issue will never have been before the Tribunal and the Tribunal will therefore not have provided reasons with respect to same. The issue arose before the Supreme Court with respect to the judicial review of a decision of Alberta's Information and Privacy Commissioner that the Alberta Teachers' Association (the "ATA") had disclosed information contrary to that Province's privacy legislation. Complaints were filed with the Information and Privacy Commissioner and subsequently delegated to an adjudicator, who found that the ATA had contravened the privacy legislation.

The legislation included the requirement that the inquiry into a complaint was to be completed within 90 days of the receipt of the complaint, unless the Commissioner notified the parties of an extension and an anticipated date for completion of the inquiry. The Commissioner did not notify the parties of an extension until 22 months after the complaint had been filed, and the decision was issued 29 months after the filing of the complaint.

The ATA did not raise the issue of timeliness before either the Commissioner or the

Adjudicator. Rather, the ATA raised the issue on judicial review, arguing that the Commissioner had lost jurisdiction to issue a decision because the time limit had not been extended within 90 days of receipt of the complaint. The Chambers Judge quashed the Adjudicator's decision. The Alberta Court of Appeal upheld the decision of the Chambers Judge.

The Privacy Commissioner appealed to the Supreme Court, raising three questions:

"First, should the timelines issue have been considered on judicial review since it was not raised before the Commissioner or the adjudicator? Second, if the timelines issue should be considered, what is the applicable standard of review? Third, on the applicable standard of review, does the adjudicator's continuation and conclusion of the inquiry, despite the Commissioner having provided an extension after 90 days, survive judicial review?"

With respect to the first question, the Supreme Court held that it was appropriate for the reviewing Court to consider the issue of timelines on judicial review because the Commissioner and Adjudicator had both implicitly decided it. The Commissioner had implicitly decided the issue when notice of the extension was given after the 90-day limit had passed, and the Adjudicator had implicitly decided the issue by rendering a decision. The Supreme Court noted that the ATA did not have the right to require the issue to be considered by the reviewing Court on judicial review since it had not been raised before the Commissioner or the Adjudicator. However, it was within the discretion of the reviewing court to consider an issue raised for the first time before it on judicial review. The reviewing court was required to consider whether hearing the issue for the first time would unfairly prejudice the opposing party, and whether there was an inadequate evidentiary record before it.

With respect to the second question of the applicable standard of review, the Supreme Court held that the reasonableness standard should be applied. The determination of the timeline was specific to the privacy regime in Alberta and was not of central importance to the whole legal system. Moreover, it was a question that fell within the expertise of the Commissioner. The majority held that the issue of the timeline was not a question of the jurisdiction of the Commissioner, **and that when interpreting its own statute or those closely connected to its function, a tribunal should be accorded a high degree of deference**. The majority questioned whether true questions of jurisdiction existed on judicial review and whether jurisdiction should be considered in determining the appropriate standard of review. The majority held that true questions of jurisdiction would be unusual. It should be noted that it was on the issue of jurisdiction that the justices supporting the two minority decisions departed from the majority.

Since the decision was deemed to be implicit, there were no reasons for the lower court to review. The Supreme Court held that if there was a reasonable basis upon which the Commissioner or Adjudicator could have made the decision, the reviewing Court must not interfere with that decision. If, however, there was no apparent reasonable basis upon which the decision was based, the reviewing Court should have given the Tribunal an opportunity to provide an explanation for the decision.

With regard to the third question, the Supreme Court found that the Adjudicator's decision had been reasonable. The Commissioner and Adjudicator had previously issued consistent decisions with respect to the issue of timeliness on which the reviewing Court could rely to determine there was a reasonable basis for their implicit decision with respect to timelines. KC

Professional Development Corner

April 13, 2012 - KC LLP Special Education / Student Discipline Session
at Dufferin-Peel Catholic District School Board

May 4, 2012 - KC LLP Human Resources Session
at Dufferin-Peel Catholic District School Board

Keel Cottrelle LLP provides Negotiation and
Conflict Resolution Training for Administrators as well as Mediation Training.

Modules include a one-day Session or a four-day Mediation Training Program.

For information on 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 Jennifer Trépanier 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
Jennifer Trépanier - Managing Editor

Contributors —
The articles in this Newsletter were prepared by Jennifer Trepanier, Nicola Simmons, Jasmeet Kala and Krista Moreau, who are associated with KEEL COTTRELLE LLP.