Education Law Newsletter

Fall 2021

Ontario won't require student immunization against COVID-19

On October 28, 2021, Dr. Kieran Moore, the Chief Medical Officer of Health stated that the province will not require students to be vaccinated against COVID-19 to attend school and will not add the vaccine to its list of mandatory immunizations, which includes illnesses such as polio and measles.

Dr. Moore indicated that the vaccine will not be integrated into the *Immunization of School Pupils Act* "at present".

"We have to look at the trends and the ongoing threat of this virus. If it persists season after season and is an ongoing threat, at that point we would review with government the integration of COVID vaccination status into the (law). At present our goal was to improve outbreak management within the school settings and to enable local public health agencies to have the data they need at their fingertips to be able to respond to outbreaks."

Also on October 28, Education Minister Stephen Lecce announced what he called an additional layer of protection, saying that starting in mid-November, take-home COVID-19 tests will be available at all public schools across Ontario.

The PCR tests have been available in schools in Toronto and Ottawa and some other communities in a pilot project. Mr. Lecce said that now all students in public schools will have access to the tests.

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If a student develops a COVID-19 symptom or is identified as a close contact of a positive case, they can pick up a test at their school, take the test at home and drop it off at a community location for processing, eliminating the need to book an appointment at an assessment centre.

The province also unveiled an expanded rapid testing program that would see students take regular tests over 10 days if public health and school officials are otherwise contemplating a whole-school dismissal due to high cases.

In addition, Minister Lecce announced that as of November 10, unvaccinated education workers will have to undergo rapid antigen testing three times a week instead of two as an added measure to protect schools from the risk of COVID-19.

Background

On September 13, 2021, Dr. Eileen de Villa, Medical Officer of Health for Toronto, wrote to the Toronto Board of Health, asking it to request the province require COVID-19 vaccination for eligible students based on their age. On September 27, the Board of Health adopted her recommendation.

Dr. de Villa's recommendation came after the chair of the Toronto District School Board, Alexander Brown, requested the Ontario government to add COVID-19 to the list of required vaccinations in a letter addressed to Dr. de Villa, Education Minister Stephen Lecce and Ontario's Chief Medical Officer of Health Dr. Kieran Moore.

Under the Act, adding COVID-19 to the list of "designated diseases" does not need to be legislated, but can be done by Ontario's Minister of Health.

While some health experts are concerned that adding COVID-19 to the mandatory list could antagonize vaccine-hesitant parents and make them less open to persuasion, Dr. Anna Banerji, an infectious disease expert at the Dalla Lana School of Public Health, said that the COVID-19 vaccines should be compulsory for eligible children and youth.

"We have vaccines for diphtheria, diseases that are very rare, so why not ensure vaccination against COVID-19 in the middle of the pandemic's fourth wave when we're trying to keep kids in school?"

"Having these kids vaccinated could save some of their lives, or prevent a lot of kids from suffering and prevent (COVID-19) from being spread to other people in the community. I support it – I think it's the right thing to do."

Unexpected good news

Several weeks into the academic year, the Delta variant was driving higher COVID-19 infections in public school classrooms compared to last fall. In Ontario, one in five new COVID-19 cases in the province are school-related, compared with just seven per cent last fall. For example, schools accounted for 902 cases the week of September 20, or roughly 20 per cent of the total cases in the province. In the same period during the fall of 2020, schools accounted for 189 cases or seven per cent of all cases in the province.

However, outbreaks of COVID-19 in Ontario elementary and secondary schools are down considerably from where they were at the end of September. Public health experts credit vaccinations, masks ventilation upgrades, cohorting and other protective strategies as helping to keep the virus under control in classrooms.

Research indicates that outbreaks in both elementary and secondary schools started to grow in mid-September, about a week after most classes began following the summer holidays. However, the rate at which elementary outbreaks grew was far higher than that of secondary schools, where most students are fully vaccinated against COVID-19. By September 20, ongoing outbreaks in elementary schools sat at 35, more than triple the 11 recorded cases in secondary schools on the same day.

Public health experts caution that with children between the ages of 5 and 11 still unable to receive the vaccines, a reduction of public health measures along with the coming flu season and colder weather will likely lead to an increase in the number of infections in schools.

Colin Furness, an infection control epidemiologist at the University of Toronto said that the "only really big biome for COVID now is primary schools. To me, they're the canary in the coal mine. The canary is fine but it's not necessarily going to stay that way."

Dr. Furness indicated that in the event of future outbreaks, they are likely "to show up and wreak havoc" in elementary schools.

Pediatric specialists report that most COVID-19 infections in children seem to be mild, and this appears to be true with the Delta variant. However, as the virus circulates more easily, the number of severe cases could increase in proportion to the wider community.

A small number of children are developing a life threatening condition called multi-system inflammatory syndrome or MIS-C. This is an inflammatory reaction in the body about four weeks after the infection with COVID-19. The inflammation can affect the heart, blood vessels and other organs, which can make some children very ill and in need of urgent care. Other children who contract the virus have lingering symptoms for months.

On October 1, 2021, Pfizer Canada submitted its initial trial data for the use of its COVID-19 vaccine in children aged five to 11 to Health Canada. On October 18, Pfizer asked Health Canada to approve its COVID-19 vaccine for children. The Pfizer vaccine for children ages five to 11 could receive approval from Health Canada by the end of November.

In initial trials, Pfizer tested a much lower dose, a third of the amount that is in each adult dose, in a study involving 2,268 kindergarten and elementary school-aged children. After their second dose, the company said that these children developed antibody levels just as high a teenagers and young adults getting the regular strength shots.

Public health units are preparing for vaccination rollout across the province

Public health units across the province are preparing to vaccinate children ages five to 11 once the COVID-19 vaccination is approved for them. Toronto Public Health (TPH) confirmed that it had formed a planning group that includes health partners, school boards, community representatives and the province. The medical officers of health for Peel Region, Middlesex-London, Hamilton and Ottawa indicated that they were making arrangements for the rollout of this new vaccination program. For example, the medical officer of health for Peel Region said that his public health unit is "ready to deploy a vaccine strategy" for that cohort, pending approval from Health Canada and guidance from the province and would keep residents informed on a timeline.

Dr. Vinita Dubey, as associate medical officer of health at Toronto Public Health recently said that "vaccinations have been proven very effective at lowering risks of severe illness, hospitalization and death."

"This is why TPH supports and recommends provincial policies that encourage and increase COVID-19 vaccination among eligible school students."

Dr. Dubey stated: "Vaccinations in the school setting will protect our school community and help build on our progress towards ending this pandemic."

The question arises as to whether the Ontario Health Minister will accept the recommendations of Toronto Public Health, the Toronto District School Board and many other organizations and public health units and add COVID-19 to the list of designated diseases under the *Immunization of School Pupils Act*. In the event that the Minister of Health accepts the recommendations, the questions arise as to how the legislation will operate, will parents be permitted to apply for an exemption and what types of exemptions will be permitted.

The *Immunization of School Pupils Act*

Ontario's only express enforcement of vaccination is set out in the *Immunization of School Pupils Act*, which governs which immunizations are required for students to attend school. The *Immunization of School Pupils Act* requires students to complete a program of immunization against all designated diseases listed under the Act, and requires students to provide proof of such vaccination – or to object through a specific exemption process – in order to continue to access the school.

Under section 3(1) of the Act, the parent of a student must cause the student to complete the prescribed program of immunization in relation to each of the following *designated diseases*:

- Diphtheria;
- Tetanus;
- Polio;
- Pertussis (whooping cough);
- Measles;
- Mumps;
- Rubella;

- Meningococcal disease; and
- Varicella (chicken pox).

However, a student can be exempt from these immunization requirements for (1) medical reasons; or (2) conscience or religious belief, if his or her parent completes the exemption process set out section 3(3) of the Act.

Exemption process

Where the exemption is sought for medical reasons, the parent must complete a "Statement of Medical Exemption" that has been signed by a physician or nurse practitioner, and submit this form to their local public health unit.

Where the exemption is sought for conscience or religious belief, the parent must attend an immunization education session (which discusses basic information about immunization, vaccine safety immunization and community health, and immunization law in Ontario), in order to obtain a Vaccine Education Certificate signed by a public health unit. The parent must also complete a "Statement of Conscience or Religious Belief," and have it sworn by a commissioner for taking affidavits in Ontario. Finally, the parent must make copies of their Vaccine Education Certificate and the sworn "Statement of Conscience or Religious Belief" and submit the originals to their public health unit.

Exclusion or suspension of students pursuant to ISPA

Should a student fail to complete the program of immunization, or the exemption process, required by the Act, the student may be excluded and/or suspended from school in certain circumstances. Under section 12 of the Act, a student may be excluded from a school where:

(a) of the medical officer of health is of the reasonable opinion that there is an outbreak (or immediate risk of an outbreak) of a designated disease at the school; and

(b) the medical officer of health has not received:

   i. a statement from a physician, nurse, or prescribed person confirming completion of prescribed program of immunization; or

   ii. a statement of medical exemption signed by a physician or nurse

Similarly, under section 6 of the Act, a student may be suspended from school where:

(a) the medical officer of health has not received:

   i. a statement from a physician, nurse or prescribed person confirming completion of a prescribed program of immunization;

   ii. an unexpired statement of medical exemption; or

   iii. a statement of conscience or religious belief/ parental completion of education session

(b) the medical officer of health is not satisfied that the pupil has completed or will complete a prescribed program of immunization.

Decisions from the Ontario Health and Services Appeal and Review Board consistently uphold the validity of such exclusions and suspensions where a student fails to complete the immunization program or exemption process required by the Act.[1]

Given the relative novelty of the COVID-19 virus, COVID-19 is not listed as a designated disease under the Act, and therefore vaccination against COVID-19 is not currently mandatory for eligible students to attend school in Ontario.

Dr. Moore has confirmed that the province will continue to review trends and the ongoing threat of the virus. In the event that the virus persists season after season and presents an ongoing threat, the decision to make COVID-19 vaccination mandatory for eligible students may be revisited.

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1 See *LRH v Noseworthy*, 2019 CanLII 88572; *JB v Eastern Ontario Health Unit*, 2018 CanLII 31877; *IB v Kyle*, 2018 CanLII 30998.

Arbitrator finds no obligation to reimburse expenses in transition to remote work

In *Toronto District School Board v. CUPE Local 4400*, the CUPE Local 4400 (the Union) brought forward grievances arising from the transition of the Toronto District School Board (the Board) employees to remote work due to the COVID-19 pandemic. In a decision released on April 9, 2021, Arbitrator Eli Gedalof dismissed the grievances and concluded that the Board reasonably exercised its management rights during the transition to remote work.

Background

On March 12, 2020, the Government of Ontario began to close all public schools in the province, with closures and remote learning eventually extending to the end of the school year. During the 2020-2021 school year, the Government of Ontario mandated schools to open and close multiple times. Due to the school closures, many Board employees were obligated to work from home.

The Union's position

The Union argued the Board should reimburse its employees for their out of pocket expenses they incurred while transitioning to remote work. These expenses range from $20/month to $1,000 and include office supplies, furniture, technology, internet and utility expenses. The Union argued that the Board's failure to reimburse the members' out of pocket expenses was an unlawful restriction on its members' compensation and an unreasonable and arbitrary exercise of its management rights, which was inconsistent with the collective agreement and the *Employment Standards Act, 2000* (ESA). Further, the Union argued the Board had been unjustly enriched by passing its operating expenses to its employees. They also argued that the Board had imposed technological changes without giving proper notice and that the Board had altered the terms and conditions of employment and consequently, breached seniority rights.

The Board's position

The Board argued there was no legal basis in the collective agreement, the ESA, or in equity for reimbursing out of pocket expenses incurred due to remote work as the circumstances were not under the Board's control. In April 2020, the Board issued a Reimbursement Policy to manage reimbursing employees for expenses, which provides for employees to obtain pre-approval for expenses. The policy includes the following:

- Learning supplies or courier costs incurred after April 16, 2020 will not be reimbursed;
- Purchases of office supplies or computer accessories that are essential to staff's remote work arrangement will need to be reviewed on a case-by-case basis to determine eligibility for reimbursement. Staff must request pre-approval from their supervisory officer before making the purchase;
- These purchases are only permitted if it is considered an essential item for the work they are performing, and the supervisory officer pre-approves this purchase and
- Out of pocket purchases for any technology, equipment or computer peripherals (including headset or document cameras) will not be reimbursed.

Subsequently, the Board updated the Reimbursement Policy in May 29, 2020 to include the following:

> Generally, staff's out-of-pocket purchases of technology equipment, computer peripherals (*e.g.* headsets, printers, etc.) and supplies (*e.g.* printer toner) for the work from home arrangement will not be reimbursed. These purchases are only permitted if they are considered essential item(s) for work they are performing, and the supervisory officer preapproves the purchase.

Furthermore, the Board argued that changes related to the COVID-19 pandemic did not constitute technological changes under the collective agreement.

Finally, the Board argued that they did not breach seniority rights by implementing changes to protect health and safety during a global pandemic.

Questions

Arbitrator Gedalof considered three main questions:

1. Has the Board violated the collective agreement, the *ESA* or been unjustly enriched by "passing on the costs" of remote learning to its employees or has it reasonably exercised its management rights?
2. Has the Board implemented technological changes without giving proper notice, in breach of the collective agreement?
3. Has the Board altered terms and conditions of employment in a manner inconsistent with the collective agreement?

The Arbitrator's decision

Arbitrator Gedalof concluded that the Board reasonably exercised its management rights and did not violate the collective agreement or the ESA. The Arbitrator also found that the Board had not been unjustly enriched. The Arbitrator reviewed the collective agreement and found no specific provisions regarding expenses incurred when it is "illegal, impossible or unsafe to enter the workplace in order to work, but where it is possible to do so from home at some personal cost".[1]

Due to the silence in the agreement, the Board instituted the Reimbursement Policy as a reasonable way to address the situation since it provided employees with an opportunity to obtain the Board's approval for expenses, and to explore alternatives to making out of pocket purchases. Arbitrator Gedalof noted that many employees purchased items without exploring other options with the Board, or prior to obtaining the Board's approval for reimbursement. Additionally, the Board did not breach section 13 of the ESA because they did not withhold wages. In regards to the unjust enrichment argument put forth by the Union, the Arbitrator found that the Union failed to satisfy the three criteria for unjust enrichment, which are an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment.[2]

Second, Arbitrator Gedalof concluded the Board did not violate provisions of the collective agreement, which required the Board to discuss technological changes with the Union no later than 12 weeks prior to the introduction of the change. Since the changes were made due to government-imposed mandates for school closures, the transition to remote working did not constitute a technological change as contemplated by the collective agreement. Moreover, the Board did not make the decision to impose remote work. The Arbitrator stated:

> It would be simply absurd to conclude that the parties intended to capture such temporary emergency measures with this provision, given the 12 week advance notice requirements. It would mean, effectively, that in order to comply the Board was required to put any technological changes necessitated by the shutdown on hold for 4 months, or in this case beyond the end of the school year and the immediate need to even implement those changes.[3]

Arbitrator Gedalof concluded the provision requiring 12-week notice for decisions to introduce technological changes did not include temporary emergency measures in response to the COVID-19 pandemic. Therefore, the Board did not violate the collective agreement.

Finally, the Arbitrator found that the Board did not alter the nature of employment resulting in a breach of seniority rights. Since the changes to the positions were caused by temporary emergency measures to protect workplace health and safety during a global pandemic, the Arbitrator found that the parties did not intend to include such changes in the collective agreement. However, the Arbitrator noted that if the changes were made in different circumstances, this might constitute a breach of seniority rights.

1 *Toronto District School Board v CUPE Local 4400*, 2021 CanLII 27922 (ON LA) at para 26.
2 *Peter v Beblow*, [1993] 1 S.C.R. 980
3 *Ibid* at para 30.

Key takeaways

Arbitrator Gedalof's decision in *TDSB v. CUPE Local 4400* highlights the deference attributed to school boards during the COVID-19 pandemic where health and safety concerns are paramount. As long as the school board's actions are reasonable, labour-law decision-makers will interpret collective agreements in favour of the employers who have had to adapt to new circumstances. The COVID-19 pandemic was unprecedented and most, if not all, collective agreements will not include provisions to address such circumstances. Labour law decision-makers will likely have to continue to interpret silence in order to adapt to the ongoing COVID-19 pandemic.

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Mask requirements, Ontario schools and the *Human Rights Code*

The 2020/21 school year brought Ontario schools many COVID-19-related challenges. Among them was the requirement that schools develop and enforce policies requiring students, faculty and staff to wear facemasks.

In Ontario, the Ministry of Education (MOE) issued guidance in July 2020 requiring students in grades 4 to 12 to wear masks while indoors. The guidance encouraged but did not require kindergarten to grade 3 students to wear masks. The MOE later updated its guidance to require that all students in grades 1 to 12 wear masks in school and outdoors during recess where physical distancing is not possible.

Masking requirements in Ontario schools are subject to the duty to accommodate under the *Human Rights Code*. This duty to accommodate comes into play when an individual requires an accommodation based on a protected ground – for example, disability or creed. allegations that schools, as well as other business and employers, have failed to accommodate employees, students and customers regarding masking requirements have already been raised before the Human Rights Tribunal of Ontario (Tribunal).

Under the Ministry of Education's return to school guidance, updated on Sept. 2, 2021, masks are required for students from grades 1 to 12 for the 2021/22 school year. This year schools have the benefit of reviewing some early decisions released by the Tribunal regarding challenges to masking requirements, providing guidance for educators to comply with human rights legislation.

Sharma v. Toronto

After the *Sharma* decision, human rights tribunals in Ontario and British Columbia released decisions clarifying the evidence required to demonstrate that an applicant has a disability or creed that engages the Code.

In one of the decisions, the applicant complained to the Tribunal that a store discriminated against her on the basis of disability when she wasn't allowed to enter without wearing a mask. However, the applicant refused to provide the Tribunal with any information on her alleged disability or how it interfered with her ability to wear a mask. All the applicant was willing to submit was that wearing a mask makes it "very difficult to breathe" and "causes anxiety." The Tribunal found that this explanation was insufficient to trigger protection of the Code:

> [T]he Code only protects people from discrimination based on certain personal characteristics, including disability … Any claim of disability discrimination arising from a requirement to wear a mask must begin by establishing that the complainant has a disability that interferes with their ability to wear the mask.

The Tribunal dismissed the application on a preliminary basis without proceeding to a full hearing.

In *Civiero v. Habitat for Humanity Restore*, the Tribunal similarly dismissed an application on a preliminary basis when the applicant failed to submit

evidence of her disability. However, the Tribunal later agreed to reopen the application when the applicant submitted evidence of her disability.

These decisions demonstrate that the Tribunal requires actual evidence that an applicant has a disability that fits under the Code.

In another application, the applicant was refused entry to his workplace for not wearing a mask. The applicant claimed that masking contravened his "religious creed." The Tribunal dismissed the application on a preliminary basis, stating:

> "[The applicant] has not pointed to any facts that could support a finding that wearing a mask is objectively or subjectively prohibited by any particular religion, or that not wearing a mask 'engenders a personal, subjective connection to the divine or the subject or object of [his] spiritual faith.'"

This case demonstrates that a human rights tribunal will require proof of an actual religious creed prohibiting wearing a mask in order to engage a human rights code.

CL v. Toronto District School Board

In February 2021, the Human Rights Tribunal of Ontario issued its first preliminary decision considering an objection to masking in the school context. In *CL v. Toronto District School Board*, a parent brought a human rights application on behalf of his child against the Toronto District School Board (the "Board"), as well as the Ontario Ministry of Education, the Ontario Ministry of Health, Toronto Public Health, Dr. David Williams, Dr. Eileen de Villa, Stephen Lecce, Christine Elliott and Doug Ford.

The parent alleged that the public health mandate requiring children to wear masks at school is too severe, unnecessary, unwarranted and unconstitutional. He also alleged that his child had a speech impediment and that the requirement to wear a mask impeded his child's learning and communication. The parent submitted correspondence between himself and the Board with respect to his request for a masking exemption.

In a preliminary decision, the Tribunal found that it does not have jurisdiction over general allegations of unfairness with respect to public health mandates and dismissed the application against all respondents except the Board, as well as the majority of the allegations against the Board that dealt with "philosophical and political disagreement." However, the Tribunal ordered that the allegations relating to the student's disability that allegedly required an exemption from masking at school would continue in the Tribunal's process.

Takeaways for educators and parents

The masking cases to date offer several important lessons:

- Objections to masking based on personal preferences or singular belief will not engage the protection of the Code. The Ontario Human Rights Commission confirmed in a public statement that it is not aware of any tribunal or court decision that found a singular belief against masks amounted to a creed under the meaning of the Code. The Tribunal requires proof of an actual medical reason or religious creed prohibiting wearing a mask in order for the Code to be engaged. This onus may be difficult for many applicants to meet.
- At the Tribunal, an applicant claiming a disability-based exemption will be required to provide proof of their disability and its restrictions and limitations. However, the Tribunal may be willing to provide applicants with a second chance to provide evidence of their disability.
- Some individuals have misunderstood regulations that apply to retail stores to mean that schools may not require documentation of a need for masking accommodations from students or staff. This is not the case. Employees and students seeking accommodations at their places of work or study should follow the regular accommodation processes when seeking masking accommodations.
- The Code requires that schools accommodate employees and students up to the point of undue hardship in administering masking requirements. Schools should be aware of the difference between masking exemptions and masking accommodations. Appropriate accommodations may be available to address a student or employee's needs while maintaining health and safety and stopping short of providing a complete exemption. Possible

accommodations may include complete exemptions, periodic breaks from masking, installing physical barriers, alternate workspace arrangements, remote work, remote learning and alternative forms of personal protective equipment. Individual needs for accommodation must be assessed on a case-by-case basis.

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Arbitrator rules that preparation time is required for remote teaching

The COVID-19 pandemic has led to major changes across most industries worldwide, requiring re-evaluation of industry standards and service delivery. Each school board across the province faced extraordinary challenges as they attempted to navigate new and changing information along with multiple guidelines recommended by various experts across the country and worldwide. Remote learning and remote teaching are new areas schools have been required to navigate.

In a labour arbitration decision released on March 5, 2021, Arbitrator S. L. Stewart heard a policy grievance brought by the Elementary Teachers' Federation of Ontario (ETFO), related to the Hamilton-Wentworth District School Board's (the Board) alleged failure to provide an appropriate preparation time model for the virtual classroom.[1]

Background

Prior to the pandemic, the Collective Agreement provided for 250 minutes of preparation time in a five-day cycle for teachers assigned to Kindergarten to Grade 8 classrooms. In accordance with the Collective Agreement, preparation time for homeroom teachers required scheduling during the 300-minute instructional day and should be free from supervision, teaching, recess, nutritional breaks and other assigned duties. The model required a qualified teacher to provide instruction to the class while the homeroom teacher utilized their allotted preparation time for curriculum development, evaluation or other activities as deemed appropriate in the teacher's judgement. Preparation teachers were required to develop, deliver and evaluate curriculum to be delivered during their assigned coverage time.

The grievance claimed that the Board failed to hire adequate qualified teachers, thereby failing to replace teachers by another federation member during their preparation time. This inaction led to an increased workload for homeroom teachers. The Board referred "to the challenges of adjusting to new realities, while honoring the Collective Agreement"[2] and denied the grievances on the basis that there was no violation of the Collective Agreement.

The matter in dispute was whether the Board's model for the virtual classroom provided the appropriate classroom coverage outlined in the Collective Agreement.

As school boards scrambled to develop and implement appropriate curriculum delivery in consideration of various possibilities, they developed models that would encompass, full in person learning, full virtual learning and a hybrid delivery model hosting both options. The Ministry of Education delivered a Policy Memorandum on remote learning to help guide the school boards as they navigated the new platforms of education delivery. The policy required that school boards be able to provide remote learning on request that was aligned with the provisions of their Collective Agreements. The policy indicated that the terms of the Collective Agreement must prevail when developing teaching and delivery models. The memorandum went on to instruct

1 *Hamilton-Wentworth District School Board and Elementary Teachers' Federation of Ontario*, 2021 Canlii 18496 ONLA.
2 *Ibid* at para 2.

the boards that a total of 300 minutes of instructional time was to be delivered through a combination of synchronous and asynchronous learning. Asynchronous learning could include but was not limited to teaching tools such as videos, assigned tasks or discussion boards. Teachers were required to be available to students at all times during their assigned timetable even when asynchronous learning tools were utilized.

The Board developed a model where students Grades 4 through 8 in the English track received core French teaching and students in the French track received core English teaching. During the scheduled preparation time for kindergarten teachers, a Designated Early Childhood Educator (DECE) is present in the virtual classroom for that period. No preparation teachers were assigned to replace the homeroom teachers in grades 1 through 3.

The virtual learning model considered the preparation time as asynchronous learning. The Board released an FAQ document stating, "For students in Kindergarten to Grade 3, 50 minutes at the end of the day will be independent learning time where their teacher will not be connected. This is a time for our younger students to complete learning started earlier in the day, practice new skills, read, exercise, or disconnect. The Designated Early Childhood Educator will be connected in Kindergarten classes during this time".[3]

There was some confusion as to whether federation members needed to create independent study content for this period. The Board clarified that they did not need to create further content, but should "create a culture" where students were aware that they should use the time to complete assignments, homework or exercise. The Board did acknowledge that homeroom teachers needed to develop curriculum that the preparation time teacher would normally manage, as they were now responsible for ensuring all parts of the provincial curriculum were delivered.

The Board submitted that under the management rights clause of the Collective Agreement claiming that the "cost savings associated with not providing a teacher for preparation time for these remote teachers was a consideration in reaching this decision, as costs to the Board associated with managing responsibilities in the pandemic were of significant concern".[4] The Board further submitted that the students were under the care and control of their parent or guardian negating the requirement for a preparation time teacher. Parents had the option of turning screens off during this time.

The ETFO submitted that these methods were not in keeping with the provisions of the Collective Agreement, which required boards to avail a qualified federation member to cover the preparation time. Further, the availability of a DECE or parent did not qualify as an appropriate federation member to who are required to provide instructional minutes to the students.

Arbitrator Stewart weighed the right of the Board to manage during the pandemic and the requirement to keep to the terms of the Collective agreement. In her concluding comments, the Arbitrator stated, "My obligation as an arbitrator is to interpret and apply the provisions of this Collective Agreement and the existence of a pandemic does not relieve me from that responsibility."

The award ultimately determined that the Board failed to comply with the provisions of the Collective Agreement. Compliance was left to the parties to discuss and resolve.

Key takeaways

This decision illustrates the challenges that school boards may face when designing and implementing solutions to manoeuvre to different remote learning models in light of the express terms and conditions in a Collective Agreement, which were based on in-person learning. This challenge is bolstered by the Ministry of Education's memorandum stating that collective agreement terms must prevail over alternate arrangements that do not comply with the provisions of the agreements. Boards should be alerted to the importance of complying with the terms of collective agreements when navigating new and uncertain changes in education delivery models.

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3 *Ibid* at para 14.
4 *Ibid* at para 13.

Student's Charter rights not violated: Ontario Court of Justice

A September 2020 Ontario Court of Justice ruling sheds new light on reasonable search standards in the interests of safety.

Background

On June 27, 2019, high school student Maria Calabretta stood in a security line to get into her prom. School administrators were checking everyone's bag for weapons, alcohol and drugs. The mandatory search was to ensure students' safety rather than to investigate criminal activity.

When she reached the front of line, Ms. Calabretta agreed to have her bag searched by the school's vice-principal. Visible in the bag was a small section of straw. Further searching revealed a baggie containing two grams of cocaine. The vice principal handed the baggie to an attending police officer and Ms. Calabretta was arrested.

The Ontario Court of Justice ruled that a mandatory search by a school official, though lacking reasonable grounds, had not violated the student's right to freedom from unreasonable search and seizure under section 8 of the *Canadian Charter of Rights and Freedoms*. The ruling, issued by Justice Ghosh, is the latest development in case law on moderated privacy expectations in school settings.

The trial

Several factual details became relevant at trial. The mandatory search policy was put in place by the school, not the police. The school only searched students' property. The prom ticket, which prohibited drugs and alcohol, did not specify that mandatory search was a condition of entry. Each search typically lasted five to 10 seconds. The police were present, but not involved in the search process. The vice-principal stated that she was not aware of any student refusing the search, but that resistance would likely have resulted in them asking the student to leave.

The main issue at trial was whether there had been a violation of Ms. Calabretta's constitutional freedom from unreasonable search and seizure. Ms. Calabretta claimed there had, saying that a mandatory search policy for all attendees lacked reasonable grounds.

Section 8 protections

Section 8 of the Charter guarantees freedom from unreasonable search and seizure. Its purpose is to safeguard an individual's "reasonable expectation of privacy," a concept used for determining whether a search has taken place.

A person's reasonable expectation of privacy is deliberately context-specific. In school settings, students have a diminished privacy expectation due to the statutory duty of school officials to ensure the safety of students. This moderated constitutional standard, which applies to environments both on and beyond school premises, was clearly set out by the Supreme Court of Canada in *R v M(MR)*:

> [33] … [T]he reasonable expectation of privacy of a student in attendance at a school is certainly less than it would be in other circumstances. Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require searches of students and their personal effects and the seizure of prohibited items. It would not be reasonable for a student to expect to be free from such searches. A student's reasonable expectation of privacy in the school environment is therefore significantly diminished.

The moderated standard of *M(MR)* has led to questions about the correct assessment of reasonableness in the context of school settings. In the present case, there was no disputing that Ms. Calabretta had a reasonable expectation of privacy in the contents of

her bag. Her case hinged on whether the mandatory search was reasonable under the circumstances. In ruling that it was, the court clarified standards for school searches that include the question of whether reasonable grounds are necessary, the degree of a search's invasiveness and the role of voluntary consent.

Reasonable grounds

Do school officials require reasonable grounds to search students' property? The Supreme Court in *M(MR)* was clear that, in general, a search of a student by school officials is permissible when "there are reasonable grounds to believe that a school rule has been or is being violated, and that evidence of the violation will be found in the location or on the person of the student searched."

Ms. Calabretta's defence focused on the fact that the mandatory search lacked reasonable grounds. They argued that the school did not justify the search policy with specific or informed suspicions about individual students. The court agreed with this point, but insisted that the mandate to ensure a safe environment won out. In his decision, Justice Ghosh pointed to other familiar situations in which safety concerns moderate the boundaries of reasonableness:

> [15] … The Supreme Court in *M.(M.R.)* articulated a somewhat helpful analogy that when people cross the border or board a plane, everyone accepts that they will be searched or subjected to intrusive inquiries about property where a far lesser expectation of privacy is engaged. Any related seizures are generally *Charter*-protected. Perhaps this is an inelegant analogy, but like a voluntarily attended prom party, you cannot even enter some amusement parks in Canada without having your bags searched.

The court might have added to its analogies other events where bag searches are both mandatory and uncontroversial, such as music festivals and nightclubs. Those scenarios, according to the court, uphold a clear message: while reasonable grounds provide an important starting point for the assessment of school searches, they do not impose an absolute standard. The correct interpretation of *M(MR)*, said Justice Ghosh, was a context-specific approach to reasonableness attentive to all circumstances:

> [19] … I accept the direction in *M.(M.R.)* that generally school authorities will require "reasonable grounds" to search and seize items from a student or her property. However, the court also acknowledged in discussing the reasonable grounds standard applicable to school authorities … that "Searches undertaken in situations where the health and safety of students is involved may well require different considerations … All the circumstances surrounding a search must be taken into account in determining if the search is reasonable." Despite the absence of reasonable grounds, the mandatory security search of bags at a prom is reasonable in all the circumstances.

The circumstances in Ms. Calabretta's case include the comparatively unobtrusive nature of the bag search. There were no full-body searches and the court considered it a "trite point of law" that bag searches are decisively less intrusive than the seizure of bodily samples.

As well, school officials at the prom did not look at students' cell phones, a variety of property search that case law has deemed comparatively more intrusive and oftentimes less reasonable.

Absence of a waiver

The court was similarly unsympathetic that Ms. Calabretta had not waived her constitutional right to be free from unreasonable search and seizure. The court explained that waivers become relevant typically under coercive circumstances – for example, police stops for impaired driving – which involve forced compliance with state-sanctioned interventions.

Ms. Calabretta attended prom voluntarily. She remained in "an obvious security line" aware that she would soon be subject to a mandatory search by a school official. Unlike the student in *M(MR)*, whose search was conducted in a principal's office with police present, Ms. Calabretta had the option to leave the line, get rid of the drugs and return to prom. The expected search yielded two grams of cocaine, which were immediately given to an off-duty police officer. Ms. Calabretta's consent to a search that lacked a coercive element was an important factor in the court's rejection of a section 8 violation.

Takeaways

The case of Maria Calabretta is the latest example of the courts dealing with the diminished expectation of privacy in school settings. The decision clarifies the boundaries of reasonable search practices in the following ways:

- Despite the absence of reasonable grounds, the mandatory search of bags at a prom is reasonable due to overriding interests of student safety.
- The mandatory search is reasonable in part because it is a search of property, not of persons, and is comparatively unobtrusive. The seizure of body samples or searching cellphones is subject to different standards.
- A student's voluntary attendance at a prom, and the lack of coercion or police involvement, remain important considerations in assessing reasonableness.

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Arbitrator rules they cannot adjudicate local terms of teachers' collective agreements

A recent decision in an arbitration involving the Ontario English Catholic Teachers' Association (OECTA), the Ontario Catholic Schools Trustees Association (OCSTA) and the Crown in Right of Ontario sets an important precedent for school boards across the province.

Background

The *School Boards Collective Bargaining Act*[1] (the Act) outlines the process for collective bargaining in the education sector. The process divides bargaining for the collective agreement into two parts, central and local negotiations. The parties to central negotiations determine the scope of issues for bargaining at the central table to form the Scope Agreement. In this case, central negotiations took place between the OECTA and OCSTA, with the Crown as a participant, forming Part A of the collective agreement. These terms are binding on all school boards. Local negotiations took place between the individual school boards and the OECTA, forming Part B of the collective agreement.

On August 8, 2018, the central parties authored a Scope Agreement, which included the preparation and planning and supervision provisions. On October 26, 2020, OECTA filed a notice of dispute with OCSTA alleging a violation by 17 school boards of the preparation, planning and supervision provisions of the "Central Scope Agreement".

The parties agreed to the central terms set out in the central collective agreement on March 12, 2020. Although preparation, planning and supervision were included in the Scope Agreement, the parties did not include provisions pertaining to preparation, planning or supervision in the central terms. Each of the 17 school boards included language in their local agreements pertaining to preparation, planning and supervisions. Part B of the collective agreements between the school boards and OECTA includes provisions addressing preparation, planning and supervision. These include provisions surrounding violations of how the preparation, planning and supervision provisions are to be remedied. For example, in many local agreements, Part B includes provisions permitting local union/management committees to address any contravention or breach of the preparation, planning or supervision provisions.

A provision in the Memorandum of Settlement specifically states "where a matter was agreed as a central item and no collective agreement language was agreed to, any existing collective agreement language […] shall continue in force and effect for the term of this agreement and the matter shall not be available for local bargaining".

The issue for determination was one of jurisdiction. The OCSTA and the Crown argued that the arbitrator hearing a central grievance is without jurisdiction to hear and determine the dispute because the preparation, planning and supervision provisions are local terms, and the arbitrator is limited to hearing cases involving central terms only.The OCSTA and the Crown argued that the arbitrator's jurisdiction was limited to determining whether there has been a violation of a central term of the collective agreement and not on whether there has been a violation of a central scope issue.

The OCSTA and the Crown asserted that the Act clarifies the arbitrator's jurisdiction is limited to a determination of whether there has been a violation in the interpretation, application or administration of a central term of the collective agreement. They state there is no room in either the Act of the collective agreement for a finding of jurisdiction to determine if there has been a violation of the Scope Agreement.

The OCSTA and the Crown also asserted that in this case OECTA is seeking one central grievance to enforce Part B provisions in force in 17 different school boards, most, if not all, of which have different provisions. They stated that this is not contemplated by the Act and the provisions of the Act regarding arbitrations in respect of local terms should be followed.

1 *School Boards Collective Bargaining Act*, S.O. 2014, chapter 5.

OCSTA pointed out the administrative issues that would result if the preparation and planning and supervision provisions were determined to be a central term. It was noted that while OCSTA has collective bargaining responsibilities in respect of central issues, which no doubt have a significant impact on school boards, OCSTA has no authority to dictate to those school boards how to administer Part B of the collective agreement.

In turn, the OECTA noted that the Memorandum of Settlement explicitly states that Part B consists of both local and "certain central terms". OECTA argued that because the preparation and planning and supervision provisions were part of the Scope Agreement, parties to local bargaining could not negotiate the terms of the preparation and planning and supervision provisions thereby making them central terms.

The Act created a central system of collective bargaining with a transparent process that provided a set of central terms and conditions, uniformly applied to all school boards across Ontario. In keeping with the intent of the Act, Arbitrator Steinberg found that the preparation, planning and supervision provisions were not a central term of the agreement, and that the central parties had deliberately decided not to add the preparation, planning and supervision as a central term.

Arbitrator Steinberg stated:

> "In my view, in light of the fundamental significance of central bargaining and the resulting central terms of the collective agreement, OECTA's argument does not give sufficient weight to the clear intent of the legislation that central terms are to be negotiated between the parties in a transparent process resulting in a clear delineation between central and local terms. Moreover, it would have the illogical result of making a scope issue a central term where the central parties have not only not negotiated about the matter but deliberately decided to not include it as a central term."

Arbitrator Steinberg concluded that OECTA's approach would ignore the clear intent of the central parties as expressed in the Memorandum of Settlement.

As a result, the arbitrator concluded that preparation, planning and supervision provisions are not central terms of the collective agreement and he has no jurisdiction to adjudicate the grievance.

Key takeaways

Moving forward, this decision will limit the ability of unions within the education sector to file central grievances pertaining to issues that are solely covered in local terms of collective agreements. While the trustees' association is the employer bargaining agency for collective agreement responsibilities in respect of central issues, it has no authority to dictate local school boards on how to administer Part B of their respective collective agreements. Given the statutory scheme and role assigned to the trustees' association, it likely cannot be required to pay damages itself for any violation of the collective agreement by school boards.

On August 19, 2021, OECTA filed a notice of application for judicial review of this decision before the Divisional Court. The matter is scheduled to be heard on June 1, 2022.

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Ontario issues PPM 165 on teacher hiring practices in schools

A new Policy/Program Memorandum (PPM) from Ontario's Ministry of Education (Ministry) allows schools more flexibility to hire teachers based on merit, diversity, and the needs of the school, rather than by seniority.

What you need to know

- On February 22, 2021, the Ministry issued its long-awaited *Policy/Program Memorandum No. 165*[1] (PPM 165) concerning teacher hiring practices for publicly funded school boards in the province.
- PPM 165's purpose is to "provide direction to school boards on the development and implementation of fair, consistent, and transparent teacher hiring policies and processes" by fostering "a well-prepared, qualified and diverse teacher workforce with the knowledge, skills, and attributes needed to ensure that all students reach their full potential."
- On March 31, PPM 165 came into effect and replaced the *Interim policy for school board hiring practices* released in October 2020 following the revocation of Regulation 274/12.[2]

Background

From 2012 until October 2020, Ontario's teacher hiring practices were largely governed by Regulation 274/12, the procedures of which generally prioritized seniority in hiring. For example, when filling long-term assignments of thirty days or less, school boards were required to offer, without an interview, the position to one of the five most senior qualified occasional teachers from the long-term occasional teachers list.

In 2019, the Ministry consulted with various stakeholders to solicit feedback on Regulation 274/12. Several associations, including the Ontario Principals' Council, identified hiring for merit and diversity rather than seniority as a key area for improvement, citing concerns about their inability under the existing Regulation to hire the best teacher for the position. The former *Interim Policy* and newly issued PPM 165 emerged out of these consultations and respond to several concerns identified during the process.

PPM 165

PPM 165 identifies several inter-dependant components that boards are expected to integrate into their respective teacher hiring policies:

- Qualifications and merit;
- Diversity, equity, and human rights;
- Employment mobility;
- Fairness and transparency; and
- Monitoring and evaluation.[3]

These components and their related requirements are discussed below.

In addition to the qualification requirements set out in Regulation 298,[4] school boards should also rely on the following when developing their selection and evaluation criteria:

- Valuing applicants' demonstrated experience and commitment to creating a safe, inclusive, equitable, accessible, and high-quality learning environment; providing the best possible program as determined by the principal, and considering applicants' demonstrated:
    - o teaching commitment
    - o experience or time spent in a particular school
    - o suitability for a particular assignment
- Valuing applicants' additional experiences, skills, backgrounds, lived and work experience
- Responding to school and board priorities based on clearly defined criteria, including qualifications[5]

1 Ontario Ministry of Education, *Policy/Program Memorandum 165* (22 February 2021) online: Ontario
2 *Hiring Practices*, O. Reg. 274/12 [Repealed].
3 Above note 1.
4 *Operation of Schools – General*, R.R.O. 1990, Reg. 298.
5 Above note 1.

Diversity, equity and human rights

PPM 165 recognizes that the promotion of human rights and equity is "vital to achieving a diverse and representative teacher workforce to meet the needs of a diverse student body," and that "there is a positive effect on the educational experience and outcomes of historically under-served students when teachers reflect their identities."[6] To achieve these outcomes, PPM 165 requires school boards to:

- Ensure that all employment policies and practices are anti-discriminatory.
- Work to intentionally identify and remove barriers for Indigenous peoples and equity-seeking groups at each stage of the hiring process.[7]

The latter requirement "involves examining each part of the teacher hiring process — from setting job requirements and employment conditions to establishing the recruitment, application, screening, interview, and selection processes so that no stage creates a barrier for candidates."[8]

Employment mobility

Pursuant to PPM 165, school boards' teacher hiring processes "should address employment mobility by providing equal opportunity to all OCT [Ontario College of Teachers] certified teachers to apply for any position (occasional, long-term occasional, or permanent) for which they are qualified irrespective of where they are currently employed."[9]

PPM 165 lists several components to be included in teacher hiring policies to support a fair and transparent process for candidates:

- A conflict of interest disclosure policy based on the conflict of interest template provided by the Ministry of Education;
- Clear steps to avoid nepotism [including the minimum standards outlined in the *Teacher Hiring Conflict of Interest Template* attached to PPM 165];
- A process for adherence to the bona fide or "legitimate" job requirements and qualifications through the hiring process, while following the requirements outlined in Regulation 298…;
- A process and criteria for all aspects of teacher hiring — setting job requirements, postings, outreach and recruitment, application, screening, interview, and selection processes, including the communication of these steps;
- A process for tracking and communicating with applicants;
- Processes to promote demographically diverse hiring panels that draw on the different experiences, skill sets, and educational and professional backgrounds in the board;
- Criteria for evaluating candidates based on more than one source;
- Provisions for structured evaluation criteria, questions and tools that prevent interview and selection bias;
- A process for providing constructive interview feedback for candidates, upon request;
- A process for providing accommodation based on needs related to the *Human Rights Code*; and
- A process for the disclosure of information to the appropriate bargaining units.[10]

Lastly, the PPM notes that school boards "should develop a monitoring and evaluation plan to review the effectiveness of their teacher hiring policy and make adjustments as necessary."[11]

6 *Ibid.*
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 *Ibid.*
11 *Ibid.*

Recommended practices for school boards

In addition to the required, interdependent components above, PPM 165 also requires boards to develop several effective practices to "remove barriers and gaps in teaching hiring." These recommended practices fall under two main areas, which are summarized briefly below.

(1) Candidate selection practices

PPM 165 makes the following suggestions regarding the candidate selection process:

> Hiring policies should acknowledge the importance of supporting renewal in the teacher workforce and help to provide career pathways for newly qualified teachers, including those who have been on long-term assignments for a number of years and have not yet secured a permanent position…
>
> Encouraging diversity of the teaching workforce in the school board is vital because the workforce should be reflective of the diversity in the province.[12]

(2) Monitoring and evaluation practices to strengthen accountability

The PPM also lists several suggestions for the monitoring and evaluation of school boards' hiring practices themselves. These suggestions, which relate to the collection of data during the hiring process, the review of systems used to store and/or manage such data, and the creation of fairness in employment plans, include the following:

- The collection of teacher workforce demographic data is the first step to helping boards identify employment barriers and foster a diverse and inclusive workplace.
- When developing "a voluntary workforce census and analyzing results, boards should consider the following questions:"
    - Whether the teacher workforce reflects "the social identities of the student population and the region … [and] the diversity of the province"
    - Which "identities, and intersections of identifies should be represented in the teacher workforce … to meet the needs of the … [board's] community and the diversity of the province"
    - Whether the members of some under-represented communities "are reluctant to self-identify," and whether it is therefore "necessary to use alternative or supplement [sic] approaches to a census"[13]
- School boards should "explore how they can collect voluntary demographic information from candidates in order to assess whether there is diversity of candidates … applying for positions, as well as where there may be barriers to candidates in the teacher hiring process."[14]

Regarding Employment Systems Review (ESR), PPM 165 provides that:

> [e]ach school board should examine the employment systems in which its workforce data is collected to determine whether they create barriers for potential candidates or otherwise unfairly impact their chances to succeed…
>
> A centralized applicant tracking and file management system for all hiring-related documentation is recommended as a key monitoring tool.

The final recommendation is that school boards, employee representatives, and unions "should use the result of the workforce census and ESR to develop a fairness in employment plan that includes goals and timelines for closing … gaps and removing … barriers [identified by the ESR]."[15]

12 *Ibid.*
13 *Ibid.*
14 *Ibid.*
15 *Ibid.*

Key takeaways

The introduction of PPM 165 provides many school boards with increased discretion and greater flexibility to hire the best, most qualified candidates based on the unique needs of their schools and communities. This greater flexibility is particularly crucial now when many schools continue to face increased staffing challenges as a result of the COVID-19 pandemic.

Despite the increased flexibility suggested by PPM 165, it is important to note that it must be applied in accordance with applicable law, and hiring decisions must continue to respect (and are subject to) the rights of denominational school boards and of French-language schools.

Similarly, and significantly, PPM 165 must also be applied in accordance with existing collective agreement obligations, and the terms of a collective agreement will prevail in the event of a conflict between the two. In other words, the discretion of certain school boards with regard to hiring decisions may still be largely controlled by the provisions of a collective agreement, particularly when the procedures therein are centrally negotiated at the provincial level (as is the case with Catholic school boards in Ontario).

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Ontario Labour Board rules no jurisdiction in COVID-19 related appeal

The Ontario Relations Labour Board ruled it does not have jurisdiction to hear appeals from several unions related to a guide issued by the Ministry of Education on reopening schools during COVID-19.

In light of the March 2020 school closures due to the pandemic, the Ministry of Education (MOE) issued the *Guide to Re-Opening Schools* (the Guide) for the 2020/21 school year.

The Ontario Secondary School Teachers' Federation, the Ontario English Catholic Teachers' Association, the Elementary Teachers' Federation of Ontario and L'Association des Enseignantes et des Enseignants Franco-Ontariens (the Unions) alleged that the Guide violated the *Occupational Health and Safety Act* (OHSA). They requested that a Ministry of Labour (MOL) inspector review the Guide and issue orders to correct alleged deficiencies, specifically regarding implementing minimum standards for class sizes, ventilation, student socialization, face mask usage and busing procedures.

The Unions submitted four appeals under section 61 of the OHSA. In his decision, OLRB Chair Bernard Fishbein, held that in order for the OLRB to have jurisdiction to hear the appeals, after the MOL conducted an investigation an order must have been issued or there must have been refusal to issue an order.

Last year the MOE prepared the Guide without consulting the Unions and released it on June 17, 2020. The MOE noted the Guide was preliminary and not intended to be comprehensive.

Over the next three months, the Unions tried speaking with the MOE to try and persuade them to mandate minimum provincial standards they felt were required to protect teachers and students from COVID-19. The requests included:

- Develop minimum standards for class sizes, students socialization, busing and ventilation;
- Increase funding from the government to meet reopening guidelines;
- Consult with the Provincial Working Group – Health and Safety (PWGHS) on the guidance and resources provided to schools for all school boards' reopening plans, and;
- Copy the PWGHS on all health and safety recommendations from the government to school boards.

The MOE did not agree to these requests. On July 30, 2020, the MOE issued a revised version of the Guide and stated the "document constitutes a return to school direction […] approved by the Office of the Chief Medical Officer of Health." The Unions were still not satisfied with the updated Guide because they felt it did not adequately protect against COVID-19 transmission. They continued to try speaking with the MOE.

On Aug. 13, 2020, the Unions requested an urgent meeting with the Minister of Labour and the Minister of Education in a lengthy letter, which alleged that the Guide did not "take every precaution reasonable in the circumstances to protect teachers and education workers as is required by s. 25(2)(h) of *OHSA*." They also requested that an MOL inspector conduct an inspection on whether the Guide complies the government's *OHSA* obligations.

The Minister of Labour (the Minister) replied to the letter a few days later, emphasizing that inspections occur based on the facts at each specific workplace and that inspectors would conduct inspections when school resumed in September.

The Minister also ensured inspectors met with school boards to discuss return to work plans. Finally, the Minister offered to schedule a meeting with the Unions and the Chief Prevention Officer (CPO) to discuss further. The Minister's reply did not state that an inspector would be present at the meeting. The Unions accepted the invitation and made no further mention of their request for inspectors.

On Aug. 24, 2020, the Minister met with the CPO and MOL and Union representatives. There was no inspector at the meeting. The Minister refused to make the orders the Unions requested regarding the alleged deficiencies in the Guide, but ensured the MOL

inspectors were visiting school boards to provide training and support for the reopening of schools.

The Unions were disappointed with the meeting, particularly with the absence of an inspector. The CPO invited the Unions to submit their requests in writing and the Unions did so on Aug. 25, 2020.

The Minister responded on Aug. 28, 2020, largely repeating what he said in his previous reply: inspectors can only issue orders on a case-by-case basis and they remain committed to upholding the health and safety of workers.

Feeling they had no other recourse, the Unions submitted these appeals on Aug. 31, 2020. They sought an order for the MOE to comply with their obligations to protect education workers by amending the Guide to include specific minimum standards on class sizes, ventilation, student socialization, face masks and busing protocols. They also sought an order to stop work until the inspector withdraws or cancels the prior order.

The OLRB decided it did not have jurisdiction to hear the appeal, because there had never been an order or a refusal to make an order by an MOL inspector.

The OLRB reiterated the principle from *Dunsmuir v New Brunswick* that statutory tribunals such as the Labour Board get their jurisdiction from the assigning statute. Section 61(1) of the *OHSA* gives the OLRB jurisdiction to hear appeals from orders of an inspector. Section 61(5) clarifies the definition of an order to mean inspector-issued orders and refusals to make orders by inspectors.

There was no dispute that there was not an order issued by an inspector here – the question was whether there had been a refusal to issue an order by an inspector. The OLRB decided there had never been a refusal to make an order by an inspector and as a result, they did not have jurisdiction to hear the appeal.

Section 61 of the *OHSA* requires that an inspector must make the refusal to issue an order in order for an appeal to be available. In these circumstances, there was no inspector refusal. The Unions requested to have an inspector attend the Aug. 24, 2020 meeting, but this did not happen.

The Unions attempted to argue that the Minister and the CPO held themselves out as inspectors, therefore they should be able to rely on their assumption that the Minister and CPO were inspectors during the meeting. This argument did not persuade Chair Fishbein. He ruled it contradicts the Unions' argument that the Minister and the CPO in fact inspectors. He also stated it cannot be said that the Minister held himself out as an inspector just because the Unions asked for one to come to the meeting.

Even if it was decided that the Minister was an inspector, there still would not have been a refusal to issue an order within the meaning of section 61(5) of the *OHSA*. Chair Fishbein ruled that the OLRB does not have the authority to issue the orders that the Unions were seeking in the appeals, as the Labour Board only has "all the powers of an inspector."

This case highlights that the MOL, through its inspectors, only has authority to issue orders for employers on a case-by-case basis. While the Unions cannot pursue province-wide orders through the *OHSA*, individuals or joint health and safety committees still have a course of action to have their concerns addressed by triggering an inspection.

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