

---

## **What Does the OLRB Teachers Pandemic Decision Mean for OHS Appeals?**

By: [Ryan J. Conlin](#) and [Jeremy Schwartz](#)

In one of the most significant OH&S decisions issued during the COVID-19 epidemic, the Ontario Labour Relations Board (hereinafter the “OLRB”) has ruled that is not legally permitted to hear an appeal filed by a number of teachers’ unions (hereinafter “unions”) alleging that the safety standards issued by the Ontario Government for school safety do not comply with the OHS.

### **The Case**

The facts of this case are lengthy and complicated. Below, we have set out only a very high-level overview of what led the matter to proceed at the OLRB. Obviously, safely reopening schools has been one of the most complex and controversial political and legal issues created by the pandemic. The Ministry of Education (hereinafter “MOE”) issued a document entitled the “*Guide to Reopening Schools*” (hereinafter “the Guide”) following a consultation process with medical experts that set out specific standards for school safety.

The unions took significant issue with the standards set out by the Guide and had several meetings with representatives of both the MOE and the Ministry of Labour, Skills, Training and Development (hereinafter “MOL”). Notwithstanding a request by the unions, the MOL did not have an Inspector present at the various meetings which were held to discuss the Guide. The Chief Prevention Officer was actively involved in the discussions. The unions requested that the MOL issue specific orders that would impose stricter OH&S standards for schools than were contemplated by the Guide.

Neither the MOE nor the MOL agreed to the changes to the Guide that the unions proposed. In response, the unions filed an appeal under section 61 of the OHS, asking that the OLRB issue a number of specific orders that would apply to all publicly funded schools.

The OLRB decision did not address whether the unions were legally correct that the Guide did not comply with the OHS. The results in the case turned entirely on whether the unions had the right to bring a sweeping OHS appeal that related to every publicly funded school in Ontario. The Ontario Government contended, and the OLRB agreed, that the OHS did not authorize the OLRB to hear such a case and that the issues would need be litigated based on specific alleged OHS violations at specific schools.

## **The OLRB Decision**

Section 61(5) of the OHSA allows a party to appeal the refusal of an Inspector to issue an order or make a decision under the authority of the OHSA or the Regulations thereunder. The crux of what the OLRB had to decide was whether an Inspector had refused to issue the Orders that the unions asked for and whether the OLRB could determine these issues for all publicly funded schools.

The OLRB described the position of the Ontario Government as “straight forward,” and that it was essentially based on the reality that there had been no refusal by an Inspector of the MOL to issue any orders. The government argued that neither the Minister of Labour nor the Chief Prevention Officer was an “Inspector” within the meaning of the OHSA. The government further argued that a party can only appeal where an Inspector has investigated a specific violation of the OHSA at a specific worksite and has refused to issue an order.

The unions argue that the government’s position was unduly technical and was contrary to a number of legal decisions, which have held that the OHSA should be given a very broad interpretation. It is our view that the unions faced an uphill legal battle from the outset to get this appeal heard. The OLRB has repeatedly rejected previous appeals by education sector unions to adjudicate concerns that transcended a specific work site. Not surprisingly, the OLRB cited these earlier decisions when it concluded that the OHSA did not authorize it to effectively hear a what would essentially amount to a “class action” section 61 appeal.

In a lengthy decision, the OLRB concluded that the OHSA only allows an appeal from the decision of individual Inspectors relating to specific workplaces. The OLRB pointed out that nothing in the decision prevented union members from engaging in work refusals or the unions from pursuing individual appeals.

The unions contended that accepting the government’s argument would result in the OLRB being flooded with potentially thousands of appeals relating to specific issues at individual schools. We believe that the OLRB correctly rejected this argument. The potential for an avalanche of litigation does not alter the type of appeal the OHSA empowers the OLRB to hear. Further, as the OLRB pointed out, the myriad of issues which have arisen in the healthcare sector has not ground the OLRB to a halt since the pandemic began some 7 months ago.

It should be noted that this was purely a legal decision about the OLRB’s powers. There was no substantive ruling about whether schools were safe or whether the Guide was legally sufficient. There is little doubt that some of the issues raised in this appeal will be litigated in the context of specific schools down the road.

We expect that some specific decisions of the OLRB about an individual school would have an impact on other cases (i.e. where worksites are materially similar). Those appeals would

effectively be treated as “test cases” which would very likely impact how issues were treated provincewide.

In such cases, the decision of the OLRB may, as a practical matter, be treated as an education sector wide decision. For example, in the famous *Blue Mountain* case, the OLRB ruled on the obligation of a resort to report to the MOL under section 51 of the OHSA when a guest was injured. The decision of the OLRB and ultimately the Ontario Court of Appeal upon judicial review, established the legal standard for all employers.

Clearly, there will be some OHSA appeals that will be very specific to the circumstances of a particular workplace (i.e. involving mechanical equipment at a specific school). Such cases will be less relevant to other workplaces and employers.

You can learn more about government COVID programs, and other pressing HR-law issues, at our upcoming [34<sup>th</sup> Annual Employers’ Conference](#) on November 5 ~ complimentary webcast edition.

### **What does the Decision Mean for Employers?**

This case does not really alter the legal landscape for how section 61 appeals work. Cases must relate to alleged violations of the OHSA at a particular workplace and are not a mechanism to adjudicate industry wide disputes (although some decisions will have that practical effect) or to adjudicate how the MOL enforces the legislation.

One “sleeper” issue that emerges from this case is that it represents one of the first legal tests of the argument that a once in a century pandemic dramatically alters historic norms about how labour and employment law operate. The unions characterized this case as one of “first impression” at the OLRB, in light of the current pandemic. We disagree that this issue is one of first impression, as the OLRB has dealt with this type of jurisdiction question on several occasions in the education sector in the past.

The only aspect that is different, is the existence of what all parties agreed was once in a life pandemic. The decision of the OLRB confirms that the pandemic does not alter the jurisdiction of the OLRB or give it extended powers to expand the type of decision the law allow it to make.

There are numerous legal skirmishes that are on-going, where various parties are saying the pandemic dramatically changes how the law works without any changes from the Legislature. This decision confirms that the pandemic itself does not alter the legal jurisdiction of an administrative tribunal. It will be interesting to see if the pandemic changes other areas of labour and employment law as more decisions are made.

For more information, **please contact:**

[Ryan J. Conlin](mailto:rconlin@stringerllp.com) at [rconlin@stringerllp.com](mailto:rconlin@stringerllp.com) or 416-862-2566

[Jeremy D. Schwartz](mailto:jschwartz@stringerllp.com) at [jschwartz@stringerllp.com](mailto:jschwartz@stringerllp.com) or 416-862-7011

---

*UPDATE* is an electronic publication of Stringer LLP  
390 Bay Street, Suite 800, Toronto, Ontario M5H 2Y2  
T: 416-862-1616 Toll Free: 1-866-821-7306  
E: [info@stringerllp.com](mailto:info@stringerllp.com) I: [www.stringerllp.com](http://www.stringerllp.com)

*The information contained herein is general information only and should not be relied upon as a substitute for legal advice or opinion.*