ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **1228-20-HS**

Ontario Secondary School Teachers' Federation, Applicant v **The Crown in Right of Ontario as represented by the Ministry of Education**, The Crown in Right of Ontario as represented by the Ministry of Labour, and A Director under the Occupational Health and Safety Act, Responding Parties v Canadian Union of Public Employees, and Council of Trustees' Associations, Intervenors

OLRB Case No: **1236-20-HS**

Ontario English Catholic Teacher’s Association, Applicant v **The Crown in Right of Ontario as represented by the Ministry of Education**, The Crown in Right of Ontario as represented by the Ministry of Labour, and A Director under the Occupational Health and Safety Act, Responding Parties v Canadian Union of Public Employees, and Council of Trustees' Associations, Intervenors

OLRB Case No: **1239-20-HS**

Elementary Teachers’ Federation of Ontario, Applicant v **The Crown in Right of Ontario as represented by the Ministry of Education**, The Crown in Right of Ontario as represented by the Ministry of Labour, and A Director under the Occupational Health and Safety Act, Responding Parties v Council of Trustees' Association, and Canadian Union of Public Employees, Intervenors

OLRB Case No: **1240-20-HS**

L'Association des enseignantes et des enseignants franco-ontariens, Applicant v **The Crown in Right of Ontario as represented by the Ministry of Education**, The Crown in Right of Ontario as represented by the Ministry of Labour, and A Director under the Occupational Health and Safety Act, Responding Parties v Canadian Union of Public Employees, and Council of Trustees' Associations, Intervenors

BEFORE: Bernard Fishbein, Chair

APPEARANCES: Susan Ursel, Parmbir Gill, Kristin Allen and Norman Westbury for the applicant, Ontario Secondary School Teachers' Federation; Paul Cavalluzzo, Bernard Hanson and David Church for the applicant Ontario English Catholic Teachers Federation; Howard Goldblatt, Dan Sheppard and Sharon O'Hallloran for the applicant, Elementary Teachers Federation of Ontario; Lise Leduc and Pierre Leonard for the applicant, L'Association des enseignantes et des enseignants franco-ontariens; Ben Ratelband, Tim Lawson, Ryan Plener and Brenda Jones for the responding party, The Crown in Right of Ontario as represented by the Ministry of Education; Joe Ferraro and William Robertson for the responding party, The Crown in Right of Ontario as represented by the Ministry of Labour and A Director under the Occupational Health and Safety Act; Jackie Esmond for the intervenor Canadian Union of Public Employees; and J.P. Alexandrowicz, Nadine Zacks, Jennifer Lamarche, Janet Edwards, Penny Mustin, Percy Toop and Veronique Anne Towner-Sarault for the intervenor Council of Trustee Associations

DECISION OF THE BOARD: October 1, 2020

1. This decision raises important questions of the limits of the Board's jurisdiction under, or as the applicants choose to frame it, access to, the *Occupational Health and Safety Act,* R.S.O. 1990, c.O.1, as amended ("*OHSA"* or the "statute"*)* all in the midst of a pandemic which some, and the applicants, have characterized as the greatest public health crisis to have arisen in our lifetime.

The Parties

2. These are four purported appeals of Inspector's Orders under Section 61 of *OHSA*. They are filed by the Ontario Secondary School Teachers' Federation ("OSSTF"), the Ontario English Catholic Teachers' Association ("OECTA"), the Elementary Teachers Federation of Ontario ("ETFO") and L'Association des enseignantes et enseignants franco-ontariens ("AEFO") (hereinafter collectively referred to as the "Unions"). The Unions are the statutory bargaining agents for teachers (including occasional teachers) in the publicly funded education sector

(including elementary and secondary schools in both the English and French and Catholic school systems) in Ontario pursuant to the *Education Act,* R.S.O. 1990, c. E.2 (the "*Education Act")* and the *School Boards Collective Bargaining Act, 2014*, S.O. 2014 c.5 (the "*SBCBA*") under which the Unions bargain collective agreements with the appropriate local school boards. I have been told they represent approximately 190,000 teachers (and other educational workers) in approximately 5000 schools across the entire province. Equally, I am told that there are 72 school boards in the province.

3. The responding parties are the Crown in Right of Ontario (the "Crown") as represented by the Ministry of Education ("MOE") and the Ministry of Labour ("MOL") and A Director under *OHSA*, (the "Director"), made a party to all appeals pursuant to *OHSA*. The Crown is also a participant in the central negotiations in the bifurcated system of bargaining (both local and provincial) provided for under *SBCBA* with the various Unions and designated employer bargaining agencies for their respective local school boards, and which central agreements or terms are incorporated into and form part of each collective agreement the Unions reach with the appropriate local school board. Both the Crown and the Director have filed responses to these appeals (hereinafter sometimes collectively referred to as the "Government").

4. Interventions have also been filed by the Council of Trustees Associations (the "CTA") and the Canadian Union of Public Employees ("CUPE"). The CTA is a council of the four trustee associations that are the designated employer bargaining agencies (corresponding to the Unions) for their respective local school boards in central bargaining under *SBCBA* as well as being a designated employer bargaining agency itself directly involved in the central bargaining for educational support workers, some of whom are separately represented by some of the Unions. CUPE, among the many other employees it represents, also is the bargaining agent and central bargaining agency under *SBCBA* for the largest group of educational support workers. In the bargaining under the *SBCBA* for the educational support workers CUPE (and its locals) represents, CUPE deals with the CTA in the central bargaining. Again the negotiated central terms form part of each collective agreement with the applicable local school boards. No one objected to the status of either the CTA or CUPE to intervene and they were accordingly granted intervenor status.

These Appeals and this Decision

5. On or about March 17, 2020 the Government invoked its powers under the *Emergency Management and Civil Protection Act,* R.S.O. 1990, c.E.9 to declare a state of emergency in Ontario as COVID-19 "constitute(s) danger of major proportions that can result in serious harm". On March 12, 2020, the MOE issued a Ministerial Order to close schools which has been extended a number of times until September 2020.

6. The appeals relate to the MOE's *Guide to Re-opening Schools* (the *"Guide"*) which the Unions (and CUPE) say violates *OHSA* and the alleged refusal of the MOL (or an inspector of the MOL) to inspect and/or issue orders to the MOE under *OHSA* to correct the alleged deficiencies of the *Guide*, primarily to direct certain minimal provincial standards be imposed for a number of issues.

7. The Government says that the appeals do not make out a *prima facie* case of violation of *OHSA* and that the Board has no jurisdiction to deal with them under *OHSA* and in particular, Section 61, under which they have been made. In particular the Crown says that no order was made or refused to be made by an inspector under Section 61 and in any event the MOE is not the employer (or supervisor) of any of the teachers (or educational support workers). The Government says the appeals should be dismissed preliminarily.

8. In accordance with the request of the Unions, the Board scheduled a Case Management Hearing ("CMH") to deal with these appeals to determine how they should be litigated. Following that CMH, the Board issued a decision dated September 11, 2020 incorporating the agreements of the parties both how and timelines how the case should be litigated. In particular, the parties agreed, and the Board directed, that the first issue that would be determined was the "narrowed" jurisdictional question (narrowed in the sense that the Government was not abandoning its other jurisdictional objections but proceeding with this question first without prejudice to its other objections) of whether an order of an inspector had been made or refused to be made under Section 61. In particular, this decision does not deal with the question of whether the MOE is an employer for purposes of *OHSA,* as the Unions asserted, and which the Government and the CTA strongly disputed. That question will be determined later if necessary.

9. This decision deals with the jurisdiction of the Board under Section 61, or, again put another way, whether Section 6(1) and *OHSA* have properly been engaged in the circumstances alleged (or not disputed) here. Because of the urgency of this matter generally and the expedited scheduling of the balance of these appeals by the Board, at the request of the Unions, I have strived to prepare this decision with some reasons as quickly as possible. The decision does not purport to deal with every issue that the parties disputed (or argument, some of which, with all due respect, were overly broad touching upon either the merits of the complaint or other preliminary issues which everyone clearly understood would not be determined in this decision) or every case cited or given to me (of which there were many), only those necessary for me to reach the conclusions outlined here. The reasons are reflective of the context and the time constraints urged by the parties.

10. For the reasons outlined below I have preferred the Government's position and dismiss these appeals.

The Background more elaborated—but still only briefly summarized and not in all of the detail pleaded by the Unions

11. Following the closing of schools, the MOE retained the Hospital for Sick Children ("Sick Kids") to prepare a report entitled "COVID-19: Recommendations for School-Reopening" which was released on June 17, 2020 ("the Sick Kids report"). The Unions were neither consulted nor advised of the retention of Sick Kids to prepare the Sick Kids report. It was explicitly acknowledged to be preliminary and "not intended as an exhaustive school guidance document or implementation strategy". The Sick Kids report did not recommend face masks for children returning to school, class size maximums or ratios (although observing smaller classes would aid in physical distancing but not to the extent that the daily school routine should be disrupted to accommodate smaller class sizes—the same as its suggestion for "cohorting" classes for younger age groups or children with medical and/or behavior problems) and any particular busing standards.

12. On or about June 19, 2020 the MOE released a document entitled "Approach to re-opening schools for the 2020-2021 school year" which directed school boards to prepare a plan for three possible return to work scenarios: fully remote learning for all students; a complete return to conventional in-school learning; and a hybrid involving elements both.

13. Earlier, following the release of a task force report in 2014, recommending its creation, in the central bargaining under *SBCBA* (and reaffirmed in the most recent round) of all the Unions (including CUPE and other educational support worker unions) Letters of Understanding were agreed to creating a Provincial Working Group—Health and Safety ("PWGHS"). Its mandate was set out in its Terms of Reference:

> "…to function as an ongoing provincial level Working Group that supports the Internal Responsibility System, a whole school approach, and a positive health and safety culture for occupants of Ontario's publicly funded schools. The Working Group will review health and safety issues with system-wide application and make recommendations to the Ministry of Education, Ministry of Labour and/or school boards that may lead to resolution of such issues and where appropriate, assist with implementation. Where exemplary practices are commonly identified through consensus by the members, those practices will be appropriately shared. The Working Group will strive to facilitate health and safety excellence, while complementing, and not usurping, existing local structures and legal obligations under the *Occupational Health and Safety Act* and the *Education Act*."

The Unions, CUPE, other educational support worker unions, the employer designated bargaining agencies, and other interested parties are members of the PWGHS. The MOE participates as "facilitator/secretariat" and the MOL as technical advisor.

14. In June, July and August of 2020, the Unions sought to engage the MOE either directly and/or raised at the PWGHS (or subcommittee) meetings, minimum provincial standards the Unions thought the MOE should require of School Boards to protect teachers and students from the transmission of COVID-19 upon school reopening, including:

> (a) PWGHS meetings as required (minimum bi-weekly—the PWGHS had only resumed meetings on June 24, 2020 after they had been discontinued (whether on agreement or not) in June 2019 because of then ongoing provincial bargaining with the Unions, and others, and then only after the Unions had been pressing for their resumption after the declaration of the emergency and the closing of the schools) and forming various subcommittees to work on, *inter*

alia, what guidance and resources school boards would need for the reopening of schools (including personal protection equipment ("PPE") and masking) and review and make recommendations for all school board reopening plans;

(b) The PWGHS be copied on all health and safety recommendations from the Government to school boards;

(c) That minimum standards be developed for various items such as class size, cohorting of students, busing, ventilation (including adopting the American Society of Heating, Refrigerating and Air-Conditioning Engineers ("ASHRAE") minimum standards for "Reopening of Schools and Universities"; and

(d) The Government provide increased funding to meet guidelines for reopening (reducing cohort sizes, adequate staffing for enhanced cleaning, IT support, mental health supports, upkeep of facilities and supplies and PPE).

The MOE did not agree, at the PWGHS or otherwise, to these Union proposals.

15. On or about July 29, 2020, Sick Kids released an updated report (described as a "living document"). After being reviewed by more contributors, it departed from the original Sick Kids report in some ways, recommending (not necessarily on a unanimous, but majority basis), very briefly simplified and summarized, *inter alia*:

(a) Masking for middle and high school students, whenever physical distancing could not be maintained—but not for elementary school students;

(b) Physical distancing in class rooms so masks need not be worn constantly—one metre for elementary and two metres for secondary school students;

(c) Smaller class sizes as a priority but no pre-specified class size because of the limited evidence;

(d) Attention to improving classroom ventilation (both maintenance and increasing the proportion of outside air brought in) in consultation with the appropriate experts; and

(e) Encouraging the use of outdoor or environments with improved ventilation (e.g. keeping windows open weather permitting).

16. On or about July 30, MOE issued the *Guide.* It states:

> This document constitutes a return to school direction issued by the Ministry of Education for the purposes of section 5 to Schedule 1 of O. Reg. 364/20 (Rules for Stage 3 Areas) originally made under the *Emergency Management and Civil Procedure Act* and continued under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020.* This direction has been approved by the Office of the Chief Medical Officer of Health.

17. It would be an understatement to say that the Unions were not satisfied with the Guide—both with its development, their limited (if any) involvement in its preparation and, probably most importantly, with its allegedly insufficient or inadequate contents. Again, the Unions sought to engage the MOE directly and their representatives sought to raise at the PWGHS their concerns. To the extent that the Government responded to the concerns of the Unions, if at all, the Unions were not satisfied that their concerns were adequately addressed, if at all.

18. In August the Government did announce changes or new developments how the Guide would be implemented. For example, on or about August 13, 2020, the MOE announced it was "unlocking" funding in the form of permitting school boards to use up to 2% of their operating budget taken from the prior year accumulated surplus to support a return to school plan, with an additional $11 million in funding for school boards that did not have sufficient reserves. For example, on or about August 18, 2020, the MOE issued a memorandum to the Chairs of district school boards, Directors of Education and School Authorities, entitled "School Reopening". It announced, *inter alia,* that schools could

"stagger their reopening over the first two weeks of school where this approach would enhance the health and safety preparedness" and imposed three key requirements, that: 300 minutes of instruction be delivered per day; limit "indirect and direct" student contacts "to approximately 100 students in the school"; and that secondary school students "must be in a maximum of two-in-person cohorts". The memo set out some models that had "emerged" to meet the requirements.

19. The Unions say that there was much confusion and uncertainty at the school board level (and probably on a much broader scale) about the school reopening. That is probably a fair statement.

20. However the Unions still felt that none of their concerns had yet been adequately addressed by the Government. Briefly stated, those concerns included:

> (a) There were not adequate limits on either class sizes (especially where adequate physical distancing could not be achieved) prescribed for all schools in the province or "cohorting" of students;
>
> (b) There were not minimum measurable standards for ventilation in school (and that the ASHRAE standards were not adopted);
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> (c) The masking policy did not apply to all students; and
>
> (d) Busing standards were not addressed at all, or in any meaningful way.

21. As a result, in addition to their other efforts (public or otherwise), including unsuccessful attempts by the Unions to have these issues raised at meetings of the PWGHS, on August 13, 2020, the Unions delivered a lengthy letter to the Minister of Labour and the Minister of Education, requesting an urgent meeting with them, their representatives and representatives of various trustee associations and designated employer bargaining agencies (including the CTA). Specifically it also stated:

> "We also request that a representative of the Ministry of Labour's Health and safety inspectorate be in attendance, pursuant to section 45(6) of the *Ontario Occupational Health and Safety Act*…"

I would only note here that Section 45(6) is in Part V of *OHSA* dealing with the right to refuse or stop work where health and safety is in danger. It specifically deals with when certified members of a joint health and safety committee established under the statute disagree whether dangerous circumstances exist and may request that an inspector investigate the matter. The letter never elaborated how, at least in the Union's view, Section 45 (6) came into play.

22. The letter reviewed the Unions' concerns with the Guide at some length and in some detail and alleged that it does not "take every precaution reasonable in the circumstances to protect teachers and education workers as is required by s. 25(2)(h) of OHSA". It specifically stated:

> "Pursuant to OHSA, the Federations request that an inspector from Ministry of Labour conduct an inspection through the requested meeting regarding the Ministry's failure to protect the health and safety of our members and direct implementing province wide health and safety standards that address the above noted issues.
>
> The Federations take the position that the Ministry of Education has violated s. 25(2) (h) of OHSA by failing to implement province-wide health and safety measures that take every reasonable precaution necessary to protect the health and safety of our members working in elementary and secondary schools, school authorities and other public educational institutions in Ontario…
>
> The Federations are left with no alternative but to invoke the protections of the *Occupational Health and Safety Act,* pursuant to sections 25, 45 and other sections that may be implicated in this failure on the part of the government to engage in meaningful discussion and resolution of these pressing health and safety issues.
>
> Because of the urgency and importance of these fundamental issues, the Federations would be prepared to go directly before the Ontario Labour Relations Board before schools are reopened in September in order to obtain a final determination on whether the Guide complies with the obligations of the Government under OHSA "to take every reasonable precaution" to ensure that schools are a safe workplace for teachers and education workers. Most importantly, a timely and expeditious determination from

> that body, which is expert in health and safety matters, could provide a final determination of the safety of our schools before our students return to school. Our students deserve no less."

The letter was signed by the presidents of the Unions.

23. The Minister of Education never replied to this letter. However the MOE was continuing to issue memos to Directors of Education of School Boards; Memo B12 ("Optimizing Air Quality in Schools") and B14 ("Student Transportation Funding for Enhanced Cleaning and PPE for Drivers") on August 25 and Memo B14 ("Additional Funding for School Reopening"). Again the Unions were not notified that these memos were being issued nor were they consulted with respect to their contents. Suffice it to say the Unions did not regard the memos or the Guide as fully or adequately addressing their legitimate concerns (for example, it did not adopt the ASHRAE standards with respect to ventilation) and did not establish the provincial minimum standards they sought.

24. However the Minister of Labour ("the Minister") did reply to the Unions' letter by e-mail dated August 19, 2020. After describing the priority the MOL had given in enforcing health and safety for workers including teachers, agreeing that the law was clear that employers must take every reasonable precaution to protect their workers from hazards in the workplace, the Minister further asserted:

> "…My ministry's inspectors independently enforce the *Occupational Health And Safety Act* and its regulations…
> …The Ministry…determines whether an employer has complied with Ontario's labour laws based on the facts at each specific workplace. When school resumes in September, our health and safety inspectors will conduct reactive and pro-active risk-based inspections to enforce full compliance with Ontario's health and safety legislation."

The Minister further advised that MOL was conducting a "Return to Work" initiative, MOL inspectors were already meeting with safety staff and Joint Health and Safety Committee co-chairs at school boards across Ontario to discuss their return to work plans before they open their doors, and concluded:

> "I am encouraged by our initial work with the boards and remain committed to supporting school boards in creating workplace environments that Teachers and staff feel safe to

> return to. Workers and employers trust my ministry to be the impartial arbiter on workplace safety. Therefore, I must remain a neutral party in your conversations with the Ministry of Education. In keeping with my open-door Policy, I would be pleased to join a meeting with you and Ontario's Chief Prevention Officer [the "CPO"] to further this discussion. I am committed to putting the safety of our teachers and school staff first."

25. The letter did not state that an inspector would not be present at the meeting contrary to what the Unions had requested—it did not explicitly address the request at all. Notwithstanding that, by letter dated August 19, 2020, the Unions thanked the Minister for his letter and accepted the invitation to meet with the Minister. Although that letter expressed a hope for a successful meeting to learn more about what the MOL was doing and "provide you with our perspectives on what additional measures or procedures might be considered for the new school year" it neither reiterated their request that an inspector be there nor refused the invitation unless an inspector was present, i.e. did not explicitly make their attendance at the meeting conditional upon the presence of an inspector. The Unions say they attended the meeting because it would be "helpful" to attend a meeting with the CPO since the "CPO … has a broad range of responsibilities, including…setting province-wide training and safety program standards" (see Section 7.1 of *OHSA* and following).

26. The meeting took place by way of conference call on August 24, 2020 with the Minister, the CPO, various other officials of the MOL—but no inspector (and there was a roll call at the outset of the conference call)—and various representatives of the Unions and their respective counsel. Equally there were no representatives of trustee associations, designated employer bargaining agencies (including the CTA) or the MOE as the Unions had also requested. I need not go into the great detail about what the Unions alleged of who said what during the conference call. Suffice it to say the Minister did not agree to make the orders the Unions requested about their concerns with the alleged inadequacies of the Guide. Equally the Minister (nor anyone from the MOL) did not advise the Unions of the jurisdictional objection now being advanced here. Both the Minister and the CPO advised the Unions of the efforts of the MOL to date including visits by MOL inspectors to school boards to provide training to promote internal responsibility and other areas of concern. The Minister had to leave the conference call but left the CPO to address the questions and the positions of the Unions. The Unions expressed their disappointment with the shortness of the time

provided for the meeting and the absence of an inspector as they had requested. There is no dispute that there was a discussion with the CPO who advised the Unions that inspectors were already out visiting schools and school boards in preparation for the reopening of schools and among other things were referring to the Guide as a resource for them to use for the safe reopening of schools. In fact a significant number of inspectors' reports of these visits were filed to substantiate that. Each Union's counsel raised different questions about the alleged inadequacy of the Guide on various issues. Ultimately counsel for OSSTF indicated six provincial health and safety standards they wished the Ministry to issue or ask its inspectors to issue under *OHSA* to rectify the deficiencies of the Guide. The CPO did not commit to do so (nor, again, did he indicate any of the jurisdictional objections the Government now makes) but invited the Unions to set out their requests in writing. By letter dated August 25, 2020 the Unions did so—setting out the same orders that they wished the Minister or his "inspectorate" to make in view of the shortcomings of the Guide "since the MOL has not yet set such standards".

27. The Minister responded by e-mail dated August 28, 2020 to the Unions. The Minister did not make the orders the Unions wanted (and in fact did not specifically address the requested orders at all). The Minister largely reiterated the positions of his first e-mail to the Unions inviting them to the meeting in the first place. The Minister stated:

> "Section 25(2)(h) … of OHSA sets a performance-based standard for workplace health and safety Employers are required to take every precaution reasonable in the circumstances for the protection of a worker. They must assess and address hazards in the workplace, including COVID-19. In determining what precautions to take, they must consider the unique aspects of the work and their workplaces, such as a wide variety of classes, classrooms and schools. We strongly recommend that the joint health and safety committees be involved in this process…
>
> Our inspectors have considerable experience in enforcing the OHSA during the pandemic. Since March 2020, inspectors have conducted more than 18,000 COVID-19 related field visits and have issued more than 15,000 orders as a result of those visits. Inspectors can only issue orders on a case-by-case basis where they find a contravention of the OHSA involving a specific workplace.

> Our inspectors have the knowledge, training and experience to address occupational health and safety issues as and when they arise in the education sector. They remain committed to conducting inspections and investigations in a professional and timely manner, always looking to uphold the health and safety of workers."

28. The Unions did not reply. Rather on August 31, 2020, the Unions, asserting they were left with no other recourse in the face of the non responsiveness of the Government, filed these appeals. By way of relief the Unions sought from the Board *inter alia*:

> (a) An order that the MOE has violated Section 25 of *OHSA* by failing to put adequate **system-wide** measures in place to protect the health and safety of education workers from the risk of COVID-19 infection.
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> (b) An order that the MOE fully comply with its obligations pursuant to *OHSA,* and in particular its obligation to take every precaution reasonable in the circumstances for the protection of education workers prior to the reopening of schools on September 8, 2020.
>
> (c) An order under Section 57 (1) of the *OHSA* that the MOE shall comply forthwith with Section 25 (2) (h) of the Act forthwith and prior to September 8, 2020, including by **amending the Guide to included the following minimum standards:**
>
> > (i) That class sizes at elementary schools and secondary school at non-designated school boards be limited to 15-20 students or a lesser number if the 2 metre physical distancing standard cannot be maintained within the specific classroom;
> >
> > (ii) That the ASHRAE standards be adopted as the bare minimum requirements to address issues with ventilation and filtration in all public education worksites, and that Ontario specifically stipulate that school boards must:
> >
> > > 1. Install and maintain HEPA or better filters in each classroom and throughout the school and other board buildings, and to assess and provide

for other filtration and air circulation options as needed;

2. Upgrade existing heating, ventilation, and air conditioning (HVAC) systems to meet the ASHRAE standards;

3. Stipulate air exchange rates e.g. HVAC systems in accordance with the ASHRAE standards;

4. Provide for alternate measures for air circulation and buildings with no HVAC systems, e.g. those which rely on water heat;

5. Provide for alternative measures for air circulation and exchange in buildings with no or inadequate windows that open; and

6. Assess air flow/circulation in each classroom and throughout the school and board buildings and develop a plan for ensuring optimal air flow and filtration locally, considering how air flow will interact with other preventative measures such as Plexiglass barriers.

(iii) That cohorting standards be developed that take into account all potential points of incidental to school, including on busing and during after-school care, and that these standards apply not just to students but to all workers in elementary and secondary education settings in Ontario;

(iv) That all students be required to wear non-medical masks at all times during the school day, subject to reasonable exceptions for medical accommodations; and

(v) That standards for busing be implemented that require at a minimum the PSHSA recommendations.

> (d) An order that under Section 57 (6) of *OHSA* that the failure to implement measures to address the risks set out above contravenes Section 25 (2) (h) in such a way that these failures create a serious danger or hazard to the health and safety of education workers, and that **work at secondary and elementary shools and other public education worksite shall stop until this order is withdrawn or cancelled by the inspector.**
>
> (emphasis added)

There can be no doubt that the Unions were seeking orders to apply to all schools everywhere in Ontario directing minimum standards to be inserted into the Guide (which the Unions repeatedly reminded me was a "legal" directive binding on all public schools and all public school boards in Ontario—again something nobody disputed). Section 57 of *OHSA* invoked by the Unions is the authority granted to inspectors where there is non-compliance with *OHSA.*

29. There is no evidence, nor do the Unions allege, that they ever tried to directly engage an inspector with respect to their concerns, other than the correspondence with the MOL and the meeting as outlined above, and in particular with respect to any individual or specific workplace. There can be no dispute that the Unions have done this countless times before and have filed countless appeals to the Board under Section 61 when they have been dissatisfied with the result of that interaction with an inspector. At a minimum some of those cases were raised and commented upon in the arguments made to me. There is no dispute that there is no order issued by an inspector here. The question is whether there has been a refusal to issue an order (and there is no dispute that a refusal to issue an order is sufficient to ground an appeal under Section 61—See Section 61(5) of *OHSA*) of an **inspector** as Section 61 (1) appears to require. There is no dispute that there is no Board precedent exactly like this seeking the relief the Unions wish from the Board. The Unions say this is a case of first impression in unique (and involving a pandemic, once in a lifetime very urgent) circumstances.

The Legal framework

(a) The Jurisdiction of the Board

30. The Board is a tribunal created by statute and has only those powers conferred on it by statute. Notwithstanding its specialized expertise and whatever deference that entitles its decisions on any judicial review by a superior court, the Board enjoys no inherent or plenary jurisdiction. See the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para 29:

> "….administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her."

What this means is no matter whatever specialized expertise the Board may or may not bring to *OHSA* matters, no matter how legitimate and grave the concerns of the Unions and their members are in this once in a lifetime pandemic (and there is no dispute about that and, in any event, of which I was repeatedly reminded), no matter what my view of the wisdom of the conduct of the Government, the MOE, the MOL or the Minister (and, not surprisingly, the parties have divergent views about that), no matter what my own views of the Guide, I can only exercise the jurisdiction conferred upon the Board by *OHSA*—and that again no matter what I think about the wisdom of or any limitations or gaps in *OHSA* or the regime established under it.

31. *OHSA* is a relatively lengthy statute involving, *inter alia,* an elaborate system to insure its compliance and for its enforcement including, joint health and safety committees of various size and composition depending on the size of the workplace, inspectors, inspections, orders the inspectors may make, the right to refuse unsafe work, extensive and frequently extremely detailed regulations made by the Lieutenant Governor in Council and potential prosecutions for offences under it. The Board is drawn into *OHSA*'s elaborate scheme (or put another way, has jurisdiction under *OHSA*) in very limited, essentially only three, ways—a reprisal complaint under Section 50 (and there is no question that this is not involved here in any way), an application under Section 46 by a certified member of a joint health safety committee at a workplace or an inspector who has reason to believe that the procedure for stopping work in Section 45 will not be sufficient to protect workers at the workplace from serious risk to their health and safety (and that is not the application here), and appeals from an order (which includes a refusal to issue an order) of an **inspector** under Section 61 which is the case before me. Section 61 provides:

Appeals from order of an inspector

> **61** (1) Any employer, constructor, licensee, owner, worker or trade union which considers himself, herself or itself aggrieved by any order made by an inspector under this Act or the regulations may appeal to the Board within 30 days after the making of the order. 1998, c. 8, s. 57 (1).

Certainly the Board's jurisdiction under *OHSA* is far more limited and constrained than the much broader jurisdiction it enjoys under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended.

(b) The Interpretation of OHSA generally

32. There is no dispute that *OHSA* is a public welfare statute, the purpose of which is to maintain and promote a reasonable level of protection for the health and safety of workers in and about their workplace. It must be interpreted both broadly and generously to achieve this purpose. However this broad approach to the interpretation of O*HSA* is not limitless. In *Blue Mountain Resorts Ltd.* [2013] O.J. No. 520 (CA):2013 ONCA 75 CanLII, also in an appeal under section 61 of *OHSA,* the Board upheld an inspector's order, albeit under a different section of *OHSA,* interpreting workplace in a certain fashion, *inter alia,* because "the purpose of the Act is to provide protection to workers". The Divisional Court upheld the Board decision. Notwithstanding observing that the standard of review was "reasonableness" and the Board "is an expert tribunal that was interpreting a statute within its mandate and engaging its specialized expertise" the Court of Appeal still quashed both the Board and the Divisional Court decision. It is worth quoting at some length:

> **24** Public welfare legislation is often drafted in very broad, general terms, precisely because it is remedial and designed to promote public safety and to prevent harm in a wide variety of circumstances. For that reason, such legislation is to be interpreted liberally in a manner that will give effect to its broad purpose and objective: *R. v. Timminco Ltd.* (2001), 54 O.R. (3d) 21 (C.A.), at para. 22.
>
> **25** In *Ontario (Ministry of Labour) v. Hamilton (City)* (2002), 58 O.R. (3d) 37 (C.A.), at para. 16, Sharpe J.A. reinforced that notion:
>
> > The *OHSA* is a remedial public welfare statute intended to guarantee a minimum level of protection for the

> health and safety of workers. When interpreting legislation of this kind, it is important to bear in mind certain guiding principles. Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purpose and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objectives are to be avoided.

26 This generous approach to the interpretation of public welfare statutes does not call for a limitless interpretation of their provisions, however.

27 One of the problems with what is otherwise an understandable approach to the interpretation of public welfare legislation is that broad language, taken at face value, can sometimes lead to the adoption of overly broad definitions. This can extend the reach of the legislation far beyond what was intended by the legislature and afford the regulating ministry a greatly expanded mandate far beyond what is needed to give effect to the purposes of the legislation.

28 Such is the case, in my view, with the interpretation given by the Board and the Divisional Court to the language of s. 51(1) in this case.

29 In these circumstances, the principle of statutory interpretation affirming that broad language may be given a restrictive interpretation in order to avoid absurdity may come into play: *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at pp. 1081-82; and *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727, at para. 109, *per* Iacobucci J.

…

43 As noted above, where there are competing plausible constructions, a statute should be interpreted in a way that avoids absurd results: *Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27, at para. 27; *Boma Manufacturing*, at para.109; and *Canadian Pacific*, at pp. 1081-82. In *Rizzo*, at para. 27, Iacobucci J. states that "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd results."

> **44** The consequences or results of the Divisional Court's and the Board's decision are incompatible with the objects of the Act and the enforcement provisions of s. 51(1), in my opinion. Their interpretation extends the scope of the Act and has the potential to give the Ministry and its inspectors significantly intrusive powers far beyond what is reasonably required to accomplish its purpose of preserving and promoting worker safety in the workplace. The interpretation is therefore unreasonable.

(c) Relevant Statutory Provisions of OHSA

33. The relevant provisions of *OHSA* are attached in Schedule "A" to this decision.

Analysis

34. The position of the Government is relatively straightforward. There has been no order (and about that there is no dispute) and there has been no refusal to issue an order by an **inspector**. The Minister is not an inspector (nor is the CPO). See *Thames Valley School Board,* 2001 CanLII 9209 (ON LRB) at paras. 10-14—where ironically these same unions (or at least some of them) sought to appeal under Section 61(1) a decision of the Minister (not to approve to a multi-workplace joint heath and safety workplace under Section 9.3 of *OHSA* which explicitly requires the consent of the Minister) and the appeal was explicitly dismissed on this exactly the same jurisdictional ground. See also *Greater Essex County District School Board* 2007 CanLII 35596 (ON LRB) where again two of the Unions had a purported Section 61 appeal dismissed because the Board had no jurisdiction to review decisions of the Minister. See also *Peel District School Board*, 2014 CanLII 38304 (ON LRB) at para 6 (involving CUPE the intervenor here who supported the position of the Unions).

35. Both the Minister and the CPO have defined roles under *OHSA* and they do not include performing the role of an inspector (whose broad powers are necessarily explicitly set out in the Act and explicitly granted to inspectors, not anyone else—including Section 57 the basis upon which the Unions seek their remedial orders). Inspector is a defined term under *OHSA,* and it does not include the Minister (as opposed to a Director under *OHSA* who is explicitly given the authority of an inspector pursuant to Section 6(2)—in fact pursuant to Section 6(1) it is explicitly the Deputy Minister, not the Minister, who appoints inspectors). The Unions cannot cloak the Minister with the powers or

authority of an inspector just because they write to him and meet with him (or ask him to bring an inspector to such a meeting which in fact did not happen). That is not the way *OHSA* works, has ever worked or is intended to work. The Board's jurisprudence under *OHSA* supports this, although conceded to be not in exactly the same circumstances as here, as this being a unique case of first impression (as the Unions characterized it).

36. Moreover, even if somehow the Minister was an inspector, he has not made or refused to make a decision or order within the meaning of Section 61(5) of *OHSA*—for example, the wording of Section 57 with respect to an inspector's remedial authority requires the inspector to "find" a contravention of the Act or its regulations. With respect to such a decision or order, the Board, has, admittedly in the context of an actual inspector, repeatedly held that it must be a final decision of an inspector after having made an investigation and the Board should not "police" the actions of an inspector, or act as "Royal Commission" to review every aspect of or how an investigation by an inspector was conducted. See by way of example *Ford Motor Co of Canada,* [1997] OOHSAD No. 192 at para 3; *Ottawa Carleton Detention Centre,* [1999] OOHSAD No. 290; *City of London* 1986 OOHSAD No.5. Here however the telephone conference/meeting with the Unions and the Minister on August 24,2020, is characterized, and leaving aside the fact that no inspector participated, no one could call it an investigation.

37. Lastly an inspector has no authority to issue the provincial minimum standards that the Unions seek. The Board has under Section 61 (4) "all the powers of an inspector" (in the jurisprudence frequently described as" standing in the shoes of an inspector") but on a Section 61 appeal from an inspector's refusal to issue an order, ought not issue an order that the inspector could not, or so the Government says. The regime of *OHSA* (other than regulations under it which, again, are made by the Lieutenant Governor in Council not the MOL or the Minister, albeit likely upon their recommendation and with their input, and certainly not by an inspector) and particularly with respect to its enforcement and specifically with respect to the role of an inspector, was established and is intended to deal with specific circumstances in specific workplaces and not create provincial standards across Ontario. *OHSA* in Ontario can readily be contrasted to parallel legislation in Alberta where the power under Section 60(2) of the Alberta *Occupational Health and Safety Act*, SA 2017 expressly provides that when an officer **is of the opinion** (as contrasted to the Ontario provision that requires an inspector to "find") that activities involve (or

are likely to involve) a danger to the health and safety of workers, may make orders **at more than one work site**. Such language does not exist in *OHSA.* Rather it repeatedly speaks of the workplace (see for example Sections 43(6) and (8), 57 (6) (b) and (c) and (9)). That has been the longstanding approach and policy of the MOL (as clearly stated in both letters from the Minister to the Unions) and been countenanced by the Board. See *Kawartha Pine Ridge District School Board,* 2012 CanLII 31549 (ON LRB)—about which I will have more to say later.

38. In the end, no matter what my personal view of the conduct of the Government or the Unions here, the alleged shortfalls of the Guide, and the unprecedented gravity of the pandemic (which no one can or does dispute), I believe the Government's position about *OHSA* and the Board's jurisdiction under it and in particular with respect to Section 61, and its presentation of the current state of the law (at least as I have addressed above) is correct. The Board does not have jurisdiction to do what the Unions want in these proceedings.

39. I was repeatedly (and passionately) urged by the Unions not to allow the Government's "technical objections" defeat the hearing of the merits of the Unions' justifiable concerns in these unique times. I ought not let form triumph over substance—especially considering the indisputable nature of *OHSA* as a public welfare statute that should be interpreted broadly and generously. Again I recognize the seriousness and sincerity of the Unions' (and their members') concerns in this public health crisis. But that alone cannot justify or enable the Board to do what it is not empowered or not intended to do. The objections of the Government raise fundamental questions about the scope of the Board's limited jurisdiction under *OHSA* and perhaps more importantly how the regime of *OHSA* is supposed to work and the Board's role in that regime. To characterize those objections as merely "technical" is neither accurate nor fair.

40. So why do the Unions say I can escape what seems the relatively clear statutory language and scheme as understood by the Board for decades—other than the legitimate and justifiable concerns of their members in the midst of an unprecedented public health crisis (which again is not disputed)?

41. As I understand the Unions' first argument is that they wrote to the Minister explicitly asking the Minister to appoint an inspector to investigate into their alleged deficiencies of the Guide (although one cannot help but observe that the relief requested in the appeals is the

actual direction of those minimum standards they have always sought in the Guide). The Minister then took positive steps. The Minister responded to the letter by inviting the Unions to a meeting to which he invited the CPO (but not an inspector which he did not advise them beforehand nor of the jurisdictional objections raised here), came to the meeting with the CPO (again without an inspector which someone must have decided), the meeting took place (without an inspector) and the Unions outlined in some detail their concerns and deficiencies of the Guide, told the CPO the orders they sought (or the minimum standards they wished put in the Guide), and when the CPO asked them to put them in writing they did so. Again at no time were the Unions advised of the jurisdictional objections that the Government now makes. The Unions say that they are entitled to assume that the Minister or the MOL have acted "in the place of the inspector" and rely upon that.

42. The Unions point me to Section 4 of the statute:

> **Administration of Act**
>
> **4.1** (1) The Minister is responsible for the administration of this Act. 2011, c. 11, s. 2.
>
> **Powers of Minister**
>
> (2) In administering this Act, the Minister's powers and duties include the following:
>
> 1. To promote occupational health and safety and to promote the prevention of workplace injuries and occupational diseases.
>
> 2. To promote public awareness of occupational health and safety.
>
> 3. To educate employers, workers and other persons about occupational health and safety.
>
> 4. To foster a commitment to occupational health and safety among employers, workers and others.
>
> 5. To make grants, in such amounts and on such terms as the Minister considers advisable, to support occupational health and safety. 2011, c. 11, s. 2.

The Unions also point me to the "indoor management rule" briefly stated in *Midas Investment Corporation v. Bank of Montreal,* 2016 ONSC 3003 at para 4:

> "…[I]f a corporation holds someone out as a director, officer or agent to third parties, the corporation cannot deny that the person is duly appointed or that he or she has the authority customary or usual for such a director, officer or agent. A person dealing in good faith with a corporation is entitled to assume that the corporation's internal procedures have been followed. The outsider is not required to conduct an inquiry into compliance with those procedures unless that person had actual knowledge to the contrary or where the person ought to have knowledge to that effect."

The Unions say that "the indoor management rule" (or an equivalent if it has not been explicitly so described) has been applied by the Board before—See *Prairie Plumbing Ltd.*, 2010 CanLII 62258 (ON LRB) at para 59; *Topcan Inc. o/a Sushi Train,* 2007 CanLII 50578 (ON LRB) at para. 15; and *Steven Sift,* 2017 CanLII 49963 (ON LRB) 2017 CanLII 49963 at para 10.

43. I am simply not persuaded. First the argument implicitly, if not explicitly, recognizes that the Minister is not the inspector which is what is required under Section 6(1) of the Act.

44. Second, the facts relied on by the Unions, although technically accurate, leave out enough to not accurately or realistically reflect (or distort) what, in my view, really happened. I do not wish to reproduce in greater detail the events and exchange of correspondence than I already have above—but the Unions spent a great deal of time in argument reviewing, highlighting and stressing the facts (at least those they thought significant) so that I understood and appreciated the context here in these "extraordinary" circumstances. A number of things which the Unions leave out are apparent. In the original letter, although certainly the Unions did ask for an inspector to investigate their allegations of contravention of Section 25 (2) (h), that depended upon the MOE being the employer—and again that is disputed (not surprisingly in my view) by the MOE, the MOL and the CTA and I am not deciding that here. Their asserted basis for the authority to appoint an inspector is Section 45 (6) which they, in my view, pointedly, did not elaborate—what disagreement between what certified representatives of what joint health and safety committee at what workplace. I now know that they assert that the PWGHS is "akin" to a joint health and

safety committee (which is also strongly disputed by both the MOL, the MOE and the CTA) and some Union members are certified (if elsewhere)—but I still do not know the dispute between which certified representatives that is required to trigger Section 45(6). In any event the positions of the MOE, MOL and the CTA are not likely, in my view, to come as a surprise to the Unions.

45. But it is more than that. It is true that the letter from the Minister in response inviting them to the meeting did not tell them that an inspector would not be there, or that the MOL would make jurisdictional objections if the Unions went before the Board as they had said they were "prepared" to do in their original letter. But, in my view, the letter still made pretty clear the position of the MOL and the Minister that determinations "whether an employer has complied with Ontario's labour laws based on the facts at each specific workplace" and assured them that "when school resumes in September, our health and safety inspectors will conduct reactive and proactive risk based inspections to enforce full compliance with Ontario's health and safety legislation". That could hardly come as a surprise to the Unions. It has been the longstanding policy of the Government. The Unions have lost Section 61 appeals, admittedly in very different circumstances, seeking to review the decision of the Minister or seeking to obtain provincial wide orders. The Minister, after stating that he and the MOL must be neutral arbiters in the Unions disputes with the MOE, in "keeping with" his "open door policy" did indicate his willingness to "join a meeting" with the Unions and the CPO.

46. The Unions did not reiterate their demand that an inspector be there or that their attendance was conditional upon an inspector being at the meeting (whether because they wished to trigger a Section 61 appeal or otherwise). They went to the meeting.

47. There was no inspector at the meeting. Although the Unions expressed their disappointment at the inspector's absence, they did not leave nor did they (or the MOL) raise whether the inspector's absence would preclude getting the orders they wished. Rather they discussed at length the need for provincial standards and the deficiencies of the Guide with the CPO, they told him what orders they wished and elicited the CPO's request to provide them in writing and he would get back to them. The CPO neither asserted that he was an inspector nor that he necessarily had the power to issue those orders nor did he (or anyone) say that the Government would make the jurisdictional arguments

raised now. Simply none of that was discussed. The Unions provided the orders they wished in writing.

48. The Unions did not hear back from the CPO. Rather they heard back from the Minister. They did not get orders that they wished (again there had been no inspector present which everyone knew). Again in my view, relatively clearly, the Minister again set forth the MOL's longstanding policy that employers in taking every reasonable precaution to protect workers, which they must do:

> "….must assess and address hazards **in the workplace**, including COVID-19. **In determining what precautions to take, they must consider the unique aspects of the work and their workplaces, such as a wide variety of classes, classrooms and schools. We strongly recommend that the joint health and safety committees be involved in this process.**
>
> **…** Our inspectors have considerable experience in enforcing the OHSA during the pandemic. Since March 2020, inspectors have conducted more than 18000 COVID-19-related field visits and have issued more than 15,000 orders as a result of those visits. **Inspectors can only issue orders on a case-by-case basis where they find a contravention of the OHSA involving a specific work place…"**
>
> (emphasis added)

49. I do not see how it can be said that the Minister assumed, or represented that he had assumed , the role of an inspector or that the Unions could reasonably or properly rely on that in these circumstances. The Unions say they do not allege (or need to allege) bad faith on the part of the Minister or the Government—although they do indignantly say the Government should be precluded from making these "technical" objections here. These are experienced, sophisticated and well resourced parties—both the Unions and the Government. I have no doubt that all of these letters were carefully (maybe even tactically and strategically) worded. I have no doubt that meetings occur between the Minister and interested parties about provincial standards (whether they are lacking or whether they are too onerous) on a not infrequent basis. Just because someone asks for an inspector to be present at a meeting with the Minister which meeting then does occur (without the inspector) I do not believe that the Minister steps into the shoes of an inspector. If that is correct every or any meeting with the Minister, simply by the request for the presence of an inspector,

could potentially be rendered appealable under Section 61 to the Board when the person attending the meeting with the Minister is dissatisfied with what the Minister does or does not do. Obviously that also applies to the CPO.

50. That Section 4 makes the Minister "responsible for the administration of" *OHSA* is not in dispute, but that very general statement cannot make him, in a highly defined statute, like *OHSA*, with its various different players, their different roles and laid out duties and powers, and an elaborate enforcement system, an "inspector". The statute nowhere says that. It does not list being an inspector or exercising the power of an inspector among the Minister's duties in Section 4(2). It does not say that the Minister can act or step into the role of an inspector or exercise the powers or perform the duties of an inspector which by way of contrast it explicitly does for a Director. All of that is equally true for the CPO. This is extremely important to the Board whose jurisdiction under Section 61 is limited to an appeal from an order of an **inspector**.

51. Moreover the "indoor management rule" is really of no assistance to me here or relevant. The Unions cannot realistically say that it is "customary" to ask for an inspector in a meeting with the Minister that the unions have asked for with respect to the failure of the Guide (or any provincial "legal" directive) to implement minimum standards. In my view the Minister did not do anything to hold himself out as an inspector to "lead the Unions on"—he certainly said nothing to do this effect. The Unions cannot say that this usually or routinely happens so that is customary for the Minister to act as or step into the shoes of an inspector such that they are entitled to rely on it—in fact they assert this is a case of first impression. The Board cases the Unions pointed me to arise in wildly different factual settings and do not purport to apply the "indoor management rule", even if it is not necessarily called that, to a Minister of the Crown in taking a meeting requested by "significant" players to discuss their concerns about allegedly deficient provincial minimum standards.

52. In this regard the Unions did refer me to *Noble v. Forests (Minister of)*, 1995 CanLII 1467 (BC SC) at para 19 :

> 19 If an administrative decision such as the ministerial consent here cannot be relied upon as final, an element of uncertainty is introduced into decisions intended to be relied upon unequivocally. If the decision cannot be taken at face value the natural tendency will be to look behind it and seek

> to scrutinize the inner workings of government to be satisfied that the decision making process is free from blemish. The indoor management rule was devised to avoid the necessity of such inquiry in the case of corporations, and the reasons for such a rule are even stronger in the case of government.

Even were a decision of the British Columbia Supreme Court binding upon me (and it is not), I fail to see how this decision helps the Unions here at all. In *Noble* the relevant statute explicitly required the consent of the Minister to a transfer of a tree farm license. It was obtained. The petitioner, the Chief of the Klahoose First Nation, sought to quash that consent because of the failure of the Minister to consult with the Band before consenting to the license. It was in this context that the Court dismissed the application (even assuming the duty to consult existed as contended) and made these remarks about relying on Government conduct quoted to me by the Unions. It has nothing to do with the Minister assuming or stepping into a role (that arguably is not his). In *Noble*, the Minister had an explicit statutory role that he exercised and it was in regard to that decision the quoted remarks were made. I also note that although the Court found that the Band had lost "an opportunity to influence [the license]… it has other opportunities available to it." More about that later.

53. The Unions say (with respect to their request in their letter for an inspector to be at the meeting) that there is no prescribed form or manner for asking for an inspector in the statute or otherwise. That may be true—but that still does not make the Minister an inspector. More importantly the jurisdiction of the Board is limited to an order of the inspector. The Unions say that someone at the MOL, even if not the Minister, must have decided what to do with their request for an inspector—apparently not appoint one and that refusal to "put the issues to an inspector" is something that can be appealed under Section 61. Again, the jurisdiction of the Board is an appeal from the order of an inspector—how can there be decision of an inspector not to appoint himself at all and how can that be a decision of an inspector? That is not the same as the inspector once appointed or dispatched not issuing an order—the situation in the cases that the Unions point me to for the proposition (with which I do not necessarily quarrel) that an inspector's refusal to issue an order need not necessarily be in writing. See *Laser Electric,* 2006 CanLII 29138 (ON LRB) and *Castonguay Blasting GP,* [2008] OLRB Rep. 504—in both cases there was no dispute that the inspector attended but then did not issue an order or arguably did not clearly refuse to do so.

54. In fact the parties disputed whether the failure to send an inspector was appealable at all—to the Board or otherwise—the Government saying it was not as a matter of the administration of the MOL, which is not reviewable by or appealable to the Board as the jurisprudence makes clear. I need not decide that specific point here—the issue before me is whether there is an inspector's order that can be appealed under Section 61.

55. This is equally applicable to the Unions' argument that since inspectors in their visits to schools and school boards before the opening of school were referring to the Guide (which is not disputed) someone at the MOL, and even the inspectors making these visits themselves, must have determined that the Guide is compliant with *OHSA*—the Government or an inspector would not be referring to a document or Guide that was not compliant with the statute. First, as the inspector reports filed by the Unions make clear to me, the Guide was being referred to, along with other documents and sources, as a "resource" available to schools and school boards in the preparation and for the safe reopening of schools. There was no representation let alone determination that the Guide itself was sufficient to meet the requirements of the statute. Second to the extent that this use of the Report is suggested (in argument for the first time) to be the order of an inspector sufficient to ground a Section 61 appeal, there is nothing at all before me (in the pleadings or otherwise) to suggest that challenges to the Guide (notwithstanding the controversy at the provincial level as outlined above about the need for provincial minimum standards, or the inadequacy of the Guide once it was issued) were raised with those inspectors so that they could make an order or refuse to make an order (let alone conduct any investigation). As these appeals and the pleadings contained in them (and the overwhelming bulk of the Unions' submissions) make clear what is in dispute is the Minister's (or the CPO's) refusal to make orders as requested in the Unions' letter and the meeting with the Minister in August.

56. What this does lead to however is the Unions' argument that to fail to allow these appeals—to dismiss them preliminarily—is to leave them (or their members) without remedy and to "immunize" the Guide from any scrutiny whatsoever. Neither of these assertions is, in my view, correct.

57. Whether the Guide is deficient or not, its standards lacking or non existent, nothing takes away the right of individual members under *OHSA* to refuse to perform unsafe work. Nothing prevents the certified

members of a joint health and safety committee from disputing and disagreeing "whether dangerous circumstances exist in a workplace" under *OHSA*. Either will trigger an inspector under Part V of *OHSA*—and his order or refusal to issue an order will indisputably ground an appeal under Section 61 of the statute. None of this includes whatever remedies the Unions may seek either politically or in the courts (and again I need not decide that here).

58. The Unions say that this is an interpretation that not only is not the broad and generous one demanded of a public welfare statute, but leads to an absurdity (as the Court of Appeal found in *Blue Mountain, supra*). The absurdity is that this could lead potentially to thousands, or tens of thousands, if not more, individual appeals when this could be determined in one single case. I cannot help but observe that would be true even if the Unions were successful in these appeals (including the merits) since the Guide is only minimum standards—there is still the possibility of countless cases asserting that even the minimum standards the Unions wish are not good enough in any particular workplace. As Chair of the Board I certainly would not welcome a torrential flood of urgent cases that could overwhelm the limited resources of the Board—although I also cannot help but observe that at the time of this writing the state of emergency due to the pandemic is at least six months old and the Board has received very many Section 61 appeals related to the pandemic and in particular in the hospital and long term health care sectors (albeit not of the magnitude that could possibly occur in the public schools in Ontario) and this has not yet happened. But that is not only obviously beyond my power to predict or control (and ought not determine whether the Board has jurisdiction in any event), but might not happen. There are obviously very many schools across Ontario (where the pandemic has presented itself differently) with very different features—when they were built, size, classroom design etc. It may be that many of the complaints may be resolved, with or without an inspector, with or without an inspector's order, by the individual workplace parties taking into account their individual workplace circumstances—therefore requiring no appeal under Section 61. This is what the Government says *OHSA* and its enforcement and inspector regime is designed for and to facilitate. Most importantly it is what the Government says it will do—and leaving aside that the first draw will be on the inspectors of the MOL before there can be an appeal to the Board of an inspector's order under Section 61. The Minister has consistently told the Unions in the letters and their meetings that its inspectors are ready to do this. The Minister's letters to the Unions virtually invite this approach.

59. Equally the fact that the Board does not have jurisdiction here under these Section 61 appeals does not "immunize" or protect the Guide from scrutiny or allow it to escape the application or requirements of *OHSA*. That is not the Board jurisprudence—See for example *Ministry of Health and Long-Term Care, Land Ambulance Programs* 2010 CanLII 11302 (ON LRB) at paras. 107, 202 and 204, which the Unions referred me to. There the Board clearly did not allow the fact that the Ministry of Health and Long-Term Care had made a funding decision or "arguably a policy decision" on whether to fund a second portable radio to paramedics to insulate it from a review whether in the unique circumstances of the paramedics in the County of Essex-Windsor (as opposed to the rest of Ontario) or preclude a determination whether that complied with the *OHSA* (and certainly not be determinative in a Section 61 appeal). Moreover in the *Ambulance* case jurisdiction does not appear to be questioned on the same basis as here. Moreover, and in any event, that is not the position of the Government. Equally the Guide with its repeated references to *OHSA* and its provisions and the need for compliance with them seems to be saying as much. The Government repeatedly asserted (conceded) throughout these proceedings that *OHSA* could require more (or less) than what was in the Guide and that the Guide was not in and of itself determinative of whether the statute was complied with. That would turn on the particular circumstances of each workplace (and again I need not repeat the countless ways that could vary) after an inspector's investigation. That is not the same as contesting the Board's jurisdiction under Section 61 to deal with these appeals.

60. Maybe even more importantly, I do not believe the questions these appeals raise or the relief they seek are how *OHSA* is intended to operate and not the role the statute or the legislature ever envisaged for the Board under *OHSA.* In *Kawartha Pine Ridge District School Board, supra,* again ironically one of the Unions, sought an appeal of an inspector's refusal to issue an order under Section 61 of the statute. There had been an asbestos problem (admittedly not on the global and provincial scale of the pandemic, but a serious safety concern) at a particular school. There had been a number of orders made by the inspector with respect to the asbestos problem at the particular school—a number of orders because the inspector was called back a number of times because the problem had not been adequately dealt with or the previous orders not fully complied with. In the appeal of the last order ETFO, asserting it had lost confidence in the school board's ability to deal appropriately with asbestos, perhaps

understandably, sought an order that the Board direct inspections for asbestos or asbestos related issues at all schools of the school board. The MOL (and the responding party school board) objected on a preliminary basis that the Board lacked jurisdiction for this under Section 61 of *OHSA.* In upholding the preliminary objection and dismissing the appeal the Board had an opportunity to review its jurisprudence and the approach to the statute—which I think worth repeating here at some length:

> 27. It may or may not be that ETFO's concern that there are some systemic problems with the School Board is in fact correct. However, that is not the jurisdiction of the Board under section 61 of the Act. The jurisprudence makes that relatively clear.
>
> 28. As stated in *Re Walker*, supra, at paragraph 6:
>
> > **An appeal under section 61 is not in the nature of an enquiry where all issues are at large. It is clearly an appeal of a decision or a non decision by the Ministry of Labour.** The Ministry is required to investigate the health and safety concerns of the workplace parties. It is the Ministry of Labour at the investigative stage that is able to conduct a free ranging enquiry and decide whether and what violations have occurred. It is those decisions that are subject to appeal.
> >
> > [emphasis added]
>
> 29. To the same effect are the comments of the Board in *Re CAW Canada*, *supra*, at paragraph 6:
>
> > My role is to sit in review of circumstances or issues that were brought to the attention of an inspector at a certain point in time, about which inspector either wrote or did not write orders. My job is to look at the same issues and circumstances that were brought to the attention of the inspector, and decide if the inspector made the right decision….. My role is limited to looking at what was brought to the attention of the inspector. **My role is further limited by the parameters of the Act. I do not have the jurisdiction to correct any and all issues that the Union considers to be health and safety problems.**
> >
> > [emphasis added]

30. See also *Ottawa Carleton Detention Center, supra,* where the Board stated at paragraph 19:

> At its most basic, the Act is about establishing safe workplace practices. It places obligations on persons and entities who can have an impact on workplace safety, including workers, joint health and safety committees, employers, contractors. The role of the inspector, at its most basic, is to make determinations about whether those persons and entities are meeting their obligations, and if they are not, to encourage or require compliance. Inspectors have a range of options (some mandatory and some discretionary) to achieve those goals. **The scheme of the Act is not concerned with "policing" the actions or non–actions of the inspectors and the Ministry.** While the conduct of the inspector will often be an issue in an appeal under section 61, the inspector is relevant only to the extent necessary to illuminate the adjudication of the workplace dispute. For example, parties can bring appeals only with respect to issues brought only to the attention of the inspector. Parties can appeal only orders made (or failed to be made) by an inspector; they cannot appeal advice or counsel provided by an inspector.
>
> [emphasis added]

31. Equally the Board stated at paragraph 8 of the *Kitchener Fire Department*, *supra*:

> These decisions, as well as the decision of the Board in *Tembec Industries Inc.(Timmins Sawmill)* [2005] O.O.H.S.A.D. No. 156 thus establish that not all emanations from an inspector fall within the scope of what can be subject to an appeal, and suspension, under section 61 of the Act. Whatever form these emanations take, the essential ingredient is either the assessment of violation of the Act or a refusal to conclude there has been such violation. In circumstances where the inspector had not made any assessment that there had been a violation of the Act, an application cannot seek, through an appeal, another sort of "refusal of an order" with a different reason.

32. See also *Canadian Auto Workers, supra,* at paragraph 46:

> In its grounds for appeal, the Union also indicated its concern about the Employer's breaches of subsections 43 (1), (2), (3), (4), (5), (6) and (11). However there is no evidence any of these matters were ever put before any of the inspectors. In these circumstances, it is difficult to understand how the Union can be found to be aggrieved by decisions by the inspectors when their complaints about these breaches were not presented to the inspectors for their consideration. While I am mindful that an inspector ought to consider all matters related to a work refusal it is difficult, if not impossible, for these inspectors to have dealt with those issues in circumstances where they were not raised as matters to be determined."

(See also *Xstrata Canada Corporation*, *supra* at paragraphs 14 to 17.)

33. Although I understand and agree that the Act is both protective and remedial and must be given a broad and purposive interpretation, the order appealed from is an order following an investigation at Wightman to re-inspect to verify the accuracy of the existing asbestos survey at Wightman. Although ETFO may have been losing confidence (whether justifiably or not) in the School Board's willingness to deal with asbestos problems throughout all of its schools, that is not what the inspector was doing on September 27th at Wightman when he issued his order. Although ETFO may point to memo(s) it gave the MOL or the inspector on earlier occasions or stages which suggest or raise (tangentially or otherwise) other schools (besides Wightman), neither inspector orders on other subjects nor MOL non–action in those circumstances were appealed by or challenged by ETFO. Even if those memo's were relevant (and it is unclear since it does not appear that any demands for inspectors at those other schools were made by ETFO), the simple fact is that they were not pursued. It is only this September 27th order that is being appealed.

34. Therefore, I accept and am persuaded by the MOL and School Board's position that the scope of this appeal is confined to Wightman. The School Board wide relief that ETFO seeks for all of the School Board's schools and not just Wightman is beyond the jurisdiction of the Board in this appeal.

> 35. Even if I were not persuaded by the ample jurisprudence (and I am), the practicalities of this appeal demonstrate the soundness of that jurisprudence. If in the course of determining what happened at Wightman the Board is also called upon to hear evidence about all of the other schools where ETFO has concerns (valid or otherwise) but where there has been no inspection let alone an inspector's order or refusal to give an order at the behest of ETFO or any of its members, this hearing could become unmanageable, and even if manageable, extremely protracted. Although the efficiency of one particular hearing before the Board is not determinative, for the Act itself to be effective and for the Board to be able to meaningfully and effectively regulate the health and safety jurisdiction assigned to it (or in other words to fulfill its protective and remedial function), disputes about orders or non–orders and the appeals from them must be precise and specific. Simply because ETFO may characterize (fairly or not) the School Board's attitude at Wightman to be inadequate, cavalier or non–responsive to a system–wide problem with asbestos in many schools, does not mean that the Board can grant relief in the Wightman appeal against the School Board for all of its other schools.

I note here, notwithstanding the Unions have raised the spectre of thousands of individual appeals, these appeals apply (and seek orders) for all schools in Ontario notwithstanding their countless differences on almost countless criteria and even for these appeals the evidence will be substantial and significant (not just the experts evidence—but also the contested question of who is the employer or supervisor for purposes of *OHSA*) and although the Board has scheduled four expedited hearing dates in October, in accordance with the Unions' request, I am less than optimistic that would suffice.

61. Equally, the Board observed in *KE Electrical Services Ltd.*2005 CanLII 35125 (ON LRB) again in an admittedly different factual context (a Section 61 appeal of an inspector's lifting of an original stop work order in a dispute about whether certified electricians or registered apprentices under the *Trades Qualification and Apprenticeship Act,* R.S.O. c. T-17 were performing work on the job):

> 16. … This appeal asks the Board to review the manner in which the Inspector conducted herself, (or perhaps the actions and instructions of her supervisors within the Occupational Health and Safety Branch) and to provide the Inspector, or the Branch, a series of directions on how to do her or its job by way of a declaration or a mandatory order.

17. That is simply beyond the function of this Board. Nothing in the Act gives the Board the authority or discretion to manage the Health and Safety Branch. The Act gives the Board the power to hear and determine an appeal from an order or a refusal to issue an order. The Board has often said that it "steps into the shoes of the Inspector". It does so for the purposes of quashing an order that has been made (because there was, in fact, no violation of the Act requiring an order to remedy it) or for the purposes of making an order (because there was a violation of the Act that requires such an order to ensure compliance with the Act). In hearing an appeal, the Board operates under sub-sections 61(3.13) and (4), which provide:

> 61 (3.13) For the purposes of an appeal under this section, the Board may enter any premises where work is being or has been done by workers or in which the employer carries on business, whether or not the premises are those of the employer, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any matter and post therein any notice that the Board considers necessary to bring to the attention of persons having an interest in the appeal.
>
> (4) On an appeal under this section, the Board may substitute its findings for those of the inspector who made the order appealed from and may rescind or affirm the order or make a new order in substitution therefor, and for such purpose has all the powers of an inspector and the order of the Board shall stand in the place of and have the like effect under this Act and the regulations as the order of the inspector.

These subsections make it clear that the Board is conducting a hearing *de novo*. The Inspector's testimony is important and relevant, but the Board must make a decision that the Inspector should have made (or confirm the one that she did make) based on the application of the Act and Regulations to the facts revealed by the evidence about the workplace. In this case, the applicant asks the Board to focus, not on any safety issue on the site, but on the thought processes, the diligence of the Inspector, and the decision of the Branch about how much time and resources to devote to the issue raised by the applicant's complaint, and the quality of the information that the Inspector found was sufficient to

satisfy her that the Act and regulations had been complied with.

18. In considering whether or not the Board should "rescind or affirm the order or make a new order in substitution therefor", the thought processes of the Inspector are of minimal importance. The conditions prevailing at the work site are what are relevant. Counsel for the applicant suggested, correctly, that the most clearly articulated rationale for the Board's interpretation of its role in reviewing an inspector's action is *Ottawa-Carleton Detention Centre*, [1999] OOHSAD 290. Counsel criticized this decision as incorrect. At paragraphs 19 and 20, the Board stated:

> 19. At its most basic, the Act is about establishing safe workplace practices. It places obligations on persons and entities who can have an impact on workplace safety, including workers, joint health and safety committees, employers, contractors. The role of the inspector, at its most basic, is to make determinations about whether those persons and entities are meeting their obligations, and if they are not, to encourage or require compliance. Inspectors have a range of options (some mandatory and some discretionary) to achieve those goals. The scheme of the Act is not concerned with "policing" the actions or non-actions of inspectors and the Ministry. While the conduct of the inspector will often be an issue in an appeal under section 61, the inspector is relevant only to the extent necessary to illuminate the adjudication of the workplace dispute. For example, parties can bring appeals only with respect to issues brought to the attention of the inspector. Parties can appeal only orders made (or failed to be made) by an inspector; they cannot appeal advice or counsel provided by an inspector.
>
> 20. The focus of an appeal under section 61 is always the substantive workplace health and safety concern, not how the inspector investigated (or failed to investigate). That is not to say that the inspector's conduct is not critical to the enforcement of the Act. However, I am satisfied that another forum, not a section 61 appeal, is more appropriate for enforcing, what are essentially public duties. The *Judicial Review Procedure Act* permits the bringing of an application for judicial review, seeking a remedy in the nature of *mandamus*. An order in the nature of *mandamus* is the

> typical means used to compel the performance of a public duty. I note that in this case, OPSEU has brought an application for judicial review seeking an order in the nature of *mandamus*. Without, of course, commenting upon whether such a remedy should issue, I am satisfied that the Divisional Court is the more appropriate forum to litigate the manner in which the inspectors are carrying out their duties pursuant to section 43.

With respect to the reference to a *mandamus* remedy, counsel points to sub-section 65(1) of the Act, which provides:

> 65. (1) No action or other proceeding for damages, prohibition or mandamus shall be instituted respecting any act done in good faith in the execution or intended execution of a person's duties under this Act or in the exercise or intended exercise of a person's powers under this Act or for any alleged neglect or default in the execution or performance in good faith of the person's duties or powers if the person is,
>
> (a) an employee of the Ministry or a person who acts as an advisor for the Ministry;
>
> (b) [Repealed]
>
> (c) the Board or a labour relations officer;
>
> (d) a health and safety representative or a committee member; or
>
> (e) a worker selected by a trade union or trade unions or by workers to represent them

Assuming the Inspector and her supervisors are all "employees of the Ministry", the *mandamus* remedy does not lie against them. Counsel therefore suggests that since there is no other forum, the Board must take on the role of supervising the Inspector and, ultimately, her supervisors.

19. With respect, this argument misses the point. In a sense, the Board does possess a kind of *mandamus* power under section 61. Rather than order the Inspector to issue an order, or to rescind one, the Board may make an order itself. However, section 61 still focuses on whether or not an order should issue, not how the Inspector came to the

conclusion she did. Assuming the Board did have a *mandamus* power, or something akin to it, there is no statutory guidance as to the nature of such power. Typically, a court's approach to *mandamus* is limited; so long as a public official has exercised a discretion or carried out a function under the relevant statute, a court will not interfere or dictate *how* that discretion is to be exercised or the task accomplished: see *Re Tomaro and City of Vanier* (1978) 1978 CanLII 1649 (ON CA), 20 O.R. (2d) 657 (OCA) and *Re Cornenki et al and Township of Tecumseth* 1971 CanLII 493 (ON SC), [1971] 3 O.R. 159, 19 D.L.R. (3d) 655 (OHC). There is nothing in the Act that suggests that if the Board does possess such a power, it should adopt any different standard.

20. Finally, assuming that the Board did have some authority akin to a *mandamus* power, and assuming that there were no restrictions on how far the Board could go in exercising it, the question is whether there is any good policy reason to supervise or micro-manage the conduct of Health and Safety Inspectors or the policies under which they work. There were probably few cases in which, in hindsight and with the benefit of extensive evidence and able submissions by counsel, one could not conclude that there might have been something more that the Inspector could have done, or some other consideration that could have been brought to bear on a particular situation (whether or not that would have produced a different result). However, to decide where and how an Inspector carries on her duties is beyond the Board's ability. Such decisions must be made in the context of the level of resources (both monetary and personnel) available to the Health and Safety Branch, the priorities established by the Director, and the level of demand for services that Occupational Health and Safety Inspectors are faced with. The Board is not, and cannot be, in possession of that information, and does not have the responsibility for running the Occupational Health and Safety Branch, dealing with how many Inspectors to hire, or what budget is to be allocated to health and safety inspections. That is not to say that the Board accepts, unquestioningly, that the Director of Occupational Health and Safety is behaving in the most appropriate way at all times. The Board has no institutional opinion on the subject: such opinion would be irrelevant to any adjudicative function the Board performs. Such opinions are properly in the realm of political argument and debate. It is not an adjudicative function that the Act has given to the Board.

62. The Unions say *Kawartha Pine* and *KE Electrical* are factually distinguishable (which of course must be somewhat accurate since the Unions also say that this is a case of first impression—but accordingly must be true of all the cases everyone referred me to)—but that is too glib a distinction (as well as the Unions' assertion that the decision in *Kawartha Pine* was decided only and narrowly on the basis of the scope of the union's original request to the inspector—note at para 33 *supra*, there was some issue of other schools being raised with the inspector or MOL) and ignores the underlying themes and structure of the statute that the Board was addressing.

63. Without wishing to be too blunt, that large and significant unions (or equally large and significant employers or employer groups or associations or, for that matter, anyone) may justifiably seek and justifiably obtain a meeting with the Minister (or the CPO) and by also requesting an inspector also be there, can, when dissatisfied with the outcome of that meeting, under the guise of an appeal of an inspector's order, seek to have the Board impose or order the Government to impose provincial standards (or perhaps revoke provincial standards) that the Minister or the Government has previously, justifiably or otherwise, refused to legislate or regulate, I do not believe is contemplated, let alone intended, by the statute or the Legislature in the statutory scheme or its enforcement. The statute certainly does not say anything like that anywhere. Even granting that as a public safety statute, *OHSA* demands a broad and generous interpretation (even of central otherwise statutorily defined terms, like inspector), the Court of Appeal has made clear in *Blue Mountain, supra,* that is not without limit (particularly by making an overly and unreasonably expansive interpretation of a definition). In my view, if this was what was contemplated, intended or required by *OHSA,* it would have been stipulated and made explicit (or far more clear) in the statute. That the Unions were unable to refer me to a single case even remotely similar in both circumstance or relief sought after decades of caselaw is not at all surprising to me, and cannot be put more euphemistically, as the Unions did, that is because this is a case of first impression—rather it is because it is beyond the contemplation of the statute.

64. The Unions say that this is a remedial question and I should not decide an appropriate remedy at this stage before hearing evidence (but on the particular point in dispute in this decision, it was never made clear what further evidence I needed to hear—as opposed to other issues, like the merits of the complaint or whether the MOE is the

employer). I should not let "the tail wag the dog" and am referred to *Stelco Inc. (Hilton Works)* 2000 CanLII 12471 (ON LRB) at para 45—but those remarks were made in the context of a Section 61 appeal of an inspector refusing to issue an order and thereby upholding the employer's preventing a joint health and safety committee from inspecting other portions of its site where contractors were working but not the employees of the union at the time—and the objection appears to be that what was being sought were "prospective" orders that the Board has no "jurisdiction" to grant—hardly an analogous situation to here.

65. In any event, I do not see it that way. Even if there had been an inspector present at the meeting with the Minister, as the Unions requested, I do not believe that the Inspector could order (or order the MOE) to impose (enhance or alter) standards across all of Ontario affecting countless schools under countless different circumstances under the scheme legislatively set out in *OHSA,* and therefore neither can the Board pursuant to Section 61. The Unions say that there is nothing in the statute that explicitly prohibits inspectors from making multi-workplace orders (and for this the Unions argued that every school in Ontario is a workplace—but in this context that assumes that the MOE is the employer which, again, will not be decided here). While that may be true, there is nothing in the Act that allows it either (as contrasted to the Alberta legislation that the Government referred me to) and as the Government strongly urged it runs counter to the themes and premises of *OHSA*—of inspectors investigating individual workplaces to determine if there have been contraventions of the statute (afterwards the order or refusal of an inspector to make an order is appealable to the Board under Section 61 of the statute). As I have tried to indicate throughout I believe the Government's view is the better view of the statute, and, in particular with respect to Section 61.

66. The Unions say that the powers of an inspector (which the Board has pursuant to Section 61 (4)) are broad and discretionary and point me to Board jurisprudence to that effect (again in wildly different contexts), a proposition with which I do not necessarily disagree. Yet the only case that the Unions point to me as even remotely analogous (and they concede it is an imperfect analogy, again this being a case of first impression) to support the authority to issue with what they euphemistically characterize as "multi-site" orders is the *Land Ambulance* case, *supra*. I do not think it an analogy at all—not only do they not point me to any portion of this very lengthy and detailed decision that deals with this question explicitly at all, but the case, as

outlined above, deals with (very simply summarized) whether the failure to provide a second portable radio to paramedics in the County of Essex Windsor as opposed to everywhere else in Ontario, not at all of the scope of what is in issue here. That is even more so with respect to *Xstrata Canada Corp*., [2010] OOHSAD No 21, referred to in the OSSTF written Outline of Oral Argument, where the very issue was whether a regulation under *OHSA* was contravened by having only one qualified first aid attendant in charge of the first aid rooms located at two then out of production mines (and which the Board found did not reversing the order of the inspector in a Section 61 appeal).

67. I should also note again that I have not addressed in this decision the Unions' arguments whether Section 25 (2) (h) has, even on a *prima facie* basis, been contravened. Not only does this involve a determination of whether the MOE is an employer under *OHSA*, which the parties do not agree on and some say will require evidence (and I say this notwithstanding the Unions' argument that I should assume that for purposes of this preliminary argument that the MOE is the employer—again an assertion which I do not necessarily accept or decide since that may more properly be characterized as a legal conclusion and not a fact) because I do not get to the alleged violation of Section 25 (2) (h) until the Unions establish that there can be a refusal to issue an order by an inspector under Section 61—which for the reasons outlined above I believe they have not. I will observe however that the obligation, even in Section 25 (2) (h), "is to take every precaution reasonable in the circumstances" and such an assessment of reasonableness, in the countless various scenario's that could arise in schools across the province (that I have already adverted to), also militates, in my view, for the individual workplace investigation of an inspector whose order or refusal to make an order is then the foundation of the Board's jurisdiction under Section 61.

68. Accordingly for all the reasons I have set out above, these appeals are dismissed for want of jurisdiction of the Board under Section 61 to deal with them as framed. Hearings previously scheduled for October 5, 6, 13 and 14, 2020 are cancelled.

"Bernard Fishbein"
for the Board