## School Board Update

# Back to School Edition – Student-Focused Case Law and Legislative Update

**Date:** September 28, 2017

Welcome back to school! We hope everyone enjoyed a restful summer season. To kick off the school year, we bring you the latest edition of our School Board Update with particular emphasis on legislation and decisions involving the student body.

First, Amanda Lawrence-Patel provides you with an overview of important amendments to the *Immunization of School Pupils Act.*

Kathleen Tate writes about a recent Ontario Labour Relations Board (OLRB) decision in which the OLRB considered principles applicable to work refusals in a case where a teacher refused work because of a violent student.

Amanda Lawrence-Patel then writes about an arbitration award in which an arbitrator granted the school board's request for a view to be taken of a school in the context of a student leaving school property unattended.

Finally, Dianne Jozefacki summarizes a recent human rights decision in which the Human Rights Tribunal of Ontario held that an elementary student with autism was not permitted to bring his service dog with him to class.

Regards

Amanda E. Lawrence-Patel and Dianne E. Jozefacki
Editors

## *Immunization of School Pupils Act* Amendments In Force September 1, 2017

by Amanda E. Lawrence-Patel

On September 1, 2017, sections 1, 2, 3 and 5 of Schedule 2, Bill 87, the *Protecting Patients Act, 2017*, amending the *Immunization of School Pupils Act* (Act) came into force.

Among other things, the amendments require that the parent of a pupil complete an immunization education session with a medical officer of health or delegate before filing a statement of conscience or religious belief which would exempt that pupil from completing the prescribed course of immunization (section 2 of Schedule 2, Bill 87).

Section 4 of Schedule 2, Bill 87 is awaiting proclamation. That section expands the categories of person who may administer the immunizing agents and requires them to provide a prescribed statement of that immunization to the parent of the child as well as to the medical health officer for the public health unit in which the immunizing agent was administered.

In addition, O. Reg. 325/17 amending Regulation 645 (General) made under the Act also came into force on September 1, 2017. O. Reg. 325/17 is the supporting regulation to the amendments made to the Act by Bill 87.

O. Reg. 325/17 states that the following prescribed forms are available through the website of the Government of Ontario Central Forms Registry:

"Statement of Conscience or Religious Belief – *Immunization of School Pupils Act*"
"Statement of Medical Exemption – *Immunization of School Pupils Act*"

"Notice of Transfer from a School – *Immunization of School Pupils Act*"

The regulation also:

- includes a program of immunization in respect of designated diseases; and
- prescribes the requirements that apply to an immunization education session, including the contents of the session, who must deliver the education session, and the requirements upon completion of the session.

## Labour Board Finds that Teachers have Limited Rights to Refuse Unsafe Work in the Context of Violent Students

by Kathleen D. Tate

In a recent decision, Toronto Elementary Catholic Teachers / Ontario English Catholic Teachers Association v. Toronto Catholic District School Board, the Ontario Labour Relations Board (OLRB) considered a teacher's two work refusals which arose from the presence of a student in her senior kindergarten class who was prone to violent and unpredictable outbursts. The OLRB found that the teacher's first work refusal was not justified, as the student was in imminent danger. However, the second work refusal, which did not involve imminent danger, was justified as the teacher was afraid for her safety.

**The Work Refusals**

The teacher first refused to work on a Friday after the student became violent. The teacher and the Early Childhood Educator (ECE) evacuated the classroom, leaving the Educational Assistant (EA) with the student until the student eventually calmed down. The School Board resolved the teacher's concerns by removing the student from the class.

On the following Monday, the teacher was surprised when the student arrived back in the classroom. She immediately exercised a second work refusal, telling the principal that the student's violence was unpredictable. A Ministry Of Labour inspector arrived and determined there was no reason for the work refusal under the *Occupational Health and Safety Act* (OHSA). The teacher appealed the decision of the inspector to the OLRB.

**The OLRB's Decision**

The OLRB dismissed the appeal with respect to the first work refusal. It referred to Regulation 857, in which the general right to refuse work under the OHSA for health or safety reasons is modified for teachers. The Regulation states that the work refusal provisions do not apply to a teacher "where the circumstances are such that the life, health or safety of a pupil is in imminent jeopardy." The OLRB noted that Regulation 857 had not previously been interpreted by the OLRB or any other adjudicative body.

In this case, the OLRB found that the student's health and/or safety was in imminent jeopardy because he was acting violently and was not in control of his emotions. The OLRB held that the presence of the EA did not allow the teacher the right to refuse to work as teachers are not permitted to "transfer care of her student, at a time when the life, health and safety of the student is in imminent jeopardy, to someone else" in order to engage in a work refusal.

However, the OLRB allowed the teacher's appeal with respect to her second work refusal even though the student was not acting violently at the time of the refusal. The OLRB found that the teacher had a genuine and honest concern about her safety as a result of the student's previous violent behaviour. Based on the student's history, as experienced by the teacher, the OLRB found that the teacher's concern was reasonable and that Regulation 857 was not engaged since there was no imminent danger to the student.

The OLRB concluded that teachers do not need to be in actual or imminent danger before they can initiate a work refusal. It held as follows:

[59] …teachers can refuse unsafe work in the context of violent pupils, so long as the teacher has reason to believe that the violence is likely to endanger him/her at some point either at the time of the refusal or in the immediate future. The only exception to that right is in circumstances where the safety of a pupil is in imminent danger. In such circumstances, a teacher's ability to initiate a work refusal may be delayed until none of the pupils are in imminent danger.

The OLRB issued a declaration that the School Board violated the work refusal provision of the OHSA by not following the proper process, which was not in dispute. However, the OLRB found that there was little in terms of a practical remedy and that "other than removing the student from the classroom … it is unclear what more the employer could have done to protect the teacher."

This decision provides helpful clarity to school boards with respect to the obligation of teachers to act in situations where the health and safety of a student is in imminent jeopardy. In such circumstances, a teacher may not refuse to work. Furthermore, the presence of another staff member, such as an EA, will not allow a teacher to refuse to work when, as in this case, the student's health and safety is in imminent danger.

If, however, a teacher has a reasonable belief that that there is real or significant possibility that they will experience some danger sometime in the near future due to a violent pupil if they continue to work, the teacher may initiate a work refusal under s. 43(3) of the OHSA so long as the safety of a pupil is not in imminent danger.

## Requesting a View: Determining When it Will Benefit the Arbitrator

by Amanda E. Lawrence-Patel

In a recent decision, *Halton District School Board and Elementary Teachers Federation of Ontario* (unreported, June 14, 2017), Arbitrator Randazzo provided a helpful overview of the current state of the law with respect to when a view of a workplace is beneficial in the course of an arbitration.

In the instant case, Arbitrator Randazzo was asked to consider if a view of a public school was necessary to understand whether a teacher had demonstrated a lack of judgment and disregard for her ethical responsibilities by allowing a kindergarten student to leave his class and walk to the office alone. This became an issue because the student, after being released from class by his teacher, did not attend at the office. Rather, the student left the school premises and proceeded to walk towards a busy street where he was found by a caring neighbour who returned him to the school.

In requesting a view of the school and its surrounding area, the School Board took the position that the view was necessary because the school itself is somewhat unusual and the path from the student's class to the office required the student to make a number of turns, head up and down a flight of stairs, and pass by multiple doors to the outside. The School Board argued that the complicated nature of this path made the teacher's decision to release the student by himself even more concerning, and necessitated taking a view during arbitration. The School Board also took the position that it would be difficult to understand the evidence of its witnesses, and in particular the prior written statement and potential testimony of the student, without seeing the layout of the school. The union took the position that the view was not necessary, as the floor plan was already in evidence and could be easily explained.

In arriving at his decision to grant the view, Arbitrator Randazzo considered the following factors established by Arbitrator Lynk in *Zehrs Markets Inc. and UFCW Local 175/663* (91 L.A.C. (4th) 444):

1. Would a view assist the arbitration board in reaching a proper determination of the facts germane to the issues in dispute?
2. Would the proposed view fairly represent the scene or object as it existed at the material time?
3. Would its potential benefit appear to outweigh its practical cost?
4. Would the parties be fairly and properly represented during the view?

In consideration of these factors, Arbitrator Randazzo determined that the second and fourth factor were easily met as the school premises had not been altered and the parties were both represented by counsel. However, Arbitrator Randazzo did not agree that the school premises was technical or mechanical such that it was difficult to understand. Nonetheless, he found that when considered in light of the potential evidence of the four year old student, the view would be of assistance in assessing the evidence. Arbitrator Randazzo also found that the potential benefits of the view outweighed the practical cost given that it would take only two to three hours. Accordingly, Arbitrator Randazzo ordered that a view of the school be scheduled.

This is a helpful decision to consider if requesting a view at arbitration, as it confirms that the law with respect to when a view ought to be ordered remains unchanged and the factors established by Arbitrator Lynk remain the appropriate test in the circumstances. Further, it demonstrates how the specific context of a scenario may be used to bolster an argument that a view is necessary.

## Human Rights Tribunal Considers Whether Special Needs Child Can Bring his Service Dog to School

by Dianne E. Jozefacki

The Human Rights Tribunal of Ontario (Tribunal) recently found that a School Board did not breach its duty to accommodate when it denied a student's request to have his autism assistance guide dog accompany him in school. The Tribunal confirmed the *prima facie* test for discrimination in the context of providing educational services, its relation to service animals, and its interaction with the *Accessibility for Ontarians with Disabilities Act* (AODA) and its *Integrated Accessibility Standards* (Standards).

In J.F. v. Waterloo Catholic District School Board, J.F. (Applicant) was a student diagnosed with Autism Spectrum Disorder. In an effort to control his outbursts and "bolting" tendencies, the Applicant's parents applied for a guide dog. After some training, the dog was able to calm the Applicant by sitting on his lap. As well, the Applicant could moderate his emotions by speaking with the dog about what frustrated him. Over time, the Applicant became more confident and sociable around the dog. He also stopped wandering off because he was "tethered" to the dog who, in turn, only obeyed the commands of whomever held her leash. Being too small, the Applicant was unable to control the guide dog—an adult had to do this.

The Applicant's parents applied to the School Board for permission to have the service dog on school grounds, claiming that the Applicant needed to be with his dog on a daily basis to properly bond with her. After several months of discussions and a lengthy investigation into the Applicant's needs, the School Board decided that the dog would not be helpful in delivering educational services to him and denied his request.

The Applicant's litigation guardian filed a human rights complaint on his behalf. He argued that under the AODA and its Standards, the School Board had an obligation to make its services (i.e. education) accessible. He submitted that the student's guide dog met the definition of a service animal under section 80.47 of the Standards and therefore the student had a legal right to be accompanied by his dog when accessing services open to the public. Moreover, he argued that the School Board's requirement that the student demonstrate the dog was needed for him to access the curriculum was an additional burden imposed on the student by virtue of his disability and therefore discriminatory and contrary to the *Human Rights Code* (Code).

In response, the School Board argued that the Tribunal did not have jurisdiction over the AODA. In any event, it submitted that schools are not open to the public because public access to schools is restricted under the *Education Act* (Act) and its regulations. Therefore, the Standards as they related to service animals were inapplicable. The School Board also submitted that the Act and regulations required it to provide measures to ensure the Applicant had access to its educational services, an obligation it said it had met through various other accommodations, including Educational Assistant (EA) support and modified programming.

The Tribunal stated it had no jurisdiction to apply the AODA and its Standards. In any event, it accepted the School Board's reasoning that, while the Act and its regulations allow "pupils" access to school premises, school premises are not open to the public. Therefore, the Standards were inapplicable.

However, the Tribunal confirmed that its jurisdiction over the Code obligated it to consider the Code together with the AODA and the Standards. Generally, the combined effect of these provisions and the provisions of the Code is that if a person requires a service animal for a disability, the person is entitled to access premises with that service animal, provided either that it is readily apparent that the animal is used by the person for reasons relating to the person's disability, or the person provides a letter from a physician or nurse confirming the need for the animal.

The Tribunal then turned to the question of whether the School Board was required to allow the dog as part of its duty to accommodate under the Code.

Referencing the Supreme Court's decision in *Moore*, the Tribunal affirmed that to demonstrate discrimination in the provision of education services, applicants must show:

- they have a characteristic protected from discrimination
- they have experienced an adverse impact with respect to their education; and
- the protected characteristic was a factor in the adverse impact.

Only after making out a *prima facie* case of discrimination does the burden shift to the respondent to justify the conduct within the framework of the exemptions available under the Code. The Tribunal emphasized that this assessment involves a consideration of whether the School Board provided meaningful access to education on the basis that it has delivered the mandate and objectives of public education to that particular student.

The Tribunal dismissed the allegation that the School Board first failed to meet its procedural duty to accommodate. The School Board had responded to the Applicant's requests in a timely manner and the lengthy investigation process was due in part to the School Board's behavioural team conducting a fulsome assessment of the Applicant's needs and behaviours in the classroom, and whether the dog was needed for him to meaningfully access his public education. The Tribunal held that this investigation process was, in fact, a proper and important part of the School Board's procedural duty. The same was true of the meetings held to discuss the findings with the Applicant's parents and their legal counsel.

With respect to the substantive duty to accommodate, the Tribunal found that the Applicant failed to establish that he was adversely affected by the School Board's decision not to allow him to access school with his dog and there was no *prima facie* case of discrimination.

In reaching this conclusion, the Tribunal relied on the fact that no evidence was presented to demonstrate how the dog's presence would specifically benefit the Applicant's education or address his needs in the classroom. The view of School Board staff was that the Applicant was a good student with the ability to manage his emotions without the dog and had the ability to become independent through the supports already being provided to the Applicant.

It is important to emphasize that the Tribunal's ruling in this case was arrived at based on the very specific evidence of the case, which involved an assessment of the particular student's exceptionalities and the accommodations being provided to him at school and the lack of evidence regarding the necessity of the service dog in school. This serves as a caution as the decision does not stand for the general principle that at no time may guide dogs be permitted in schools. To the contrary, each case involving service or guide dogs or other animals must be assessed on a case-by-case basis, having regard to the student's particular needs and the services already being provided by the school board.

(With thanks to Will McLennan, Articling Student, for assistance with this article.)

For more information on accommodating a special needs student, see our *FTR Now* of November 12, 2012 Accommodation

and the Special Needs Child: The Supreme Court of Canada Decision in *Moore*.

Should you have any questions or require further information, please contact Amanda E. Lawrence Patel at 416.864. 7030, Dianne E. Jozefacki at 416.864.7029, Kathleen D. Tate at 416.864.7335 or any other member of our School Board Practice Group.

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