IN THE MATTER OF AN ARBITRATION

UNDER THE *CANADA LABOUR CODE*

BETWEEN

TEAMSTERS LOCAL UNION NO. 31

(the "Union")

-and-

PUROLATOR CANADA INC.

(the "Employer")

B.C. Vaccination Grievances

ARBITRATOR:	Nicholas Glass
COUNSEL:	Michael Sherrard, Arash Farzam-Kia, Luiza Vihknovic and Gurjit Brar, for the Employer David Reynolds and Riley Kearns, for the Union
HEARING DATES:	September 8, 9 & 12; October 3, 4, 6 & 7; November 29 & 30 and December 19, 2022 January 12 & 13; March 8 & 9; April 13, 14 & 15; May 1, 2, 3 & 18; July 11 and September 5 & 6, 2023
DATE OF AWARD:	December 14, 2023

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I Introduction

1. On or about September 15, 2021 during the COVID-19 pandemic, the employer implemented a Safer Workplaces Policy ("SWP", or "workplace vaccine mandate") across its Canada-wide operations. A keystone of this policy was a requirement that all employees must be vaccinated in order to gain access to Purolator workplaces. The deadline for compliance by being vaccinated was approximately December 25, 2021. The policy went into full force and effect on January 10, 2022.

2. Employees in British Columbia are represented by the union, a member of the Canada Council of Teamsters which is the bargaining agent for all unionized employees across Canada, pursuant to a federal Certification.

3. A number of employees in the union's bargaining unit elected not to be vaccinated. The response of Purolator to this election resulted in a number grievances being filed. There was a group/policy grievance filed on January 10, 2022. There were a number of individual grievances. All the grievances complained that the grievors were improperly terminated or placed on involuntary unpaid leaves of absence. Owner operators claimed that they were improperly prevented from assigning their vaccinated relief drivers to cover their routes. One owner operator, Dan Moes, claimed he was improperly discharged.

4. There were 14 individual owner operator grievances. There were 8 original individual hourly paid grievances. The evidence was unclear whether there were employees potentially entitled to compensation under the group grievance who did not file individual grievances.

5. The hourly paid grievors all made the same complaint about being placed on an unpaid leave of absence ("LOA") and sought the same relief as the group grievance. A number of them were called upon by Purolator to re-attest their vaccination status by November 16, 2022. Some failed to provide an updated attestation by that date and were advised shortly afterwards that their employment relationship with Purolator was "consequently administratively terminated, effective immediately." The union provided notice to Purolator that this new action was grieved, but reasserted its position that these new complaints were covered by the group grievance. The employer submits these terminations are not before me.

6. The SWP was suspended by the employer on April 30, 2023.

II History

7. COVID-19 came in different waves consisting of different variants. Many of these variants did not become dominant or take hold of whole populations. Those that did were classified as Variants of Concern ("VOCs") and were labelled sequentially following the Greek alphabet. The main ones were Alpha, Delta, and Omicron.

8. The onset of the pandemic generated a number of responses worldwide. One of the most significant was the development at high speed of vaccines to combat the spread of the disease. Blind, randomized, clinical trials were started and foreshortened, and approval times were accelerated.

9. By approximately December 2020, new vaccines were being distributed, and by dint of a massive effort of encouragement and education many countries had by about mid-2021 achieved a high-level of vaccination in their general population. It was apparent that vaccination at that time contributed to some level of containment of the spread of the disease, in the case of the Alpha and Delta variants of concern.

10. However, once Omicron was developing into the dominant variant of concern, beginning in the fall of 2021, there was an unexpected and dramatic rise in the number of infections in highly vaccinated countries. Vaccination did not seem to be winning. It was not containing the rapid spread of Omicron.

11. The problem attracted a series of studies conducted to discover why this was happening. The opening statement in the Andrews study published on March 2, 2022, discussed in detail later, explains that the impetus for this and many other studies came from a worldwide realization in the medical community that this was happening and there was a pressing need to discover why.

> A rapid increase in coronavirus disease 2019 (Covid-19) cases due to the Omicron (B.1.1.529) variant of severe acute respiratory syndrome coronavirus *in highly vaccinated populations* has aroused concerns about the effectiveness of current vaccines. [emphasis added]

12. These studies over time cumulatively revealed, by the spring of 2022, a massive drop in 2 dose vaccine effectiveness against infection which occurred with the fading of Delta and the advent of the Omicron variant. It was discovered that within a relatively short time after vaccination, levels of protection against Omicron infection waned. The waning effect for 2 dose vaccination was dramatic, dropping to an average effectiveness percentage across the main vaccines of 9%, after 25 weeks (they ranged from 17% to zero depending on the vaccine).

13. It took some time for this pattern to emerge as an incontestable fact no longer justifying the precautionary principle which had been a key element in the reasonableness of vaccine mandates, as data had to be gathered and cohorts of vaccinated and unvaccinated individuals infected with Omicron had to be identified in order for there to be anything to analyze.

14. In terms of a time frame, each member of an Omicron study group had to be followed for at least 6 months post vaccination, to be of use in ascertaining and quantifying the degree of vaccine effectiveness over time, and Omicron was only in the process of becoming dominant over Delta in the fall of 2021.

15. This kind of data about vaccine ineffectiveness over time is the kind of data which according to the union's expert witness Dr. Kalyan would have emerged if the normal trials for new vaccines required for approval by public health authorities had been completed rather than cut off or foreshortened, as they were.

16. This is not stated as a criticism, since there was a massive and frightening pandemic raging across the world, which created an urgency to develop and distribute vaccines at "warp speed".

17. It was while this data was being digested and analyzed, in the winter of 2021/2022, that the Federal Government and Purolator imposed their workplace vaccine mandates. Other employers implemented them around the same time. Growing awareness of vaccine ineffectiveness did not graduate to acknowledgement of an incontestable fact until the spring of 2022, so the imposition of the Purolator mandate and other employer mandates in the winter of 2021/2022 were held to be reasonable in numerous arbitration awards based, for the most part, on an examination and assessment of the medical data and public health guidance reasonably accessible up to the spring of 2022. The Andrews study above referred to was published in the New England Journal of Medicine on April 21, 2022, with some form of earlier publication on March 2, 2022.

18. Acquaintance with the above chronology and underlying narrative is the key to understanding this case and its ultimate disposition.

III Summary of Issues, Evidence and Conclusions

19. Owing to the quantity of evidence and the number of interrelated issues, it is convenient at this point to set out a short summary of the case including my conclusions, which will provide a roadmap for following my detailed examination of the matters in dispute. I will then proceed with the more detailed review.

A. The Primary Issue: *KVP* and *Irving* Criteria

As the SWP was an employer rule or policy unilaterally imposed rather than negotiated into the collective agreement, the tests applied to assess the validity of the policy are as laid out in *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance),* [1965] O.L.A.A. No. 2 (Robinson) ("*KVP*"). When such policies infringe arbitrally recognized rights such as privacy, personal autonomy and bodily integrity, the *KVP* test is tailored to accommodate that consideration. This was confirmed in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.,* [2013] 2 S.C.R. 458 ("*Irving*"). The union position is that the grievances should be upheld because the policy during all or some of its duration fails one or more of these tests. In the case of the hourly paid employees the chief failure of the policy was that during all or some of its duration it was not reasonable. In the case of the owner operators, the application of the policy was unreasonable by denying them the use of vaccinated relief drivers, so it failed the *KVP* and *Irving* tests. It was also applied in an arbitrary and discriminatory way. The employer was also in breach of the collective agreement by misinterpreting and misapplying provisions in the agreement.

20. The grievors' personal interests which dictated primarily their refusal to be vaccinated are stated by the union on their behalf to be personal autonomy and bodily integrity. These are *Charter*-like rights recognized in arbitral jurisprudence. The employer's interests in this case are centered upon ensuring workplace safety pursuant to its corporate values, as well as its statutory and collective agreement obligations. The title of the policy highlights this. It is "A Safer *Workplaces* Policy".

21. *KVP* and *Irving* which are the leading authorities in this sphere recognize the need to weigh in the balance the interests of the affected employees against the interests of the employer, when determining the validity of the policy. It is my task as adjudicator to determine if the interests of the employer encapsulated in the policy failed to outweigh the interests of the affected employees at any point over the duration of the policy including but not restricted to its implementation. If they did the grievances succeed. The only question would then be a matter of quantum.

B. The Continued Reasonableness of the Policy: Chronology is Key

The SWP lasted from its deadline for compliance which was effectively December 25, 2021, until its suspension as of May 1, 2023. Throughout that quite lengthy time frame the policy had to continue to pass the *KVP* and *Irving* tests. The balancing exercise in question required the employer to participate in a continuing assessment of the effectiveness of its policy in achieving its goals and

furthering its interests as against the interests of the affected employees. The adjudicator in a case of this nature acts in a sense as the referee who must continually weigh those interests in the balance and depending on the outcome reach a conclusion as to whether or not the policy or rule in question at any given time is reasonable. That continuing exercise had in this case to be carried out over a considerable period, and it has been my task to evaluate the balance being struck, to determine how reasonable the SWP has been at any given point in time. The hourly paid grievors' claim for compensation based on their being unreasonably banned from the workplace is a continuing one from January 1, 2022 until May 1, 2023.

22. The scales metaphor is highly appropriate to describe the process, and as will be shown in the fuller section of the award, I identify a tipping point at which what was reasonable graduated to what was no longer reasonable, regarding the employer's continuing enforcement of the SWP.

C. Employer Reasons why the SWP was Reasonable

I identify the four main reasons which the employer says support or justify the banning of unvaccinated workers:

1) Allowing unvaccinated workers into the workplace endangered other workers already there because they are more likely to be infected and then pass it on to other workers.
2) Third-party and customer requirements for Purolator employees especially couriers, attending their premises to be vaccinated render the policy operationally necessary.
3) Vaccination provides protection against serious illness if infected, so unvaccinated workers bring with them into the workplace an increased risk (for them) of serious illness.
4) Unvaccinated workers are more infectious once infected than vaccinated workers.

23. My observations on these reasons which are discussed in detail later are as follows:

1) Although there were signs that things were changing and vaccinated protection was less effective against the Omicron variant, and waned faster, reason number one represented the prevailing medical opinion as of the date of implementation of the SWP. This meant that allowing unvaccinated workers into the workplace presented risks and dangers to the others working there. This factor alone in my view supports a finding that the SWP was reasonable as of that date, and up until about the spring of 2022.
2) Reason number two was strongly contested by the union mainly on the grounds that the evidence presented with respect to third-party requirements was hearsay and unreliable. I conclude that despite much of this evidence lacking strong evidentiary value, there was

sufficient evidence of third-party requirements to support the reasonableness of the policy as and when implemented.

3) The medical evidence in support of reason number three did not change much during the duration of the SWP. But it does not qualify, upon careful analysis, as a sufficient workplace safety risk or danger. Allowing unvaccinated workers into the workplace did not increase their risk of infection leading to serious illness. It also did not alter the risk of infection in the workplace leading to serious illness for vaccinated workers. There are other considerations involved in adjudicating this difficult issue, discussed later.
4) The data used in the studies to support reason number four came from very small and highly specialized population samples. There were also other serious limitations related to the difficulty of measuring infectiousness which were acknowledged by the authors of the studies. Meta-studies reviewing the range of studies addressing this issue reported results for the Omicron variant which were very similar for the unvaccinated and the vaccinated. They differed markedly from one study focused on by the employer. Standing alone, this reason was not adequately proven to present a workplace danger sufficient to justify a vaccine mandate.

24. Turning then to the question of chronology and changing circumstances during the full duration of the SWP, the following observations are made.

25. Reason number one is gone by June 2022. While there were some marginal dissenting voices, the overwhelming medical opinion by the spring of 2022 was that a two-dose vaccination after 25 weeks was effectively useless to protect against Omicron infection. All the vaccinated workers at Purolator would have completed their two dose vaccinations at least 25 weeks prior to the end of June 2022. Thus, by that time unvaccinated workers presented no more threat of infecting others than 2 dose vaccinated workers.

26. Reason number two is gone by June 2022. No meaningful evidence was supplied by the employer to establish there were any third-party requirements by then. Given the then current environment including the lifting in June 2022 of the Federal vaccine mandate (strongly relied on by the employer to support implementation of the SWP), and a multiplicity of mandates and restrictions being lifted by then, there was a heavy obligation to verify that these third-party requirements remained in place if they were to continue to be used as justification for the ban. There was, I must confess, a shocking absence of interest on the part of the employer in finding out the status as of June 2022, and no effort was made to provide the necessary evidence at the hearing.

27. Regarding reason number three, while vaccination continued to provide this desirable public health outcome, banning unvaccinated workers from the workplace after June 2022 did nothing for their safety and contributed nothing to the safety of the others working there. It was not a reasonable and proportionate workplace safety measure.

28. By the late spring of 2022, only reason number four was arguably still in place as a valid reason for continuance of the SWP. But with its questionable validity, standing on its own, it was, as I have said, wholly inadequate to justify the banning of unvaccinated workers with its sweeping adverse consequences of loss of livelihood. The employer's own expert pointed out that it was never listed by public health authorities as a reason to get vaccinated.

29. The *KVP/Irving* balancing of interests by June of 2022 became heavily weighted against the ban.

D. Other Considerations

30. The employer was subject to a number of statutory safety regulations, as well as safety obligations spelled out in the *Canada Labour Code* and implicit in the collective agreement. The implementation of the SWP was consistent with those obligations.

E. The Rights of the Grievors to Personal Autonomy and Bodily Integrity

31. The authorities require that these rights be respected, and insofar as they must be infringed in order to give way to weightier interests such as safety, the least intrusive means of satisfying those weightier interests must be selected. Some of the vaccination awards identify an obligation to disclose specific personal reasons for electing to not get vaccinated and say that the failure to provide specific reasons is a compelling factor in weighing the employees' interests with employer interests. This reveals a fundamental misunderstanding of the rights being infringed and is a serious error.

F. Public Announcements, Messaging from Health Authorities, and Consulting Advice from Cleveland Clinic

32. The employer relied heavily on support and encouragement from all these sources in favour of vaccination generally as producing a desirable public health outcome. But when statements and information from these sources are examined closely, they do not, after about March of 2022, assert that a two-dose vaccination after 25 weeks was of any value in protecting against infection. Many public health and government sponsored agencies provided statements and reports which made it

very clear that 2 dose vaccination after 25 weeks provided no meaningful protection against infection and devoted their messaging to encouraging booster shots and emphasizing the value of vaccines in protecting against serious illness. Reliance on these sources does not exonerate the employer from its failure to focus on the ineffectiveness of the two-dose regime it was mandating via the SWP and take steps to end the mandate by late June 2022.

G. The Federal Vaccination Mandate

33. The employer provided extensive evidence explaining how the imposition of a Federal vaccination mandate for its employees, and the immediate prospect of a mandate for federally regulated employers, played a significant part in its decision to impose a mandate. But when the Federal government lifted its mandate on June 20, 2022, citing several reasons including the evolution of the virus, vaccine science and high levels of vaccination in the population as a whole, the employer chose not to follow that lead. Its reasons for not doing so were unconvincing.

H. Expert Evidence

34. Both sides called expert witnesses. Their reports and evidence are discussed later. However, my conclusion after considering all of it, is that both experts were, with some shading, of substantially similar opinions about the loss of vaccine effectiveness against infection and the continuing value of vaccines as protecting against serious illness. They both acknowledged the data was inconclusive on the subject of infectiousness of the unvaccinated compared to the vaccinated.

35. Both experts agreed there was a major shift in messaging from public health authorities brought about by a growing realization among medical experts that two dose vaccinations after 25 weeks were ineffective at protecting against infection. The shift was to concentrate on spreading the message that vaccines were effective at protecting against serious illness and encouraging booster shots.

36. Dr. Rebick equivocated when cross examined about the “ineffective” description related to 2 dose protection after 25 weeks against Omicron infection, and claimed there was still “some protection” without putting a percentage number on it. When cross examined about what he meant by “some protection” he failed to give a responsive answer. But elsewhere in his report he agreed that it emerged that two dose vaccination “did not provide good protection” against Omicron infection. On this issue I preferred the evidence of Dr. Kalyan which was that by the spring of 2022 protection against infection became “statistically insignificant”.

I. Consequence of the Changed Primary Role of Vaccines from Protection against Infection to Protection from Serious Disease

37. This shift in prevailing medical opinion and public health messaging altered the balancing of interests between employer concern for workplace safety and the interests of the affected employees, in a major way.

38. Whereas protection from infection had a workplace safety consequence which justified the policy, protection from serious illness was a public health benefit, which had either minimal or no specific workplace safety consequence. It could not, I find, be used to support the reasonableness of the Safer Workplaces Policy. My final finding, which asserts that there was no workplace safety value at all was arrived at by careful analysis, and I acknowledge that it is somewhat counter-intuitive.

J. Internal Discussion of the Employer in June 2022 about Lifting the Mandate

39. As early as April 2022, union counsel wrote to the employer advising of reduced vaccine effectiveness, including supporting statements from the Chief Public Health Officer of Canada, and the Vancouver Coastal Health Authority.

40. This, and the imminent lifting of the Federal mandate, as well as the lifting of other mandates and restrictions across Canada triggered an internal discussion in June 2022 amongst management about whether to keep the SWP in place or to lift it. A draft confidential brief was placed in evidence, dated June 6, 2022 which was agreed by the employer witness Mr. Hayashi to be the basis for internal discussion. This will be reviewed in more detail later. At this point I have to say that I found the reasons for keeping the SWP in place to be less than convincing. The brief as a whole failed to reflect the need at that critical time to carry out a *KVP/Irving* analysis. Instead, it focused on matters which while of interest to management were not relevant to the requisite analysis.

41. While at the hearing Mr. Hayashi attempted to provide one, there was also no convincing explanation provided by the employer as to why the imposition of a Federal vaccine mandate played such a significant part in influencing its decision to implement the SWP, while the lifting of the Federal mandate on June 20, 2022, played no significant part in influencing its resolve to keep the SWP in place.

K. Conclusion re Continued Reasonableness of the Policy

42. I conclude that based on all the evidence, including public health announcements, expert testimony, third party requirements, much of which was included in the admissions and agreed statement of facts in *Purolator versus Teamsters Local 938*, (Wilson, March 15, 2022) ("*Wilson*") in Ontario and *Purolator versus Teamsters Locals 931 and 1999*, (Morin, April 27, 2022) ("*Morin*") in Québec, the SWP was reasonable when implemented on January 10, 2022. I conclude that it remained reasonable until the late spring of 2022. My decision therefore is consistent with the awards in *Wilson* and *Morin* and accords them due deference. This becomes highly relevant in evaluating the employer's res judicata preliminary objection discussed later.

43. However, the effectiveness of the Policy to achieve the employer's goals of improved workplace safety reached a point at which the interests of the unvaccinated workers in personal autonomy and bodily integrity as well as their interests in maintaining their livelihood outweighed the interests of the employer. The improvement in workplace safety achieved by the ban became so minimal or nominal by the late spring of 2022 that it weighed very little. The added consideration that the unvaccinated workers were suffering the devastating impact of loss of livelihood, as a direct consequence of the Policy, meant that the scales which balance these interests as required by the *KVP* and *Irving* tests came down at that point resoundingly on the side of the grievors.

L. Fixing the Date when the Policy Ceased to be Reasonable

47. As for fixing the precise point in time when the balance shifted in their favour it is obviously an arbitrary and somewhat artificial exercise. However, it must be carried out to activate the remedial aspects of this award.

48. I identify that point as the end of June 2022. A review of my findings and conclusions in this summary, and later in the full review, will provide an understanding of why this is an appropriate date.

M. Owner Operator Grievances

49. In some respects, these grievances fall into a different category than those of the hourly paid employees. There are two ways in which these grievances can succeed or partially succeed. The first of these arises if I conclude that the SWP was applied to them in an arbitrary and discriminatory way or is otherwise contrary to the *Irving* and *KVP* criteria, or that there was a breach of the collective agreement. I have so concluded and will discuss this in detail later in the award. This

result is not dependent on a finding that the SWP itself was unreasonable. The Dan Moes Grievance is treated somewhat separately but under this heading.

50. The second way in which these grievances can partially succeed, is that if I am wrong in my first conclusion, these grievors will have the benefit of my finding that the SWP graduated to unreasonable in late June 2022. Thus, even if the policy was not applied to them originally in violation of the *KVP* and *Irving* rules, and there was not a breach of the collective agreement, their grievances will be upheld from late June 2022 onwards.

N. Non Attestation Terminations

51. These terminations came about because on November 16, 2022 the employer asked these grievors to re-attest their vaccination status and they refused or neglected to do so. As a consequence, they were "administratively terminated". These terminations were the subject of new grievances filed by the union, although the union advised the employer that they were also covered by the existing group grievance. The employer takes the position that these new grievances are not before me, and the terminations are not covered by the existing group grievance.

52. These terminations arose directly as a result of non-compliance with one of the provisions of the SWP, the reasonable application of which is part of my remit as arbitrator appointed with respect to this vaccination grievance dispute. The fact that they were terminated after I was appointed does not deprive me of jurisdiction.

53. They are also covered by the group grievance which complained of the placement of unvaccinated members on leaves of absence "and/or terminating their employment". I find that I have jurisdiction to address these terminations as part of the group grievance and also because the terminations occurred directly as a result of non-compliance with the SWP.

54. I conclude that these grievances are upheld. The employer's request to re-attest as required by the policy came after the date when the policy was no longer valid. The dismissals were a breach of the rules in *KVP*. Insofar as there was a disciplinary element to the dismissals, they were dismissed for being in breach of an unreasonable rule. This does not amount to just and reasonable cause.

O. *Res Judicata*

55. The employer launched a preliminary objection to my jurisdiction to hear this case on the grounds of *res judicata*. It relied on the fact that there had been two arbitration awards (*Wilson* and *Morin*) adjudicating the validity of the SWP between these two same parties, which had concluded

that the SWP was reasonable, and dismissed the grievances of employees who had been placed on an unpaid leave of absence.

56. Both these awards addressed facts and evidence gathered in the form of an agreed statement of facts in one case and a series of admissions in the other. In both cases all the medical and vaccine data in the agreed facts and admissions were filed with the arbitrator and crystallized as of January 20, 2022 in the *Morin* case and January 29, 2022 in the *Wilson* case.

57. Both arbitration awards addressed circumstances in place very close to the date of implementation which was January 10, 2022. If the present case concerned exclusively the validity of the SWP close to the date of its implementation, I would have little hesitation in sustaining the preliminary objection. Indeed this award confirms my agreement with the result in both the previous awards, so there is arbitral deference at work.

58. The sole issue in this case however, is not the validity of the SWP as of its implementation in January 2022. The issue, and the employer is quite clear about this, is the validity of the SWP between January 10, 2022 and May 1, 2023. The employer had a continuing obligation to respond and react to current available medical data and other relevant information, and to update or amend its policy as time went by and circumstances changed. None of this history of reacting (or failing to react) to changing circumstances all the way to May 1, 2023, could conceivably have been available to the previous arbitrators, nor was there before those arbitrators the issue of whether this history demonstrated that the employer was meeting its continuing *KVP* obligations to update the policy or suspend the policy. There was thus no possibility of the *res judicata* objection succeeding in these circumstances.

59. This case also includes grievances by a number of owner operators which involve several considerations not before the two previous arbitrators. The issue of whether they should be upheld or not is before me, in this case, even if all the other issues about reasonableness were held to be already adjudicated and subject to *res judicata*.

60. I dismiss the *res judicata* preliminary objection. I deal in more detail with the objection later in the award.

61. I now turn to a detailed review of the issues and evidence above outlined.

IV ***KVP* and *Irving***

62. In *KVP* the arbitration board set out in paragraph 34 the following well accepted propositions:

> A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:
>
> 1. It must not be inconsistent with the collective agreement
> 2. It must not be unreasonable.
> 3. It must be clear and unequivocal.
> 4. It must be brought to the attention of the employee affected before the company can act on it.
> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
> 6. Such rule shall have been consistently enforced by the company from the time it was introduced.

63. In that case the rule concerned the serving of more than one garnishee order with respect to a particular employee, which according to the rule justified termination of employment. This did not concern the possible breach of any fundamental rights of the employee. Some rules, however, potentially infringe such rights, and the rule or policy in the present case falls into this category. When this happens the *KVP* rules have been adapted to address this issue, and the leading case on the subject is *Irving*. That case concerned random drug and alcohol testing which infringed employee rights of privacy, including personal autonomy and bodily integrity. The court at page 472 stated:

> Rights to privacy and to the related right of security of the person are important and prized incidents of Canadian citizenship. Reactions to invasions of them tend to be prompt, visceral, instinctive and uniformly negative.

64. The court described the disputed testing regime in that case as follows:

> The invasion of that privacy by the random alcohol testing policy is not a trifle. It effects a significant inroad. Specifically it involves a bodily intrusion and the surrender of bodily substances…… Taking its results together, the scheme affects a loss of liberty and personal autonomy. These are at the heart of the right to privacy.

65. Well before the decision in *Irving*, the Supreme Court developed the concept of "charter values". In *Retail Wholesale and Department Store Union Local 580 [RWDSU] v Dolphin Delivery Ltd.,* [1986] 2 SCR 573, McIntyre J. said:

> Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another, the Charter will be applicable. Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer

> to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.

66. Rights of privacy, autonomy and security of the person are protected in the arbitral jurisprudence. Although they may sometimes have to give way to more important rights, they still exist and still are deserving of as much protection as possible in the circumstances.

67. In *International Union of Operating Engineers Local 793 v. Earth Boring Co, [ExakTime Grievance],* [2021] OLAA No. 311, arbitrator Rogers cited a range of authorities, including the SCC decision in *Irving*, which incorporated a balancing of interests approach:

> 306 I adopt and intend to follow the teaching of those authorities in turning to the assessment of the evidence and submissions. I also endorse the observation by counsel for Local 793 that the law in this area is not complicated and that it dictates that if an employer wishes to intrude on the privacy interests of its employees it must have a good reason to do so; and it must establish the need to do so and the reason to do so with viable evidence. Again, the more serious the intrusion, the better the reason must be and, in my view, the more persuasive the evidence must be.
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> 307 In *Halifax*, Arbitrator Venoit cited with approval Arbitrator Ponak's comments in *Canada Safeway* on the principle of proportionality. Noting that the "requirement for an employer justification for privacy-intrusive measures is in the cases" (at para. 132 of *Halifax*), Arbitrator Venoit recognized proportionality as a tool to assist in assessing whether justification has been made out and quoted the following from *Canada Safeway*:
>
> > In assessing where the balance is to be struck in the current case, I accept the proportionality argument advanced by the Employer. It is an approach reflected in a recent decision of *Office of the Privacy Commissioner of Canada* in PIPEDA 281 (page 2):
> >
> > > The Assistant Commissioner noted that the purpose of the Act is to balance the individual's right of privacy with respect to their personal information and the need of organizations to collect, use, or disclose personal information for appropriate purposes in the circumstances. In assessing this balance, the Assistant Commissioner reflected on whether the loss of privacy, *from the collection and use of the voiceprint, was proportionate to the benefits the company would likely gain*.
> >
> > *I subscribe to the principle of proportionality. The more intrusive the impact on employee privacy the greater the business rationale that must be demonstrated. Conversely, if the intrusion on employee privacy is insubstantial, the concomitant level of justification also is lower*. For example, the taking and keeping of employee DNA samples would require far greater justification than the taking and keeping of information on an employee's shoe size. Determining the proper balance requires, therefore, an analysis both of the degree to which employee privacy may be compromised and the business reasons advanced in favor of the intrusion on employee privacy. (Arbitrator Venoit's emphasis)

68. It should be noted that the balancing of interests in the present case concerns not just the rights of personal autonomy and bodily integrity of the affected employees, which in a sense were not directly infringed because the SWP provided them the option to not get vaccinated and suffer no

disciplinary consequence, but also and more directly, the serious economic impact of the policy, should they elect not to get vaccinated, which banned them from the workplace and thus deprived them of their livelihood.

69. *Irving* requires a balancing of the interests of privacy, personal autonomy, and bodily integrity against the benefits to workplace safety which may be conferred by vaccination. This process is echoed in public health ethics, an example of which is found in a guide published by the BC Centre for Disease Control, entitled BCCDC Ethics Framework and Decision Making Guide. In a section entitled "Terms of Reference, Key Concepts, and Definitions" the document addresses the dilemmas involved in public health including the question "To what extent it is just and proper for public health to involve itself in the lives of individuals for the betterment of the population." The concepts deserving of ethical consideration include:

> • Respect for Autonomy: Respecting a person's capacity and right to make decisions for him or herself, based on his or her own values preferences and goals. It is, in essence, a respect for persons' freedoms and liberties. It is this respect for autonomy that is the source of tension with competing concepts of justified paternalism and justified harm prevention.
>
> • Paternalism: Acting like a father or parent to another. It is the idea of restricting a person's freedom for his or her own benefit or protecting that person from harming him or herself. It implies a judgment that the person may not fully understand what is in his or her own best interest, or the risks involved in his or her decisions.
>
> • Harm: Harm and burden are often used interchangeably, and are often used in conjunction with the word risk (which is the probability of a harm multiplied by the magnitude of the harm). Broadly speaking, harms or burdens in the realm of public health ethics can be of three types:
> o Breaches of privacy or confidentiality.
> o Compromised autonomy or personal liberty.
> o Infringements on justice; the unequal distribution of harms (or goods) when public health interventions target specific populations.
>
> • "Harm Principle": This refers not to harm in the public health sense as noted above but to individual hurt and suffering. It is a fundamental concept in public health ethics and is attributed to John Stuart Mill:
>
> *"That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."*
>
> This is essentially a justification for intervention by the state, and a warrant for infringements on personal autonomy in the name of harm prevention or reduction. In public health practice this is most commonly considered in the context of a duty to protect the public from harm.
>
> • Proportionality: This is the notion that any public health intervention should be proportionate to the threat faced, and that measures taken should not exceed those necessary to address the actual risk.

> • Public Justification: This is related to transparency. When a public health program threatens to infringe on the liberties of an individual or community, public justification is the notion that the agency has a responsibility to explain and justify this infringement.

While the employer is not a public health agency but a private enterprise, it is not out of place for an employer to have in mind most of the above considerations when carrying out the balancing exercise required in *KVP* and *Irving*. The point made by the union in its submissions is that the primary principle applicable to this aspect of the case is that attributed to John Stuart Mill above, i.e. "that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." This is not quite true in the case of workplace safety as there are statutory obligations on employees to take every reasonable precaution to ensure their own *workplace* safety as well as the safety of others. However, the primary concern driving all the vaccine mandates at the beginning was that unvaccinated workers endangered others in the workplace because they were more likely to be infected and pass it on. This concern fell squarely within the bounds of Mr. Mills' dictum. Once that concern dissipates and the only issue left is self-preservation 24/7, the balancing exercise takes on a very different character.

V Chronology Leading to the Implementation of the SWP

70. The employer witness who provided evidence in support of the reasonableness of the SWP was Mr. Hayashi, director of Labour Relations.

Early Impact of the Pandemic

71. He testified that the COVID-19 pandemic was the most challenging thing he had to deal with in his more than 25-year career. In light of the emerging health crisis, in March 2020 Purolator staff considered what steps needed to be taken, including discussion with its National Joint Health and Safety Committee.

72. The theme of multiple discussions in the National Joint Health and Safety Committee meetings involved the presence of COVID-19 in Purolator's workforce, whether there were COVID-19 infections or illnesses amongst the employees, and what Purolator was doing to keep its employees safe. This included discussions about the uncertainty around how the virus was transmitted, under what conditions, and the appropriate use of personal protective equipment ("PPE").

73. Mr. Hayashi testified that another significant concern in March 2020 was how Purolator was going to continue to operate to serve its clients, including its clients in the healthcare and long-term care home industries, pharmacies and various other institutional clients. Given the potential for lockdowns or the inability to service Purolator's clients, Mr. Hayashi was asked to come up with scenarios regarding potential layoffs.

74. He testified that large numbers of Purolator workers were affected by being close contacts of a COVID-19 positive person, either resulting in illness or, at the very least, requiring isolation. Hundreds of Purolator workers tested COVID-19 positive. In May 2020 there were 103 cases of employees having COVID-19. Four Purolator workers were hospitalized due to contracting COVID-19.

75. Mr. Hayashi testified there were at least two serious outbreaks at Purolator caused by employees not following the rules regarding social distancing measures. One was in the Calgary Hub (in response to which Alberta Health Services asked Purolator to demonstrate the precautionary steps taken up to that point of the outbreak). The Calgary outbreak resulted in 33 employees testing COVID-19 positive and having to self-isolate.

76. There was another outbreak in Ontario. Mr. Hayashi also testified that at least one other similar employer, Amazon, experienced a large outbreak in Toronto. A failure to self-assess and a failure to manage controls led to a massive outbreak resulting in an Amazon facility being completely shut down for several days.

77. Mr. Hayashi testified that Purolator's business continuity team, comprised of operations and health and safety personnel, worked to ensure Purolator was able to continue to deliver and pick up important shipments for important customers and ensure packages got delivered on time. Because of the Calgary outbreak, a lot of staff were not present, either because they tested positive or were a close contact and had to isolate. The business continuity team changed Purolator's network to have packages that would normally go through Calgary bypass Calgary. This would make sure that if a BC hospital needed a package, it would not get delayed in Calgary.

78. He testified that in January 2021 the Employment and Social Development Canada Labour Director ordered Purolator to create a COVID-19 safety plan, specifically focused on *the prevention of transmission of COVID-19 in the workplace*. This plan was shared with the union through the Joint Health and Safety Committee and shared with employees electronically and in hard copy. [my emphasis]

79. Mr. Hayashi testified that COVID-19 had a serious impact on the health of Purolator's employees, as well as the viability of its operations.

80. Mr. Hayashi also referred to the National Health and Safety Policy Committee minutes dated January 31, 2023. This document set out that Purolator had experienced 3,959 confirmed COVID-19 cases to that date amongst its employees in Canada. Unfortunately, the document did not identify any dates, or the seriousness of the cases and Mr. Hayashi was unable to shed any further light on that.

Purolator's Legal and Collective Agreement Obligations

81. Mr. Hayashi testified that Purolator was subject to several legal and operational obligations which informed its decision to implement the SWP.

82. He referred to the minutes of the National Health and Safety Committee for February 18, 2020. Membership of this committee consisted of himself, Ken Johnston, Purolator's Senior Vice-President of Human Resources, and Purolator's Director of Occupational Health and Safety. Union representatives on the Committee were Rick Eichel, who is the national representative with Teamsters Canada; Pierre Blanchard, who is an assistant director for Rick Eichel, and Bob Myles, who is the secretary treasurer of Local 938 and an assistant to Rick Eichel.

83. He acknowledged that Purolator owed a duty of care to its employees from both a legal perspective, as well as a company values perspective. Purolator meets its duty of care by doing everything possible to eliminate workplace hazards. If Purolator cannot eliminate a hazard, it tries to mitigate the risk through whatever means appropriate. Mr. Hayashi testified that Purolator wants its employees to go home as healthy as they were when they arrived.

84. Mr. Hayashi testified that, in addition to potential regulatory requirements, Purolator also had obligations under the *Canada Labour Code* and the collective agreement to ensure the health and safety of its employees.

85. Section 124 of the *Canada Labour Code* provides:

> Every employer shall ensure that the health and safety *at work* of every person employed by the employer is protected.

86. Articles 22.01 and 22.02 of the collective agreement, state:

> 22.01 The parties agree to cooperate in order to establish and maintain conditions conducive to ensuring proper health and safety *at work* for all employees.

> 22.02 The Company, the Union and the employees collectively undertake to respect the health and safety measures prescribed by applicable laws and regulations in order to ensure the health and safety of all employees. [emphasis added]

87. Mr. Hayashi testified about the precautionary principle. If there is a protective measure that may assist, an employer should not wait for the threat to materialize before taking action. Rather, if potential harm to an employee could be avoided by taking precautionary measures, whether or not any such measure(s) are guaranteed to achieve the desired outcome, then it should do so. He said this reflects Purolator's standard of care. The standard of care is that an employee should not experience avoidable harm in the workplace.

88. Mr. Hyashi testified about the health and safety concept of a hierarchy of controls. The hierarchy of controls is a pyramid and at the top of the pyramid is the highest level of control, namely elimination of a hazard.

89. Mr. Hayashi testified that originally and for a long period of time, public health officials told Canadians that vaccines reduced the transmission of COVID-19, so were in the elimination category. This advice remained unchanged and unchallenged for months. Subsequently, he acknowledged that the advice changed to vaccines being effective at reducing the serious health impact of COVID-19, rather than preventing infection.

90. By September 2021 Canadians had undergone 17 months of life in the pandemic. Thousands of people had died, most of them elderly, many in nursing homes which were ill-prepared for the crisis. Through late 2020, news outlets reported spectacular results of newly developed vaccines in clinical trials some in the range of 95% efficacy against symptomatic infection.

<u>The Federal Vaccine Mandate</u>

91. A Federal Government news release dated August 13, 2021 announced that the government would enact a vaccine mandate for all employees of the federal civil service.

92. It was clear from the evidence of Mr. Hayashi with respect to the motivation of Purolator to impose a vaccine mandate that the perceived benefit *was to be controlling the spread* of COVID-19. This is emphasized in the employer's written submissions at paragraph 123 where it is stated:

> In accordance with these principles, and because vaccination was and is the strongest measure available to control or mitigate the harm caused by Covid 19, Purolator took a "vaccine plus" approach, meaning Purolator used vaccination as a *foundation for controlling the spread of Covid 19,* and then added or maintained additional protections based on the circumstances."

93. The employer also referred to advice provided by the Chief Public Health Officer of Canada in a statement dated December 30, 2021, recommending primary doses for those who had not yet received them. It should however be noted that this statement included the following caveat:

> The number of cases associated with the Omicron variant of concern has further accelerated around the world and in Canada. Accumulating data continues to demonstrate that Omicron is the most highly transmissible variant to date *and that prior immunity, either from vaccination with the two dose primary series, or previous infection, does not offer good protection against infection.* There may be some protection against severe disease after two doses, but this remains uncertain. Importantly, getting a booster dose were eligible, with either the Pfizer Comirnaty, or Moderna Spikevax Mr.NA vaccines, is expected to help restore protection that may have waned since the second dose."

94. To be fair to the employer the accumulating data above referred to had not yet reached the point where prevailing medical opinion was that two dose vaccines failed to provide any meaningful protection against infection after 25 weeks. There is a difference between saying that "vaccines do not offer good protection against infection" and realizing as was later established that after 25 weeks the protection was statistically insignificant.

95. Mr. Hayashi testified that the SWP was also implemented as a result of the anticipated federal mandate. Via a press release dated August 13, 2021 the Government of Canada announced its intent to require vaccination as early as the end of September 2021 across the federal public service.

96. The same press release also stated:

> In addition as soon as possible in the fall and no later than the end of October, the Government of Canada will require employees in the federally regulated air rail and marine transportation sectors to be vaccinated. The vaccination requirement will also extend to certain travellers. This includes all commercial air travellers, passengers on interprovincial trains, and passengers on large marine vessels with overnight accommodations, such as cruise ships…
>
> Further the government of Canada expects that Crown corporations and other employers in the federally regulated sector will also require vaccination for their employees. The government will work with these employers to ensure this result.

97. It should be noted that with the proposed extension of a vaccination requirement to air travelers, and passengers on trains and boats, clearly the Government was focusing on reducing the spread of the virus by vaccination. The belief that this measure would assist in achieving this goal was founded on the prevailing medical opinion that vaccination was effective to reduce the risk of infection. Mr. Hayashi testified that when he reviewed the press release, he understood it to mean that Purolator "better get a vaccine policy". Many employees at that time contacted Purolator to understand the impact of the pending federal government action.

98. To address these concerns Purolator issued a pre-shift note dated August 17, 2021, which advised employees it was likely that Purolator would implement a vaccination policy. There were also informal discussions with the union as a result of the government announcement.

99. Mr. Hayashi also testified there was a need to have additional employees in the same spaces to handle Purolator's increased workload arising because of the pandemic, which was perceived as elevating the risk of exposure to or transmission of COVID-19.

Third Party Requirements

100. Mr. Hayashi testified that by October 2021 Purolator was required by a growing number of customers, including hospitals, to assign only vaccinated couriers to provide services. In support of this Purolator produced a number of documents and some correspondence. Also produced was a spreadsheet listing customers and third parties which included some information about their vaccination policies or restrictions. The union vigorously opposed this assertion and ,as it was a key feature of the employer's decision to impose a vaccine mandate, it is appropriate to devote some of this award to reviewing in detail the positions of the parties.

VI Third Party Requirements

101. Mr. Hayashi gave evidence about COVID-19 policies put in place by its clients. He maintained that these third-party requirements provided an operational imperative for the adoption of the SWP and were a significant factor in supporting the reasonableness of the implementation of the SWP. He sought to present a chart which appeared to provide details of the vaccination requirements of 39 different customers across the country and stated that Purolator was compelled to comply with the COVID-19 policies put in place by its clients.

102. The presentation of this evidence was the subject of a vigorous objection by the union based on the absence of particulars and specificity provided prehearing and asking that most of it be treated as inadmissible. I gave a written ruling on this objection dated April 13, 2023 dismissing the union objection and permitting Mr. Hayashi to provide evidence, some particulars of which had been provided earlier. I did however state at page 3 that "when and if Mr. Hayashi is actually questioned about the data on the chart he will no doubt explain how the data was accumulated." Two paragraphs further on in that ruling I stated that evidence provided by the employer with respect to factors in its decision to implement its Policy "may or may not be sufficiently proved or

sufficiently compelling. That will be a matter of argument. I will not force the employer to provide greater detail."

103. Mr. Hayashi accordingly provided the disputed evidence. The union, as it was entitled to do, attacked much of it on a number of different grounds, including that most of the information on the chart was hearsay, and that what was conveyed did not prove in many cases that couriers were required to be vaccinated. The union in its written submissions at paragraph 226 stated that it was agreed the admissibility of the chart would be dealt with in final argument. This is slightly contrary to my understanding, which is that the chart was admitted into evidence and referred to by Mr. Hayashi, but its reliability, and the extent to which it was to be treated as sufficient proof of the facts he was alleging, or was sufficiently compelling, was to be a matter of argument. The difference between these two understandings is not in the end of much significance. As counsel for the union stated at paragraph 256 of his submissions: "In the present case, the arbitration board has received the disputed document subject to Local 31's objection, eliminating the concern of making too hasty a decision on admissibility. Hence, a decision that the document is not admitted is indistinguishable in practical terms from the conclusion that the hearsay evidence will be given no weight…".

104. I here refer to the third-party requirement evidence provided by Mr. Hayashi as summarized by the employer in its written submissions together with employer comments on the union position, which is followed by the union submissions on the relevance and reliability of that evidence.

> Mr. Hayashi testified that in addition to Purolator having its own concerns about mitigating the impact of COVID-19 in its workplace, Purolator was also compelled to comply with the COVID-19 policies put in place by its clients. By October 2021, Purolator was required by a growing number of customers, including hospitals, to assign only vaccinated couriers to provide services Mr. Hayashi testified to the challenges posed by attempting to match a customer requirement for fully vaccinated drivers with a workforce consisting of both vaccinated and unvaccinated individuals. Purolator's routes included clients which had vaccination requirements and clients which did not.
>
> In addition to Purolator having its own concerns about mitigating the impact of COVID-19 in its workplace, Purolator was also compelled to comply with the COVID-19 policies put in place by its clients. These third-party requirements provided an operational imperative for the adoption of the SWP.

On May 1, 2023, in direct examination, Mr. Hayashi testified that by October 2021, Purolator was required by a growing number of customers, including hospitals, to assign only vaccinated couriers to provide services.

Mr. Hayashi testified to the challenges posed by attempting to match a customer requirement for fully vaccinated drivers with a workforce consisting of both vaccinated and unvaccinated individuals. Purolator's routes included clients which had vaccination requirements and clients which did not. Furthermore, these routes changed daily. If Purolator had a courier who had not attested to being fully vaccinated, it would have to create a specific route in which none of that courier's customers had a requirement for the courier to be vaccinated. From a practical sense, Purolator does not know what volume will come in each and every day, and the requirement for vaccinated couriers were peppered throughout Purolator's clients. The volume of deliveries changes every day. The destinations changed every day. It was entirely impractical to coordinate client requirements against the vaccination status of employees.

The Vancouver International Airport requirement: Vancouver International Airport ("YVR") was one of the Purolator clients which required all Purolator couriers to be fully vaccinated. In an email to Purolator dated October 18, 2021, the YVR stated, in part:

> I am sharing with you today that we are introducing our COVID19 Vaccination Policy, which takes effect September 21, 2021 and requires all Airport Authority employees – as well as any person directly engaged to conduct work for or act on the Airport Authority's behalf - to have the full cycle of a Health Canada approved vaccine by October 30, 2021. Under our policy, we also require that all our direct and indirect commercial partners, service providers, contractors and other organizations and agencies working at YVR implement, maintain and enforce a COVID-19 vaccination policy with at least the same degree of requirements as set in out policy.

Attached to the email is the policy last updated October 18, 2021. At no time was Purolator advised YVR's policy was lifted. As required by YVR, Purolator confirmed its compliance with YVR's policy and shared the SWP. In direct examination, Mr. Hayashi was asked to respond to earlier testimony that UPS employees had access to certain parts of YVR without requirement

to be vaccinated. Mr. Hayashi testified he did not understand how that was possible.

> Cargojet is another Purolator client. Cargojet's policy provided in evidence stated in part:
>
> This letter confirms that Cargojet has implemented a Vaccination Policy effective immediately that applies to all - 35 - cargojet employees, contractors, customers, suppliers and guests. Effective October 30, 2021, all Cargojet employees, contractors, customers, suppliers and guests must be either a) fully vaccinated, b) partially vaccinated with an approved timeline to become fully vaccinated as soon as possible, or c) they have been granted an exemption for religious or medical reasons.
>
> Please ensure that as a contractor, customer, supplier and/or guest of Cargojet, you or any representative that attend at our premises or that come into contact with our employees MUST be either fully vaccinated or fall within the categories above and that testing is being conducted. [emphasis in original]

Winnipeg Airport Authority, another Purolator client, implemented a similar requirement which was put in evidence and stated in part:

> It is required that every airport partner, regardless of whether provincially or federally regulated, have a mandatory vaccine policy in place for all its employees by November 15, 2021. WAA is requiring confirmation from you that your company has its own policy for mandatory vaccination or are working to complete one that will achieve mandatory vaccination by the required date…

Mr. Hayashi testified there was no difference between the Winnipeg Airport Authority policy and YVR's policy.

The Saskatoon Airport Authority, another Purolator client, implemented a similar requirement put in evidence which stated in part:

> This policy applies to all airport campus tenants including their sub contractors or sub tenants and anyone connected to the aviation system at the Saskatoon Airport. For clarity, this policy applies to all individuals or organizations operating on - 36 - Saskatoon Airport property other than a stand-alone nonaviation business. 141. Under "Vaccination Requirements," the memorandum stated: All airport campus tenants including their sub contractors and sub tenants and anyone conducting business [sic] the Saskatoon Airport must be fully vaccinated by November 15, 2021. Fully vaccinated is defined as: having received the full series of an accepted COVID-19 vaccine or a full series of a combination of accepted vaccines. [emphasis added]

Mr. Hayashi also referred to a document titled "Notice to Contractors of the BC Provincial Government" This document states, in part:

> HR Policy 25, issued under the BC Public Services Act, requires that as of December 13, 2021 all contractor and subcontractor personnel entering a staff-only area of an indoor BC government workplace while BC government employees are present…for provision of services under a government contract, must be fully vaccinated against COVID-19 with a vaccine approved for use in Canada. [emphasis added]

Mr. Hayashi testified he understood from this document that Purolator could only send couriers who were fully vaccinated to a government of BC facility.

Counsel for the Union suggested to Mr. Hayashi that in a BC Services Center, deliveries can take place at the reception, and an unvaccinated delivery person is not prohibited from delivering to such an area. In response Mr. Hayashi testified, if a Purolator courier delivers to a loading dock, where public is otherwise excluded, the vaccination requirement applies.

Mr. Hayashi was referred to email correspondence between Purolator and BC Mail. He testified this correspondence started because BC Mail wanted to ensure Purolator was in compliance with the government of BC's vaccine mandate, so that Purolator could continue to provide service. He testified BC Mail was not satisfied with Purolator's SWP, because it required the policy to take effect December 13, 2021. He was not aware how the dispute was resolved.

Mr. Hayashi then referred to a spreadsheet or chart of 39 customers compiled by various persons at his request. This exhibit provided some detail of their vaccination requirements.

Mr. Hayashi referred to the first entry, Life Labs and testified Life Labs required that any of Purolator's couriers attending its locations be vaccinated and be prepared to demonstrate that. Mr. Hayashi testified Life Labs, like some other clients, had a higher standard, and required evidence of vaccination. Mr. Hayashi testified in such cases, Purolator was able to explain its policy and they accepted that Purolator's workforce was fully vaccinated.

Mr. Hayashi next referred to the Trillium Health entry (under Life Labs) and the middle column, where possibility of termination for noncompliance is mentioned. Mr. Hayashi stated SWP complied with every customer's vaccination requirement.

Mr. Hayashi referred to Teva Canada and testified Teva Canada required a fully vaccinated workforce, and suppliers and contractors were required to sign a form to attest to their compliance.

Mr. Hayashi referred to the Canada Blood Services entry and testified the policy required couriers to be fully vaccinated. Those who were not vaccinated due to an accommodation were required to take a rapid antigen test. Mr. Hayashi testified the testing option did not apply to those who chose not to be vaccinated.

Mr. Hayashi testified that other clients as listed on the spreadsheet had similar vaccination requirements, including:

(a) Lumin, which also had a mandatory vaccination requirement. Drivers were required to show proof of vaccination and masks were mandatory. He testified that Purolator was able to establish with Lumin the details of Purolator's SWP. In light of that, ultimately Purolator was able to have Lumin not request a list of Dr.ivers.

(b) Accuristix/Nova Pac

(c) Kohl and Frisch

(d) SunCorp.

(e) York Region

(f) McMaster

(g) BMO

(h) Health Services Saskatchewan

(i) Sask Tel

(j) Canadian Tire: Mr. Hayashi clarified that the Canadian Tire contract was a national contract and the policy applied to all Canadian Tires throughout the country.

(k) RBC

(l) Correctional Services Canada

In all cases Mr. Hayashi could recall, he testified that Purolator's SWP complied with every customer's vaccination requirement. As a result of its implementation of the SWP, no customer with a vaccination requirement such as those as set out above terminated its contract with Purolator.

The British Columbia Public Service Agency lifted its vaccination requirement for contractors and subcontractors, including Purolator, effective April 3, 2023

> Mr. Hayashi acknowledged that Directive 6, which required hospitals to have a mandatory vaccination policy, did not require that the policy be applied to courier Drivers. But while Directive 6 did not require it, hospitals had their own individual policies. Directive 6 set out minimum standards but did not prevent individual hospitals from having more restrictive policies, and many hospitals still had mandatory vaccination policies that applied to couriers.

Separately from Mr. Hayashi's testimony the employer's submission stated that arbitrator Wilson recognized and acknowledged that Purolator was required to comply with a variety of third-party requirements concerning vaccination in order to be able to carry out its critical operations. His award was cited, at page 16:

> …many of the company's employees must work either on site or attend at the premises of third parties to discharge their duties. Major clients of the Company, most of which have acted pursuant to Government direction, have established vaccination requirements for anyone coming on to their premises. As a general rule, in the absence of an express collective agreement provision to the contrary, employers do not have an obligation to challenge policies or decisions of contractual counterparties for which the employer (and its employees) provide services. The Company must abide by these client vaccination policies and ensure that only vaccinated employees attend these sites. For this reason, the COVID-19 Policy meets an important business objective. It allows the Company to avoid business significant interruptions and assure its clients that its employees are complying with client vaccination requirements.

[Employer then responds to union arguments.]

The union position:

105. I quote from the union's written submission on this point:

> On May 1, Purolator counsel, during questions about customer policies, referred to the YVR vaccine policy and asked Mr. Hayashi "how if at all" this policy, or customer requirements generally, had factored into Purolator's decision to have a vaccine mandate. Mr. Hayashi answered: "This and many other clients who put in place a requirement for us to only send fully vaccinated employees to their locations absolutely factored into us needing to have a vaccination policy."
>
> Consideration of the limited information provided by Purolator on this issue is instructive. The particulars Purolator provided on August 24, 2022 (paragraph 47(b)) allege:

> On or around October 18, 2021, the Vancouver Airport Authority issued a notice to all its commercial partners, service providers, contractors and other organizations/agencies requiring them to implement, maintain and enforce a COVID-19 vaccination policy with at least the same degree of requires [sic: requirements] as those set out in its policy and applicable government orders. It also provided a copy of its own COVID-19 vaccination policy which required its employees to be fully vaccinated by October 30, 2021. 209.

The statement above from Purolator's particulars respecting YVR's vaccine policy is crafted to conceal more than it says, i.e., to give a false impression of the facts. The version of the YVR policy described in Mr. Hayashi's direct examination is very similar in language and effect. However, the coverage of Purolator employees under the actual YVR policy is quite different from Mr. Hayashi's self-serving description and different from the impression conveyed by the incomplete evidence provided in the Purolator's particulars.

A review of the actual YVR policy reveals that the question of what the YVR vaccine requirement is differs from the question of who among a third-party's employees the policy applies to. The YVR policy describes covered third-party personnel as follows: These policies should, at a minimum, cover personnel that work at or whose work may require them to attend at our airport terminal or any of YVR's satellite buildings or facilities located on Sea Island such as the South Terminal Airport, the Airport Operations building (AOB), the Aylmer Road Complex (ARC), the Vancouver Airport Property Management (VAPM) facilities.

The evidence is that about 500 of Purolator's BC employees work at or from Jericho Road. This is about half of the Local 31 bargaining unit. Mr. Hayashi acknowledged inside workers at this location are not required to attend any of the YVR locations listed in the YVR policy at which vaccination is required. Remaining employees are primarily couriers who clearly are not covered by the YVR policy unless they deliver at the YVR locations specified in the YVR policy. Therefore the YVR vaccine policy does not generally prevent unvaccinated employees at the Jericho Road site. We know that only because we have a copy of the YVR policy. If we had only Mr. Hayashi's self-serving description of the YVR policy, we would not know it.

Mr. Hayashi said in both his direct and cross examination that he believed it was "impossible" or "practically impossible" for UPS's YVR facility (similar in many ways to the Purolator Jericho Road facility) to function without a full vaccination requirement for its employees, given the YVR vaccine policy. However, the actual written YVR policy does not require employees in the UPS terminal to be vaccinated. 213.

Likewise, the Winnipeg Airport vaccine policy was extended beyond restricted areas "to all airport partners entering the terminal or any of the standalone WAA facilities located on the Airport property." Again, this appears to have no impact on Purolator inside sorters employed at its Winnipeg Airport terminal, or couriers unless they are assigned to the particular locations named in the Winnipeg policy.

Saskatoon Airport policy is similar, i.e., its policy on its face is not applicable to a "stand-alone non-aviation business," such as Purolator.

Because YVR is a large publicly regulated organization it is possible to find certain records online. Local 31 was able to find a YVR FAQ relating to employment. At page 5 of 8 prospective job applicants were advised that the federal vaccine mandate was no longer (since June 20, 2022) in effect, and therefore employees of YVR were not required to be vaccinated after that date.

Purolator bears the onus to establish the points it relies on; and it has an overall burden to establish that it meets the KVP and Irving requirements. It is for Purolator to establish what YVR's requirements for Purolator couriers were and the time-frame when the YVR requirements were in effect.

Purolator also placed in evidence a copy of the Cargojet vaccine policy, dated October, 2021. It requests contractors to "Please ensure that…you or any representatives that attend at our premises or that come into contact with our employee" must be fully vaccinated or fall within testing requirements. There is no suggestion that employees at Richmond or other Purolator locations attend at Cargojet premises. There is no evidence that Purolator employees

come into contact with Cargojet employees. Mr. Hayashi agreed that Purolator's secured property abuts the runway and a Purolator employee brings containers out to an outdoor area near the runway to be loaded by Cargojet employees onto Cargojet planes. Mr. Hayashi also agreed that UPS uses Cargojet planes among others.

Purolator also raises the BC government employee vaccination mandate. The policy only applies to the relatively unusual case where a courier is entering an employee only area. The BC Government on line FAQ 129 respecting the mandate contains a section addressing couriers specifically. The FAQ states that, although vaccination is required if the courier is entering an employee only area, procedures can be modified so deliveries can be dropped off in a publicly accessible area. Purolator did not provide this gloss on the BC vaccination policy on which it relies.

Once again, we note that, when genuine information is available, the customer policy often turns out to be not quite as claimed.

Exhibit 39, tab 39 is an email to contractors for Surmont, Montney and Calgary offices of Conoco Phillips. It says that there is a vaccination policy in place and that the vaccination policy is attached to the email. However, Purolator did not provide a copy of the Conoco Phillips policy to Local 31, and did not enter a copy in evidence. Surmont and Montney are known as major oil sands and natural gas developments respectively, with presumably numerous contractors on site daily performing work related to hydrocarbon production. Because Purolator did not introduce in evidence a copy of the Conoco Phillips policy attached to the email, it is impossible to determine what constitutes a "contractor" under the policy.

Mr. Hayashi was asked during direct examination whether hospitals "generally" have third-party vaccine requirements, to which he replied, "Yes, absolutely they do." In cross examination on May 3, Mr. Hayashi was reminded of the question and his answer, which he recalled. Asked whether this answer was intended to convey that the third-parties covered by hospital

vaccine requirements included Purolator couriers, he answered in the affirmative.

Ontario Directive #6 created a set of requirements pertaining to vaccinations for all "covered organizations" in Ontario, applicable to "employees, staff, contractors, volunteers and students". In response to Mr. Hayashi's May 1 evidence that hospitals "absolutely" do "generally" have vaccine requirements affecting Purolator (confirmed and clarified in cross on May 3), Local 31 introduced Exhibit 75, the Ontario Ministry of Health "Questions and Answers" respecting Directive #6. Exhibit 75 confirms at paragraph 6 that the term "contractors" covered by Directive #6 does not include couriers. While individual facilities might possibly have imposed vaccination requirements that extend beyond the requirements of Directive #6, Purolator did not provide particulars or evidence or a copy of any policy relating to any Ontario facility extending the requirements beyond those in Directive #6.

Local 31 also then introduced the March 9, 2022, revocation of Directive #6.

In Quebec -- Canada's second largest province by population – provincial attempts to initiate a vaccine requirement for health care workers were scrapped in early November of 2021, soon after they began.

Local 31 introduced a CBC report outlining Quebec's cancellation of a previously announced vaccine requirement for employees in Quebec hospitals in early November, 2021. Mr. Hayashi acknowledged he was aware of the cancellation. There was one Quebec health care entity, apparently called "Jubillant", ambiguously mentioned in the spreadsheet chart. However, Mr. Hayashi did not say exactly what the requirement was, how many locations were involved, or that it continued to exist after the provincial requirement was cancelled in November of 2021.

Other provinces, including, but not limited to, Alberta, New Brunswick and Manitoba did have hospital vaccine mandates in late 2021 and early 2022, but their language does not seem to include couriers. Staff in these facilities were exposed regularly to the most vulnerable populations. Typically, hospital

vaccine requirements began in summer or fall of 2021, and came to an end in the first part of the new year; some examples are:

1. Ontario (Directive #6), March 9, 2022;

2. Manitoba, March 1, 2022;

3. New Brunswick, April 11, 2022;

4. Alberta Health Services, July 18, 2022.

Mr. Hayashi's general impressionistic claim that generally hospitals "absolutely did" have requirements requiring vaccination for Purolator couriers was not supported by any specific evidence. Generally, the evidence suggests the opposite is true. See documentation from Alberta, New Brunswick and Manitoba. For example, Alberta Health Services required a one or two dose vaccination for health care employees "and contracted healthcare providers – including physicians and other frontline healthcare workers." There is no suggestion the requirement covers couriers..

It is noteworthy that the health care vaccine mandates described above were rescinded in 2022 after it became evident that a primary vaccine series provides little or no protection against Omicron infection after a few months.

Quebec's hospital employee mandate never got off the ground; most others were rescinded in the first half of 2022.

With reference to the "spreadsheet" or chart listing a range of Purolator customers, Mr. Hayashi said in his evidence that he believed this document was created by Purolator's ops and sales team. The person with responsibility was Jamie Wright, the director of operations excellence. Mr. Hayashi said Jamie Wright was his source for the information in this document. He was certain that Mr. Wright got the information from a variety of sources, but he did not know who those individuals were. Asked what the sources were, Mr. Hayashi said he "saw sales people making inquiries during the pandemic." (This suggests that some or all responses were solicited by Purolator.) Mr. Hayashi said this was an "all-hands-on-deck situation". He said Jamie Wright

"would have" sourced from sales in particular because sales are the first point of contact. Mr. Hayashi also thought this apparently because he personally "saw sales people making inquiries." He said he did not know whether the individuals in sales entered information directly into the document. Mr. Hayashi did not know how many different people had contributed information which ended up on the spreadsheet. Anybody who had information was asked to give it to Jamie, who gave it to Hayashi. Asked whether more than 5 individuals had contributed information, Mr. Hayashi said he did not know. Mr. Hayashi did not know what individuals in the various customer organizations provided the information to Purolator. He agreed that information from customers could have come from "the president of the company or a temp assistant." Looking at the entry for Lifelabs, Mr. Hayashi was asked if he knew the definition of "all visitors". He said "No."

Mr. Hayashi had no knowledge of how much of the information was solicited by Purolator vs. unsolicited from customers. He agreed there is no way of knowing from the spreadsheet whether a customer provided copies of a written policy to Purolator. Mr. Hayashi was asked whether, when he put out the request within Purolator to collect information on this point, he had asked for copies of a written policy. He answered "No" to this question.

Mr. Hayashi said information in the spreadsheet was not updated over time, and that unless Mr. Hayashi received a notice that a customer's vaccination policy was rescinded, he presumed the policy continued. He did not receive any such notice respecting any of the companies named on the spreadsheet.

In many or most cases, the spreadsheet does not say whether the alleged requirements apply to couriers. Where the spreadsheet suggests that a client's policy applies to "visitors" (e.g., Life Labs, Siemens, Trillium), we are given no definition of "visitor" in the policy. In some cases the notation refers to "suppliers" or "contractors" without any definition of these terms.

Mr. Hayashi referred to a document entitled "A draft confidential brief", which other evidence established was dated June 6, 2022. According to Mr. Hayashi, the brief went to Mr. Johnston and was accepted as was Hayashi's

recommendation not to remove the vaccine mandate at that time. Under "Customer Expectations/Requirements," Mr. Hayashi wrote:

> Forty plus (40+) major customers with hunDr.eds of locations continue to require Purolator employees attending their locations to be fully vaccinated. Because these customers have not yet rescinded their vaccination requirements for services providers like Purolator accessing their property, Purolator would need to either incur logistical overhead necessary to ensure to only send vaccinated employees to these locations, or risk finding itself in breach of its commercial agreements.

Asked in cross examination the source for the comment about 40+ customers, Mr. Hayashi said that the information came from the "spreadsheet" previously referred to.

Regarding admissibility of the "spreadsheet," Local 31 asserts that the "spreadsheet" exhibit should not be admitted in evidence. In the alternative it should not be relied upon (i.e., should be given no weight).

No copy of any vaccine policy from any of the parties named in Exhibit 53, tab 20 (the "spreadsheet") was provided to Teamsters Local 31 or was entered in evidence. No one affiliated with or knowledgeable about the individual facilities gave evidence. Local 31 submits that this document is not admissible for the truth of its assertions under the common law rules of evidence, and that this arbitration board ought not exercise its discretion to admit the document.

Local 31 requested production on July 15, 2022.

> Please provide full particulars and related documents as follows: (a) Particulars of grounds on which the Employer justifies its policy of mandatory vaccination, and all related documentation; (b) If the Employer intends to rely on expectations, requirements or policies of third parties, e.g. clients or customers, respecting Covid-19 vaccination of Purolator employees attending at delivery locations, please provide full particulars of such requirements and locations, and full particulars of communications with any persons regarding any such requirements; (c) In relation to item 2(b) above please provide all policies and other documents including without limitation policies, correspondence, notes, emails, minutes, etc. pertaining to such requirements or communications with such parties or with Purolator employees. [emphasis added]

> Purolator bears the onus of proof under KVP and Irving to establish the necessity for its vaccine Policy. Purolator must produce cogent evidence. Purolator knows who its customers are and was in a position to obtain copies of actual policies or rules it now claims to have been bound by. Local 31 submits such evidence is the minimum required if Purolator intends to rely on alleged customer requirements. Local 31 asserts that the evidence referred to above respecting airport and hospital policies are typical of Purolator's broad, self-serving claims led through a single witness of what was said by PHAC, or Dr. Chugh, numerous unnamed sources. However, in the few cases where the documents themselves were produced – the claims have turned out to be recklessly inaccurate.

106. The union also pointed out that Purolator provided no evidence about how long such requirements, if they existed, remained in force. Most public restrictions (i.e., "vaccination passports") were lifted in early 2022, as were other restrictions.

[end of union position]

Employer reply on relevance and admissibility

107. I do not find it necessary to detail the employer reply on this aspect of the union submission. However, there is one point made by the employer which I wish to highlight. I quote:

> It is important to keep in mind what the issue in this case is. The issue is whether Purolator acted reasonably in implementing the SWP. In this case, as Mr. Hayashi testified on May 3, 2023, the information in this document was collected by a number of employees of Purolator through various means, including direct contact with clients. This document is therefore being offered as an aide to Mr. Hayashi's testimony. In other words, Mr. Hayashi relied on the information gathered by other Purolator employees in order to make informed decisions about third-party requirements. The document therefore is not captured by the hearsay exclusionary rule.

VII <u>Analysis and Conclusion re Third Party Requirements</u>

108. The union makes a powerful case against the evidentiary value of much of the spreadsheet data compiled for Mr. Hayashi as well as against the relevance and admissibility of some of the other third-party requirement evidence he advanced.

109. But it should be acknowledged that when the employer made informal enquiries of its customers and other third parties it had to deal with, it was not conducting a judicial enquiry into the full scope of their vaccination requirements if any. It was gathering information for the purpose of determining whether operational factors would be impacted by the vaccination requirements of third parties. It was not obliged to seek out and record this information on the basis that it would have to be proved formally in a judicial proceeding.

110. It is true that the employer is obliged in this proceeding to establish the reasonableness of its vaccine mandate. On this aspect of the case, it asserts that upon a reasonable level of enquiry, it reached the conclusion that third-party vaccination requirements dictated that its employees be vaccinated, and with this understanding it implemented the SWP.

111. In spite of the frailties of much of the evidence put forward in support, and the arguments against relevance, there remains enough evidence of *bona fide* investigation into third party vaccination requirements and their impact on Purolator's operations for me to find that it was a factor which Purolator was reasonably entitled to take into account in implementing the SWP. It counts towards a finding that the Policy when implemented was reasonable.

112. In addition, I should say that I do not find it necessary to embark on a detailed analysis of all the points made by the parties for and against this finding, for the following reason.

113. As is explained elsewhere in this award, workplace safety was the dominant purpose of the SWP, and in the light of prevailing medical opinion as of the date when it was implemented, I have found that the implementation of the SWP was reasonable, applying the *KVP* and *Irving* tests. Purolator's expressed operational concern at that stage over compliance with third-party vaccination requirements was a central factor in its imposition of the SWP but was not ultimately the determining factor. It is not a stand-alone element dictating the conclusion I have reached on the implementation aspect of the case.

114. There is an important caveat, however. Purolator acted reasonably in treating third-party vaccination requirements as an important ingredient in its formulation and implementation of the SWP. But the reasonableness of continuing the policy beyond the spring of 2022 is a wholly different matter. The fact is that Purolator in the spring of 2022 made no effort to verify or confirm whether any of the third parties with whom it dealt still had in place any vaccination requirements. As the prevailing medical opinion shifted, as I find it did, it was certainly known to Purolator that many entities both government and private sector were lifting their vaccine mandates and other restrictions originally intended to prevent the spread of the virus. The Federal Government lifted

its mandate in June 2022. Yet Purolator paid no attention at all to the key question of whether the third-party requirements which were central to the implementation of its policy continued in place. This discrepancy applied not only to their failure to verify the status of third-party requirements when reviewing the mandate in June 2022, but applied also to their failure to present any evidence at the hearing on the status of those third-party requirements which could have been gathered for the purpose of the hearing to justify the assumption made by management in the discussions which took place in June 2022. There are obviously grounds for suspicion as to why it was not done but I do not dwell on that, and do not rely on those suspicions. I do however rely on the complete absence of evidence provided by the employer regarding the status of third-party requirements as of June 2022, and I will not make the assumption for them that there were any.

115. As a footnote to this issue, I should point out that the spreadsheet which was the subject of so much controversy was undated, and it was unclear from the evidence when exactly it was compiled. The evidence of Mr. Hayashi about third-party requirements included a review of the details of the spreadsheet, and it is apparent from the context that it must have been compiled sometime in the fall of 2021. It was clearly a summary of third-party requirements which was used by management in arriving at its decision to implement a workplace vaccine mandate in 2021. There is no evidence that there was any changing, updating, or even checking of the spreadsheet data between the time of its original compilation in the fall of 2021 and the date of the Confidential Brief referred to later, dated June 6, 2022.

116. I make this observation for the avoidance of any confusion. This could arise from the fact that the spreadsheet was entered into evidence attached to an email from Mr. Hayashi to Mr. Brar dated July 20, 2022. The email states:

> Here are the large accounts that have vaccination requirements. Some obviously do not have locations in BC (Trillium health) but many do.
>
> I just confirmed that the BCs public hospitals still require delivery agents to be vaccinated.

117. The final sentence of this email indicates that Mr. Hayashi confirmed that BC hospitals still require delivery agents to be vaccinated, but as for the delivery of the spreadsheet to Mr. Brar, there is no suggestion anywhere in the evidence of Mr. Hayashi or others that there was any checking done of the data in the spreadsheet itself, to confirm if any of the third-party requirements compiled in the fall of 2021 and listed in the spreadsheet continued to be operative as of July 20, 2022 when the email was sent, or as of June 6, 2022 when the confidential brief was circulated.

VIII Public Health Authority Communications

118. The employer asserted that the statements and guidance of public health authorities were an important element supporting its vaccine mandate from implementation through to the date of suspension which was May 1, 2023. The employer devoted some time in its submissions to the role of public health authorities and I wish to comment on that.

119. The Chief Public Health Officer of Canada is created under the *Public Health Agency of Canada Act*. Under the *Act*, the Chief Public Health Officer:

> …"Shall be a health professional who has qualifications *in the field of public health*"II
>
> …"The chief public health officer as the lead health professional of the government of Canada *in relation to public health*."
>
> "The Chief Public Health Officer shall provide the Minister and the President with *public health advice that is developed on the scientific basis."*

120. In British Columbia the Provincial Health Officer ("PHO") is appointed under the *Public Health Act*. SBC 2008. c 28.

121. Under the *Public Health Act* the PHO must monitor the health of the population of British Columbia and advise in an independent manner the Minister and public officials:

- on *public health* issues, including health promotion and health protection;
- on the need for legislation policies and practices respecting those issues, and
- on any matter arising from the exercise of the provincial health officer's powers or performance of his or her duties under this or any other enactment.

[emphasis added]

122. The employer cited several cases which highlighted the *prima facie* reliability of public health advice. These included *Berkeley v Mohawk Council of Akwesasne* 2000 CarswellNat 3877, and *J.N. v. CG* 2023 ONCA 77, which at paragraph 26 states:

> Under the public document exception to the hearsay rule, reports of public officials are admissible for the truth of their contents: *R. v. P.(A.)* (1996), 109 C.C.C. (3d) 385 (Ont. C.A.); *A.C. v. L.L.*, 2021 ONSC 6530. While this speaks only to admissibility, *and not to what weight a judge must ultimately assign to it*, it is important to understand why s. 25 exists and why there is a common-law exception, which speaks not only to the inherent reliability and trustworthiness of records and reports generated by public officials, but also to avoid the inconvenience of public officials having to be present in court to prove them. Consider this passage from P.(A.), where Laskin J.A. wrote, at pp. 389-390, that:
>
> > At common law statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is "founded upon the belief that public officers will perform their tasks properly, carefully, and honestly": Sopinka et al. The Law of Evidence in Canada (1992), p. 231.

123. Rand J. explained the rationale in *Finestone v. The Queen* (1953), 107 C.C.C. 93 (S.C.C.), at p. 95:

> The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy Again, *this does not compel a judge to give the evidence any weight*, but given the purpose behind s. 25 and the public document exception, *there is at least an obligation to explain why materials like those filed by the appellant are not trustworthy,* which the motion judge's reference to some of Canada's historical misdeeds – all false equivalencies – fails to achieve. [emphasis added]

124. I will now proceed to review some of these government and public health communications. In the course of doing so it is important to keep in mind certain limitations. The first of these is that while vaccination confers a general public health benefit, this is not at all times to be equated with a specific workplace safety benefit, or justify compulsion of any kind. The role of public health authority guidance is to inform, educate, persuade, and advise the general population to make good choices, beneficial to their health and safety. Care must be taken not to treat that guidance indiscriminately as justifying employer measures compelling their employees to adhere to that advice. In circumstances where that advice if taken significantly enhances workplace safety, there is at least arguably a strong correlation between the two. But when that advice amounts to a recommendation about lifestyle choice, and/or 24/7 personal protection, then that correlation melts away.

125. The second related limitation, based on an important conclusion I have reached, expanded on at length in another section of the award, is that while increased levels of protection from infection confer a specific workplace safety benefit which could arguably justify a mandate, increased levels of protection from serious illness, hospitalization and death, do not generally justify a vaccine mandate.

126. The third limitation is that when public health authorities speak of the benefits of vaccination generally, these statements should not be taken as specific endorsement of 2-dose vaccination after 25 weeks as providing meaningful protection against infection, after the spring of 2022.

127. There is one exception published in September 2022 which I will review specifically later.

128. There is another point to be considered which is not so much a limitation as a question of definition. The employer places a special reliance on the statements of "public health authorities", but in reviewing all the massive amounts of data gathered by different organizing bodies it is sometimes hard to distinguish between published statements of a public health authority, such as the PHAC (Public Health Authority of Canada), and published reports of large government

sponsored bodies, such as the BC CDC (BC Centre for Disease Control), the UKHSA (UK Health Service Agency) or the CDC (Centre for Disease Control) in the USA. Published reports of the latter kind appear as references in the two expert reports tendered in evidence respectively by the union and the employer. I intend to refer to highlights of some of these here. I am not determining that they are exactly the same, and accept that there are some different characteristics, but it is convenient to consider them at the same time. They deserve a little more prominence than the experts' reference studies which appear in medical journals such as the Lancet, Nature or other publications of that kind. Those are mostly not government sponsored studies so will be addressed in the section of this award dealing with the expert reports.

129. My reason for grouping these government agency reports together with public health authority statements, is that they are more likely to be noticed and accepted as authoritative by the population as a whole including businesses and public sector employers. On the other hand, a large sophisticated employer such as Purolator which has a full time medical director and receives regular reports on the subject from a contracted medical provider, the Cleveland Clinic, has an opportunity to achieve a level of awareness with respect to the evolution of vaccine effectiveness that should be somewhat greater than average. Given these resources it becomes harder for the employer to argue that it had no knowledge of the reports and studies which established by the spring of 2022 the ineffectiveness at reducing the risk of infection, of a 2-dose vaccination regime after 25 weeks.

130. An example of public health advice which was typical across Canada in the summer of 2021, around the time when Purolator was considering a vaccine mandate, can be found quoted by arbitrator Wright in *Wilfred Laurier University v. United Food and Commercial Workers Union,* 2022, CanLII 69168 (Ont Arb), at paras 18 & 19:

> 18. On the question of whether it was reasonable for the University to remove the rapid antigen testing option from its Policy, the University points to advice provided by the Council of Medical Officers of Health, in consultation with the Chief Medical Officer of Health ("the CMOH") in a letter dated August 19th, 2021:
>
> > Vaccination against COVID-19 is the single most effective public heath measure *to reduce the spread of COVID-19*. Its inclusion among the other public health measures (including physical distancing, capacity limits, and indoor mask use) is essential in the response to the COVID-19 pandemic. Rapid testing protocols are not preventive and are not a replacement for immunization and should be used only in instances where vaccination is not possible.
>
> 19. In my view, it was reasonable for the University to have *given serious weight to the advice provided by the CMOH,* especially in the context of the university sector. Universities are complex, multi-faceted institutions, serving the needs of students, staff, faculty and the community. Some students live on campus, others commute. Students, faculty, and staff use, or work in, lecture halls, labs, libraries, conference rooms, bars, and eating facilities. The evidence

> established that at Wilfrid Laurier three COVID outbreaks were declared on campus: October 2020; March 2021; and August 2021. The series of recommendations directed at post-secondary institutions made by various public health officials, culminating in the Instructions made by the Chief Medical Officer of Health on August 30th, 2021, underline the pressing health concerns that universities and other post-secondary institutions presented during the pandemic. Given the context, it was entirely reasonable for the University to have removed the option of rapid antigen testing from its Policy in favour of one requiring vaccination, which the CMOH described as *"the single most effective public health measure to reduce the spread of COVID-19."*[emphasis added]

131. It is readily apparent that this advice focused on the effectiveness of vaccination *"to reduce the spread of COVID-19"*. There is no mention of protection from serious illness. The message provided by the CMOH on August 19, 2021 was entirely consistent with prevailing medical opinion at the time.

132. An additional public health statement was contained in the news release of December 7, 2021, announcing that the Government of Canada would require employees in all federally regulated workplaces to be vaccinated against COVID-19.

133. The first paragraph of the release states:

> Vaccination is the best line of defence against COVID-19. It not only protects those who are vaccinated, but it protects vulnerable populations like young children not yet able to get vaccinated. To finish the fight against COVID-19, protect workers and their families, and ensure businesses can get back up to speed, we need to do everything we can to keep public spaces safe, particularly as we continue to face new variants.

134. An additional public health authority statement was referred to by the employer. This was an Order of the PHO respecting workplace safety dated February 16, 2022. While reference is made to protection by vaccination against serious illness, some extracts from the preamble to this Order demonstrate continuing faith in the ability of vaccination to reduce the risk of infection.

> WHEREAS
>
> A. In March 17, 2020 I provided notice under section 52 (2) of the *Public Health Act* that the transmission of the infectious agent SARS-CoV-2 which has caused cases, clusters, and outbreak of a serious communicable disease known as COVID- 19 among the population of the Province of British Columbia, constitutes a regional event, as defined in section 51 of the *Public Health Act*;
> B. a person infected with SARS-CoV-2 can infect other people with whom the infected person is in contact;
> C. Social interactions and close contact in the workplace between people are associated with significant increases in the transmission of SARS-CoV-2, and increases the number of people who develop COVID-19 and become seriously ill;
> D. People spending time together indoors significantly increases the risk of the transmission of SARS-CoV-2 in the population, thereby increasing the number of people who develop COVID-19 and become seriously ill;
> E. Vaccination is safe, highly effective, and the single most important preventive measure a person can take to protect themselves, their families, and other persons with whom

they come into contact *from infection*, severe illness and possible death from COVID-19. …

P. Employers are required by section 21 of the *Workers Compensation Act* to ensure the health of their workers, and this includes ensuring steps are taken to *reduce the risk to workers from communicable diseases.* During periods of elevated risk employers must implement additional requirements. The surge of infections caused by the Omicron variant creates *an elevated risk of communicable disease transmission and, in order to mitigate this risk, employers need to develop a Covid 19 safety plan as part of communicable disease prevention, as described at work safe BC OHS guideline G-P2-21.*

Q. Preventive measures that follow the hierarchy of controls, such as the elimination of risks (e.g. not working when unwell, diligent hand hygiene and vaccination)…. can help to reduce the risk of the transmission of SARS CoV-2 in the workplace.

[emphasis added]

135. She goes on to make a series of Orders pursuant to her powers under the *Public Health Act*. They do not include requiring employers to institute any programme of mandatory vaccination for workers.

136. Despite the fact that the union's expert witness Dr. Kalyan questioned whether there was any data at that time to support the statements regarding effectiveness against infection, I accept that there was insufficient data from all readily accessible sources at that time to conclude that it was unreasonable for the employer to accept the guidance indicated in this preamble. Uncertainty and the precautionary principle still operated in favour of continuing the mandate as of February 16, 2022.

137. The employer also referred to a statement from the Council of Chief Medical Officers of Health dated September 7, 2022. It is important in reviewing this statement to distinguish between protection against infection and protection against serious illness. The former has significant workplace safety consequences whereas the latter, for reasons expanded on elsewhere, does not.

138. The document is chiefly reinforcing the recommendation that individuals who are at increased risk of severe illness should obtain a fall COVID-19 vaccine booster. However. there is a passage in the statement which the employer appears to rely on as demonstrating continued Government messaging that vaccines were effective against infection. The statement is as follows:

> Communities across Canada recently experienced a rise in transmission driven primarily by the Omicron BA4 and BA5 variants. *The impact of the summer wave was reduced by the high level of vaccination and immunity in Canada.*

139. I do not read this passage as demonstrating that continued messaging at all. The phrase "impact of the summer wave was reduced by…" refers to mitigating the consequences of the summer wave not reducing the volume or height of the summer wave. This is clearly a reference to

reducing the consequence of serious illness which without vaccination would have been worse. There is no question that this was a commendable and desirable result of vaccination, but the statement cannot be used to demonstrate support for vaccination as a protection against infection. The statement does not support the assertion about vaccine effectiveness against infection contained in the February 16, 2022 Order.

140. I next refer to a study, entitled "Effectiveness of COVID-19 Vaccinations against Omicron or Delta Infection", dated December 30, 2021 posted January 1, 2022 in pre-print form. The primary contributor was Sarah Buchan of Public Health, Ontario Toronto.

141. This study determined that two doses of COVID-19 vaccines were not protective against Omicron infection at any point in time. Vaccine effectiveness was measured in minus percentages. After receiving a booster third dose vaccine effectiveness improved to 37% seven days after receiving it.

142. Next there was a statement from the Chief Public Health Officer of Canada on December 30, 2021, which included the following:

> The number of cases associated with the Omicron variant of concern has further accelerated around the world and in Canada. Accumulating data continue to demonstrate that Omicron is the most highly transmissible variant to date and that *prior immunity, either from vaccination with a two dose primary series or previous infection, does not offer good protection against infection.* There may be some protection against severe disease after two doses, but this remains uncertain. Importantly getting a booster dose when eligible, with either the Pfizer Cominarty or Moderna Spikevax Mr.NA vaccines, is expected to help restore protection that may have waned since the second dose. [emphasis added]

143. I was referred also to extracts from a letter from Vancouver Coastal Health, dated February 16, 2022, Office of the Chief Medical Officer, to Dr. Santa Ono, President and Vice-Chancellor, University of British Columbia. While this was not a public document it certainly came to the attention of Purolator as a copy of it was delivered to them by union counsel and was acknowledged. As it came from a Public Health Authority, recommending policy to the largest University in Western Canada on the subject of vaccine mandates, it should be considered together with other statements of public health authorities gathered here.

> Dear President Ono,
>
> Re: UBC plan to de-register students who have not declared their COVID-19 vaccination status:
>
> Here in the Office of the Chief Medical Health Officer at Vancouver Coastal Health we have great appreciation for the collaborative partnership we have had with the leadership of the University of British Columbia (UBC) administration throughout the COVID-19 pandemic. As

we've noted previously, the positive ongoing relationships between public health and the university have contributed to a high level of vaccination among students, staff and faculty, and a very low incidence rate of COVID-19 cases - among the lowest community rates observed in the province. Good public health policy means implementing restrictions that are the least intrusive available, based on scientific evidence, neither arbitrary nor discriminatory in application, of limited duration, respectful of human dignity and subject to review.

Current scientific evidence, including BC data, indicates that COVID-19 vaccination (2-doses), while effective at preventing severe illness, is not effective at preventing infection or transmission of the Omicron variant of the virus, which now accounts for almost 100% of cases in the province.

Therefore there is now no material difference in likelihood that a UBC student or staff member who is vaccinated or unvaccinated may be infected and potentially infectious to others. We also know that Omicron causes less serious illness than other variants of COVID-19, which is particularly true for young people.

Today, provincial officials announced that because British Columbia has a highly vaccinated population, and thanks to dropping rates of COVID-19 and subsequent hospitalizations, it's time to ease some of the restrictions that are no longer useful in preventing the spread of COVID-19.

While we applaud UBC for its work to protect and promote the wellbeing of students, staff and faculty, we believe some of the measures in place on campus - such as ongoing mandatory rapid tests for unvaccinated students and staff, and related employment/academic sanctions - are not useful in preventing the transmission of COVID-19 on campus. Not only is Rapid Antigen Testing of asymptomatic people unreliable in identifying infection with the Omicron variant, but we have no evidence that those who have not complied with UBC policies have posed any public health risk to their fellow students, faculty or staff, even during circulation of other variants.

We understand there are now also plans being developed to de-register students who have not declared their vaccination status nor complied with mandatory testing. We strongly advise against implementing such a program.
A new evidence review and analysis pre-print on the Social Science Research Network on line repository, *The Unintended Consequences of COV/D-19 Vaccine Policy: Why Mandates, Passports, and Segregated Lockdowns May Cause more Harm than Good*, by public health and infectious disease experts from around the world, looks at the harms of mandatory vaccine policies. The authors conclude that such policies "may lead to detrimental long-term impacts on uptake of future public health measures, including COVID-19 vaccines themselves as well as routine immunizations. Restricting people's access to work, education, public transport, and social life based on COVID-19 vaccination status impinges on human rights, promotes stigma and social polarization, and adversely affects health and wellbeing." Instead they found leveraging empowering strategies based on trust and public consultation represent a more sustainable approach for protecting those at highest risk of COVID-19 morbidity and mortality and the health and wellbeing of the public.

Universities are low-risk settings for COVID-19 and, as incidence has declined and there is now evidence of the endemic nature of the virus, they should have minimal restrictions in place at this stage of the pandemic. Based on the totality of public health evidence, it's now appropriate to discontinue the testing program for unvaccinated students, staff and faculty; and further, we urge you not proceed with plans to de-register students who have not declared their vaccination

status. Such measures may result in profound negative harms on their future health and wellbeing, by impacting future educational and career opportunities, and their mental health.

As Medical Health Officers with the responsibility for the health and well-being of the students, staff and residents of the UBC campus, we remain committed to working with UBC to continue to monitor and advise on both the epidemiology of COVID-19 and other important public health issues.

Dr. Patricia Daly, Vice President, Public Health Chief Medical Health Officer
Dr. Meena Dawar ,Medical Health Officer
Dr. Mark Lysyshyn, Deputy Chief Medical Health Officer
Dr. Michael Schwandt ,Medical Health Officer.

144. Next is a letter dated February 22, 2022, to President Ono of UBC, from the University of British Columbia. Its principal author is Dr. Patrick Daley, who titles himself in the letter Director of Research, and Medical Epidemiology Lead for Anti Microbial Resistance at BCCDC (BC Centre for Disease Control).

Dear President Ono, February 20, 2022

You asked for input as to whether UBC should continue to proceed with deregistration or similar sanctions against students who have not complied with the requirement to be immunized or undergo COVID-19 testing. We offer a few thoughts from a scientific and public health perspective.

These measures, imposed in September 2021, helped to ensure that UBC had a very high immunization rate and that our faculty, staff and students would suffer a low burden of illness and reduced risk of transmission to others. Viral evolution since the time of those policy decisions now suggest a different approach may be needed.

At present, the primary variant in the province is Omicron. With the large number of mutational changes in Omicron, concentrated in the spike protein, the first stage of immune protection provided by vaccines ("neutralizing antibodies") is much less effective. Vaccine effectiveness drops off rapidly since the last dose of a two-dose vaccine regimen, down to <20% by four months [1]. For this reason, the scientific evidence, with respect to Omicron, no longer supports using proof of vaccination (regardless of timing) as evidence that a person is a low risk of transmitting COVID-19 to others.

Fortunately, vaccinated people are still enjoying a high rate of protection against severe illness and hospitalization [1], largely because of the second stage of immune protection - cellular immunity - which recognizes a much broader set of viral targets. Furthermore, booster shots prime the immune response, raising antibody levels and offering substantial protection against infection with Omicron (60-80% [1]).

In light of these evolutionary changes and their impact on vaccine effectiveness, we recommend that UBC shift its focus away from documenting vaccination status based on a two-dose regimen, which in many cases was completed too long ago to provide substantive protection against infection and transmission. We recommend instead that emphasis be placed on communicating what has changed and why boosters are needed to help quell infection and transmission to others.

A variety of pieces of evidence indicate that the current wave of COVID-19 is subsiding in BC, including declining hospitalization rates and reported cases among those over 70 (an age group that has been more consistently tested) [2,3]. Nevertheless, continued attention to appropriate pandemic measures remains appropriate, and **UBC should be ready in case we are again challenged by future variants.**

At present, one risk is a shift in the prevalence of the BA.2 sub-lineage of Omicron, which is rising in frequency within the province (its current frequency is estimated at 15% [3]). Current evidence suggests, however, that immunity developed against BA.2 [4,5], indicating that the high level of immunity in the province due to recent natural infections (as well as-boosters) will lead to the decline in both sub-variants. We do not consider BA.2 to be a major risk for another Omicron surge, although this is not yet known with high certainty.

Over the longer term, a higher risk is posed by the continued evolution of SARS-CoV-2, considering the high number of cases globally and many independently evolving lineages facing altered selection pressures (particularly in immunosuppressed persistent infections and in animal reservoirs). Combined, the potential for future variants that avoid the first stage of immune protection against infection is high. As these independently evolving lineages represent a large sampling of SARS-CoV-2, past and present, these future waves may well be more severe than Omicron.

In summary, there is no longer a strong scientific reason to differentially treat those who were fully vaccinated months ago and those who are unvaccinated, in terms of the risks that they pose for transmitting COVID to others. Requiring either proof of vaccination or compulsory testing from the UBC community is currently unnecessary from a scientific point of view and likely reduces focus from what would be helpful. Appropriate measures at this time of continued, but falling transmission, include masking with high quality masks, ventilation, asking people to stay home if sick, and encouragement toward boosting for those eligible.

We do recommend that access to free masks and rapid antigen tests continue, and we commend UBC for its efforts to make these important safety measures accessible. We also recommend that UBC should develop a nimble pandemic preparedness program, enabling a rapid escalation of protective measures and research to fill gaps if and when needed.

From a public health policy perspective, sanctions should normally be of limited duration, respectful of human dignity and subject to review with changing circumstances. Dropping serious sanctions against unimmunized University people at a time when they no longer serve their original purpose is likely to increase a sense that the University's actions are proportional and trusted.

Sincerely,

David Patrick, MD, FRCPC, MHSc
Director of Research, and Medical Epidemiology Lead for Antimicrobial Resistance, BC CDC Professor, UBC School of Population and Public Health

Sarah (Sally) Otto, FRSC
University Killam Professor, Department of Zoology
Member of the BC COVID-19 Modelling group; co-lead Pillar 6 CoVaRR-Net

Daniel Coombs
Professor, Department of Mathematics

Member of the Canadian Chief Science Advisor's expert panel on COVID-19 and of the BC COVID-19 Modelling group

REFERENCES:

[1] **COVID-19 vaccine surveillance report (UK; 17 February 2022)**
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1055620/Vaccine+_surveillance_report_-week_7.pdf

[2] **BCCDC Report (15 February 2022)**
https://news.gov.bc.ca/files/Feb_15_2022_Easing_Restrictions.pdf

[3] **BC COVID-19 Modelling Report (17 February 2022)**
https://bccovid-19group.ca/post/2022-02-17-report/

[4] Yu et al. (2022) https://www.meDr.xiv.org/content/10.1101/2022.02.06.22270533vl

[5] **Technical Briefing 36 (UK; 11 February 2022)**
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1054357/Technical-Briefing-36-11February2022_v2.pdf

145. Other public health or government affiliated reports included those mentioned in the report of Dr. Shirin Kalyan at page 5:

> At the beginning of the Omicron spread, data from Ontario (the report of Buchan of **Public Health Ontario**), showed vaccine effectiveness (in those "fully" vaccinated) had dropped below zero.
>
> Similarly, data presented by the **Epidemiology Task Force of the US CDC** also showed negative vaccine effectiveness with the Omicron variant in those who were fully vaccinated (Figure 3).
>
> The **UKHSA (UK Health Service Agency) Vaccine Surveillance Report (17 February 2022)** noted:
>
> "After two doses of the AstraZeneca vaccine, vaccine effectiveness against the Omicron variant starts at 45 to 50%, then drops to almost no effect from 20 weeks after the second dose. With two doses of Pfizer or Moderna effectiveness dropped from around 65 to 70% down to around 10% by 25 weeks after the second dose."

146. In the same section of her report Dr. Kalyan referred to an article published on March 2, 2022, in the New England Journal of Medicine to which Dr. Lopez Bernal of the UK Health Security Agency, was a contributor. Drs. Andrews and Stowe contributed equally. This was a massive population-based study in which 886,774 eligible persons infected with the Omicron variant were considered. There were 204,154 eligible persons infected with the Delta variant who were considered, and 1,572,621 eligible test negative controls were identified. This study also found that after two doses of AstraZeneca vaccine, vaccine effectiveness against the Omicron variant drops to

almost no effect 20 weeks after the second dose with two doses of Pfizer, it dropped to less than 10%, and with Moderna, effectiveness dropped down to about 17% after 25 weeks.

147. The UK Health Security Agency continued to produce reports which told essentially the same story.

148. I should not leave this review of public health authority guidance without referring to the Order of the Provincial Health Officer for British Columbia dated September 12, 2022. The employer claims it relied on this public health authority guidance in continuing to maintain the SWP. The comments made in the Order about the value of vaccination to protect people from serious illness or hospitalization and death are not controversial. I make no further comment about them.

149. But there are also observations in that Order, at paragraph Q of the preamble which run entirely contrary to the overwhelming prevailing medical opinion which had crystallized no later than the spring of 2022, that the risk of infection for vaccinated and unvaccinated persons is the same, or at best statistically insignificant. I have already reviewed much of the data and studies confirming this. At paragraph Q the PHO states:

> People who are unvaccinated are at greater risk to other people than vaccinated people. The reasons for this are that unvaccinated people are more prone to carry SARS-CoV-2 compared with vaccinated people, can be infectious for a longer period of time, clear the infection more slowly, and are more likely to have symptoms that spread the virus than a vaccinated person. The result is that an unvaccinated person is more likely to become infected than a vaccinated person and is more likely to transmit SARS-CoV-2 than a vaccinated person.

150. In the light of all the evidence, data, and expert opinion I have received in the hearing of this matter I conclude that this statement is an outlier. It is wholly inconsistent with the preponderance of material I have been presented with. Dr. Kalyan specifically refuted it and I find her position on this to be credible and persuasive.

151. The employer at paragraph 265 of its submissions states that it was entitled to and indeed required to follow this Order. It provided public health guidance that "vaccination remained the most effective tool against the spread of COVID-19." I note that not even the employer's expert Dr. Rebick agrees with that proposition. He accepted that vaccination "did not provide good protection against infection". This has to refer to effectiveness "against the spread of COVID-19". He recognized and accepted that prevailing medical opinion and public health guidance all pivoted by the spring of 2022, if not earlier, to supporting and encouraging vaccination as providing good protection against serious illness, hospitalization and death while protection against infection was no longer referred to as a benefit of vaccination.

152. Accordingly, I find that this isolated and contrarian message from the PHO does not constitute an adequate plank on which to salvage the employer's assertion that the SWP remained reasonable in the fall of 2022 when this PHO message was circulated.

153. Purolator purports to have relied primarily upon the Public Health Agency of Canada, Dr. Chugh, and the US CDC. It also had evidence from Cleveland Clinic Canada. However, it did not call Dr. Chugh to testify, nor has it brought any evidence from PHAC, Dr. Chugh, or the CDC suggesting a primary vaccine series retained any significant protective value against infection at the latest by the spring of 2022. Evidence from PHAC suggested, as of December 30, 2021, that a two-dose vaccine does not provide good protection against infection. The US CDC under its ICATT program concluded that mRNA protection against Omicron infection became statistically insignificant within three months.

154. As for the employer's reliance on the advice of the Cleveland clinic, this in itself does not qualify as public health guidance or as announcements or studies published by government agencies. However, it is worth noting at this stage that there was no evidence provided by the employer that the advice it received from the Cleveland clinic differed in any way from the preponderance of messaging and data coming from the above sources which were quietly dropping reliance on vaccines to protect against infection and focusing on good protection from serious illness, with encouragement to get booster shots. I was provided with no communication from the Cleveland clinic to the employer advising or even suggesting that a 2-dose series of vaccine after 25 weeks was anything more than statistically insignificant in terms of providing protection against infection, by the spring of 2022.

IX The Expert Evidence

Dr. Shirin Kalyan

155. The first expert was called by the union, Dr. Shirin Kalyan. She is a translational immunologist, with a PhD from UBC in infectious diseases, Department of Experimental Medicine. She has an extensive academic curriculum vitae and without reciting all her career, she provided testimony as an expert witness to the House of Commons Standing Committee on Health, with respect to Canada's COVID-19 response, in March 2022. There follow extracts from her report which was submitted in evidence.

156. Before reviewing this evidence, I wish to comment on employer counsel's criticisms of her lack of appropriate skills and experience to address the issues arising about the effectiveness of vaccines.

157. Dr. Kalyan described her role as a translational immunologist as follows:

> As a translational immunologist, my research expertise in immunology is focused on "translating" experimental findings and discovery towards clinical application with the goal of improving health outcomes, primarily in the context of diseases linked to immune function.

158. This expertise fits precisely with one of my main tasks in these proceedings, which is to assess and track the effectiveness of brand-new vaccines with a foreshortened approval process, and how well they did in improving health outcomes. The employer criticized her for the fact that she was not a qualified medical practitioner, but I do not see that as a valid criticism, given the nature of the evidence which would be helpful in this case.

159. The employer also devoted much time and effort attacking the credibility of Dr. Kalyan. I did not find this productive. Almost all her expert testimony consisted of referencing a series of reports published by other experts in the field, containing quantities of data. This kind of testimony is not susceptible to serious bias or dishonesty. The data is what it is. There is some room for bias in the selection of the data, which I did find to be present occasionally in the evidence of Dr. Rebick, but even if she was guilty of that as well, the main thrust of her testimony which I found to be of value was directed at the data revealing the ineffectiveness of a 2-dose regime after 25 weeks at protecting against infection. This is the key evidence in this case and the data on this subject was overwhelming and persuasive. It was not capable of being slanted or misinterpreted. It was solid and is there for all to see. It was not and could not have been remotely distorted by Dr. Kalyan in her report or in her oral testimony.

160. She did demonstrate a leaning towards infection acquired immunity versus vaccinated immunity, which had a scientific basis. This however had nothing to do with her presentation of the overwhelming evidence about the vaccines' ineffectiveness at protecting against Omicron infection.

<u>Protection Against Infection</u>

161. With respect to vaccine effectiveness against the Delta and Omicron variants Dr. Kalyan said this:

> Prior to the Omicron variant, data showed that effectiveness of the vaccines in use in BC/Canada to prevent infection (and thus assumably transmission) initially appeared high, but this effectiveness was found to wane markedly over time. It should be noted most of the waning

effectiveness data is based on the nucleic acid delivery COVID-19 vaccines, which have been used the longest here and are the most widely used in Canada, the U.S. and Western Europe (though the use of the adenovirus vector COVID-19 vaccines have been significantly curbed following the observation of blood clots related to autoimmune thrombocytopenia combined with poor durability for vaccine effectiveness).

A large population-based study published last year during the Delta variant wave found that the decline in vaccine effectiveness in those fully vaccinated (defined as receiving the standard 2 doses of the vaccine) with the Pfizer BioNTech mRNA vaccine (which encodes the spike protein of the original Wuhan strain of SARS-CoV2) accelerated "after the fourth month to reach approximately 20% in months 5 through 7 after the second dose."

This significant waning of vaccine effectiveness was independently verified in another large population-based study across all the nucleic acid delivery platform vaccines (i.e. the mRNA and adenovirus viral vector COVID-19 vaccines) in use in Canada, which found vaccine effectiveness dropped from 92% at day 15-30 to 47% at day 121-180, with no effectiveness detected after day 211. The data from this latter study was acquired between January 12th to October 4th, 2021.

As shown in Figure 1 (data extracted from a study published in the New England Journal of Medicine), which compares the durability of different types of immunity (infection-acquired following COVID-19 recovery, being fully vaccinated with or without boosting, and "hybrid immunity" that includes some combination of infection and vaccination acquired immunity), shows the marked loss of vaccine effectiveness in those fully vaccinated (relative to those with infection acquired immunity) over time during the Delta variant wave (data acquired in August – September of 2021) – particularly when comparing rates of infection after 4 months of either infection or vaccine acquired immunity.

In the time of Omicron, there is consensus in the medical community, given the data we have from BC and around the world, that being fully vaccinated with the COVID-19 vaccines we have in Canada cannot be relied upon to prevent infection or transmission of the Omicron variant (an immune escape variant) and the Omicron subvariants of the virus,5 which now constitutes 100% of cases in the province of BC.

The information provided by the BC CDC on the COVID-19 pandemic notes: "People can spread Omicron to others even if they have been vaccinated, especially when they have symptoms." In a clear demonstration of this, in highly vaccinated Israel, the first Omicron case in the country (November 2021) came from a triple-vaccinated doctor returning from a conference in the UK who passed it on to another triple vaccinated physician.

…At the beginning of the Omicron spread, data from Ontario showed vaccine effectiveness (in those "fully" vaccinated) had dropped below zero. As the number of Omicron infections increased in the province, vaccine effectiveness was no longer negative, but it was clear that the COVID-19 vaccines in use provided no reliable protection from infection (i.e. had VE of < 20%) after 60 days of the 2nd dose of the vaccine **(Figure 2)** 8 – and boosters have shown a similarly rapid waning timeline. Similarly, data presented by the **Epidemiology Task Force of the US CDC also showed negative vaccine effectiveness with the Omicron variant in those who were fully vaccinated (Figure 3).**

As more fully vaccinated people have been infected by Omicron, more recent vaccine effectiveness surveillance data show that vaccine effectiveness hovers between 0 to less than 20% over time (instead of falling into the negative integer range). The **UKHSA (UK Health Service Agency) Vaccine Surveillance Report (17 February, 2022) noted "after two**

doses of the AstraZeneca vaccine, vaccine effectiveness against the Omicron variant starts at 45 to 50% then drops to almost no effect from 20 weeks after the second dose. With two doses of Pfizer or Moderna effectiveness dropped from around 65 to 70% down to around 10% by 25 weeks after the second dose. Unfortunately the availability of similar regularly updated vaccine effectiveness surveillance data from BC is not readily found, but it would be similar to those in other parts of Canada the UK the US and Europe.

Figure 2*. Vaccine effectiveness against symptomatic infection by Omicron or Delta among adults aged ≥ 18 years by time since last dose (Province of Ontario; Nov-Dec 2021)[8]

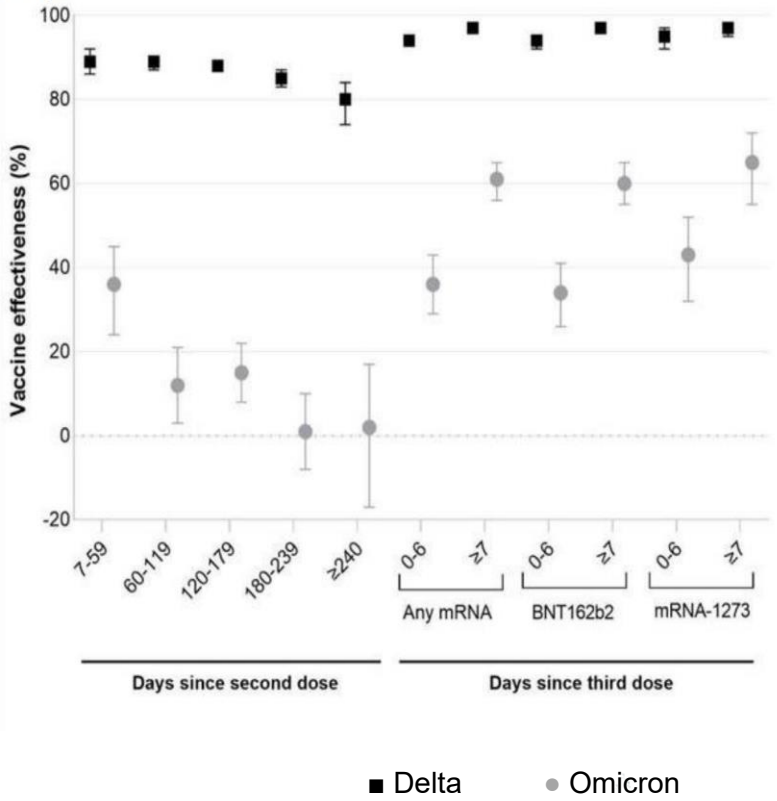
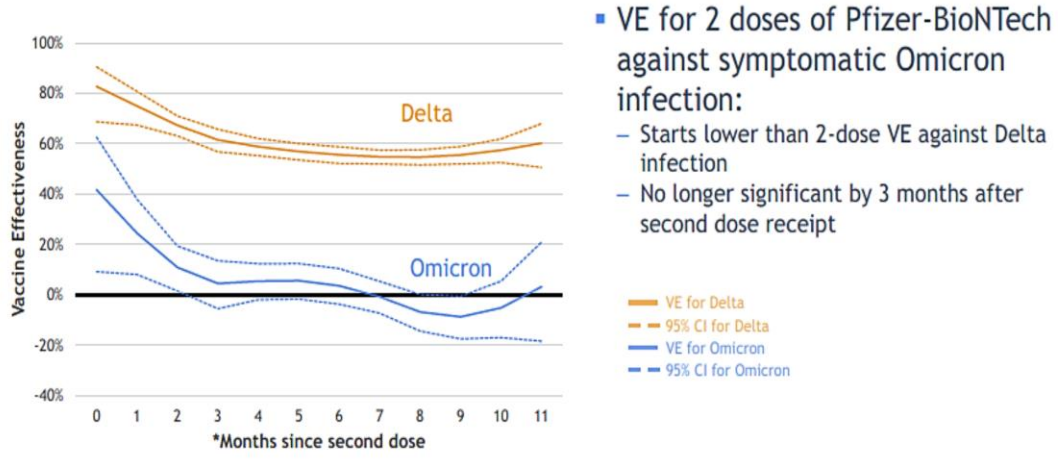


*Figure footnote: The data shown above for vaccine effectiveness (VE) for two doses of the vaccine for Omicron would fail to meet the regulatory standard of having at least 50% VE (with the lower bound of the confidence interval > 30%) for approval

Figure 3. ICATT: Pfizer-BioNTech 2-dose VE against symptomatic infection by variant and time since 2nd dose receipt, adults ages ≥18 years, Dec 10, 2021 – Jan 1, 2022[11]



*Vaccination dose dates are collected as month and year. Month 0 represents tests in the same month as 2nd dose (at least 2 weeks after 2nd dose). For all months greater than or equal to 1 the value represents the difference between calendar month of test and calendar month of 2nd dose receipt (at least 2 weeks after 2nd dose).

Accorsi EK, Britton A, Fleming-Dutra KE, et al. Association Between 3 Doses of mRNA COVID-19 Vaccine and Symptomatic Infection Caused by the SARS-CoV-2 Omicron and Delta Variants. JAMA. 2022;327(7):639-651. doi:10.1001/jama.2022.0470

162. Dr. Kalyan was asked to comment on the Vancouver Coastal Health letter and the letter from Dr. David Patrick to President Sano Ono of UBC which I referred to earlier. As a UBC staff member she was familiar with the correspondence.

163. She was asked if there was a significant difference in one- or two-dose vaccine effectiveness between the UBC campus and other locations where there may be less opportunity for distancing, e.g a meat packing facility or warehouse.

> As noted in my response to Questions 3 and 4, the scientific consensus is that the current COVID-19 vaccines in use in Canada, which all singularly target the spike protein of the original Wuhan strain of SARS-CoV-2, cannot be relied upon to either prevent infection or transmission of Omicron. Vaccine effectiveness, which is an intrinsic property of the vaccine, would not change by location or circumstance. At this time, susceptibility to infection and risk of transmission would likely be dictated by environmental controls (such as ventilation), policies which influence behaviour (such as the ability to stay home when sick), and whether an individual has already developed Omicron infection-acquired immunity (as noted in Dr. Patrick's letter).

<u>Sources of Information</u>

164. Dr. Kalyan was asked about the resources available to health professionals, businesses and others to stay up to date on COVID-19 variants and vaccine responses. Her report includes the following:

> Among the most comprehensive, up-to-date, and transparent reporting on vaccine effectiveness against infection, transmission, hospitalization and mortality has come from the UK Health Security Agency (UKHSA) that puts out regular COVID-19 Vaccine Surveillance Reports. This reporting is particularly helpful as the UKHSA in collaboration with the UK's Office of National

Statistics have comprehensive surveillance programs/studies in place (since 2020) because: "Robust population surveillance programmes are essential to understanding the rate of SARS-CoV-2 infection, and how the virus is spreading across the country. They help us to assess the impact of measures taken to contain the virus, to inform current and future government actions." Further, their immunological testing strategy "includes looking at how the immune system has responded to SARS-CoV-2 and how this varies over time. We use the data and insights generated from these studies, including analysis of the impact of the vaccine rollout, to help strengthen our scientific understanding of COVID-19, inform the government's policy decisions and work across the testing programme."

Such a COVID-19 immunosurveillance strategy is pivotal for the proper evaluation and ongoing review of the effectiveness of the public health policies and the vaccines in use.

Additionally, Denmark and many of the Scandinavian countries also provided regularly updated surveillance reports, which have included providing information on cases stratified by age and immunity status (unvaccinated, previously infected and recovered, vaccinated, boosted). Israel has been the country that has provided much of the data for the Pfizer-BioNTech Mr.NA vaccine, which has been taken in lieu of proper randomized controlled trials. Countries like Canada and the US, where health care is less synchronized across provinces/states, may have been hampered with the timely aggregation, accessibility and transparent reporting of critical national surveillance data as these other noted countries for the provision of such critical data. Certain provinces, particularly Ontario, have contributed notably to evaluating both the changing assessment of vaccine effectiveness as well as safety. They were in the forefront to show the marked loss of vaccine effectiveness in preventing Omicron infection (Figure 2).

Given the speed at which data was emerging and the slow pace of peer-reviewed publishing in traditional journals, the COVID-19 pandemic unveiled the power and utility of preprint servers through which researchers could upload their complete data, analysis and interpretation in real-time for access and review by colleagues, public health officials and the public in real-time. These early-access studies, many of which were published months later following formal peer-review, have played a very important role in sharing critical data in a timely manner.

Protection Against Serious Illness, Hospitalization and Death

165. I next quote from union counsel's question to Dr. Kalyan:

The letter dated February 20, 2022, from David Patrick et al. states in its third paragraph, "the scientific evidence, with respect to Omicron, no longer supports proof of vaccine (regardless of timing) as evidence that a person is a low risk of transmitting COVID-19 to others." According to the letter this result is related to a less effective first stage of immune protection related to "neutralizing antibodies". However, the next paragraph refers to a second stage of immune protection recognizing a broader set of viral targets, which accounts for "a high rate of protection against severe illness and hospitalization."

Would you please comment on the two paragraphs of the February 20 letter referenced above providing your view as to the accuracy or otherwise of their content? Please address or explain the following two points in particular (to the extent you have not already done so):

(a) The suggestion that proof of (two-dose) vaccine does not provide evidence a person is at low risk of transmitting COVID to others

Answer: At this time, this point cannot be disputed (and is covered in detail in responses to Questions 3, 4, and 7 above). Being fully vaccinated does not provide any assurance that an

individual is protected against Omicron infection and thus would not be any less likely to transmit infection as an immune naïve individual (i.e someone who has no immunity against SAR-CoV-2, either through infection or vaccination).

(b) The possibly counter-intuitive proposition that a two-dose vaccine cannot protect against infection and transmission but can nonetheless offer some protection against severe illness and hospitalization caused by the Omicron variant.

Answer: I will start by providing some background on immunology basics: Antibodies, which are secreted molecules produced by B cells, usually function to block infection of the host cell by binding to free viral particles. The presence of circulating antibodies in blood wane over time (considerably more rapidly following vaccination with the nucleic acid delivery platform vaccines than following infection. However, memory B cells continue to live in lymphoid tissue and the bone marrow, and these memory B cells would be activated to generate antibodies again upon infection (or when given a booster). In contrast, anti-viral cytotoxic T cells act principally by recognizing and destroying virus-infected cells. Viruses replicate within our cells; thus, resolution of infection is reliant more on T cell function than on antibodies. Despite the greater importance of T cells in eradicating viral infection,15 most of the attention, in respect to the effectiveness of COVID-19 vaccines, have been on the type and levels of antibodies they produce. In this respect, we are ignoring the central role of long-lived anti-viral T cells in fighting SARSCoV-2 infection. Most generalists refer to T cell-mediated immunity as "cell-mediated" or "cellular immunity" to contrast it to the antibodies, often referred to as humoral immunity, which are secreted molecules. In actuality – both memory B and T cells can be considered to confer "cellular immunity".

The statement by Dr. Patrick and colleagues in respect to the supposition that the more durable cellular immunity, which, as noted above, include both long-lived memory B and T cells, provided by vaccination will continue to provide protection against severe disease is plausible*,* but it is an area that requires more study. Data (from the time of Delta variant) show that vaccine protection against hospitalization may also be prone to waning, and this loss of protection would be further impacted with the emergence of the Omicron variants. A report from the UK Health Security Agency (UKHSA) shows that with the Omicron variant, vaccine effectiveness (2 doses) against hospitalization after 25 weeks following last dose is estimated to be about 40% (VE is ~55% up to 24 weeks following 2nd dose administration). It is noted, "Given that Omicron generally causes milder disease than previous variants, in particular among younger individuals, and that all individuals who are hospitalized for any reason in the UK are tested for COVID-19, an increasing proportion of individuals hospitalized with a positive COVID-19 test are likely to have COVID-19 as an incidental finding rather than the primary reason for admission. For mortality, vaccine effectiveness after 25 weeks is estimated to be about 60% (confidence intervals: 4% to 82%)." [emphasis added]

Given the rapid spread of Omicron, it is anticipated the level of infection-acquired immunity in the population will continue to grow, which would contribute significantly to reduced severity of disease over time.

166. With regard to a reduction in the risk of serious illness, hospitalization and death which may be achieved by vaccination, Dr. Kalyan stated at page 19 of a report:

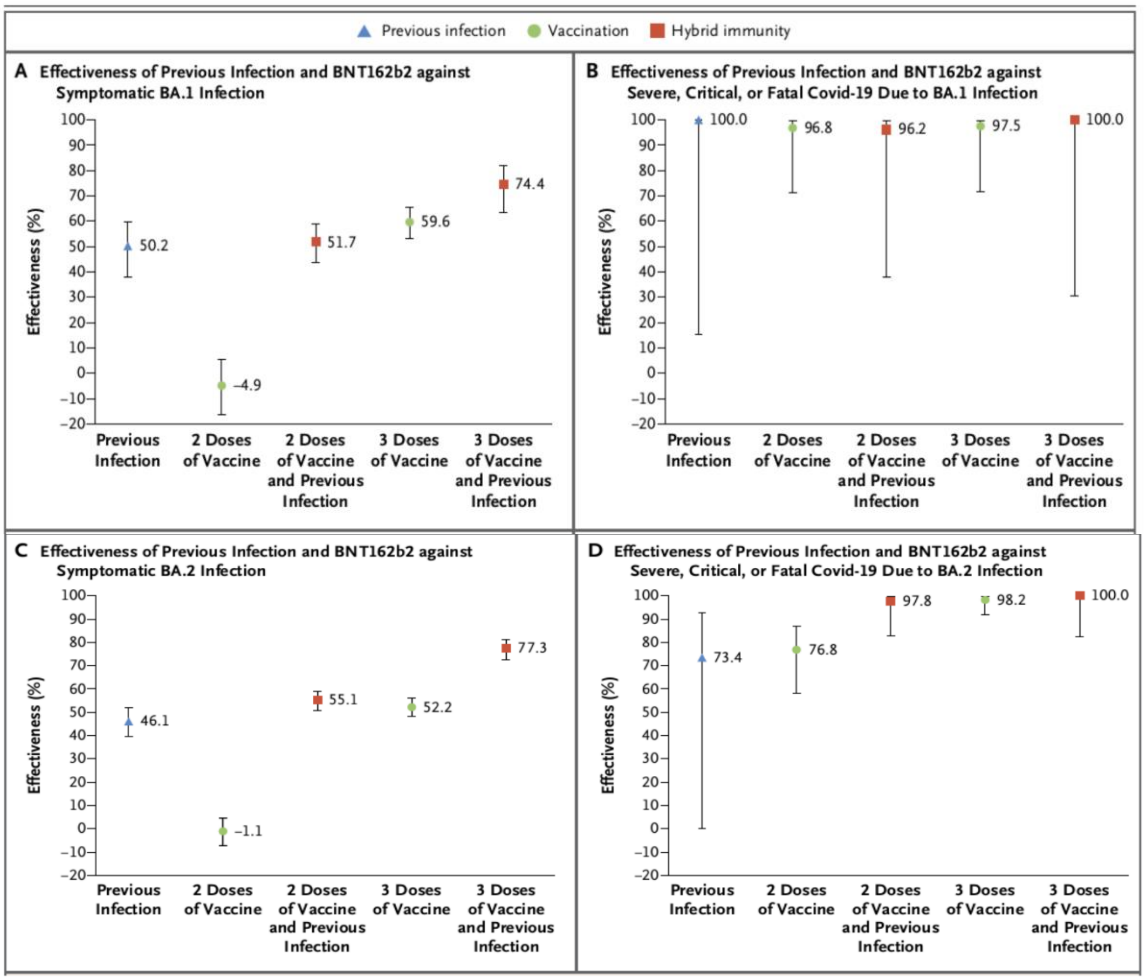
COVID-19 morbidity and mortality are significantly amplified by co-morbid conditions; a CDC study reported that 95% of those hospitalized with COVID-19 have at least one co-morbid condition. Age is by far the largest risk factor for COVID-19 related death. *A study assessing the outcomes of patients hospitalized with COVID-19 found the median age of*

patients who died in hospital from COVID-19 in the study was 80 years, and 89% of these patients had a major comorbidity.

167. She also referred to the UKHSA figures above showing 40% vaccine effectiveness ("VE") for serious illness and 60% for mortality. She also described as "plausible" the statement of Dr. Patrick that "vaccination will continue to provide protection against severe disease." So her position on this is not markedly different from Dr. Rebick's.

168. Dr. Kalyan also produced substantial data indicating that infection acquired immunity was markedly more durable in preventing reinfection relative to being fully vaccinated (during the Delta variant wave). They also had lower incidence of COVID-19 associated hospitalization, and persons who are fully vaccinated without infection acquired immunity.

Figure 7. Effectiveness of previous infection, vaccination, and hybrid immunity against symptomatic Omicron infection and severe disease (encompassing critical and fatal COVID-19 infection). Data from Altarawneh *et al.*[21]



Prior to Omicron, a study from the US CDC shows that people with infection-acquired immunity had lower case rates of COVID-19 and lower incidence of COVID-19 associated hospitalization (tabulated rates by immunity status provided in Table 2) than persons who were fully vaccinated without infection acquired immunity. This data, which included almost 22 million people, would suggest that vaccinating those with infection-acquired immunity likely provides negligible, if any, benefit. This analysis from the US CDC is in line with the data from Israel (Figure 1 above) that shows infection-acquired immunity was markedly more durable in preventing re-infection relative to being fully vaccinated (during the Delta variant wave), and this outcome was not significantly improved upon by vaccinating those with infection acquired immunity. Thus, it has been noted that individuals who already have immunity through infection would benefit very little (if at all) with vaccination, and they are thus primarily being exposed to unnecessary non-trivial risks of vaccination (as rare as they may be).Of note, these already immune individuals are also more likely to experience adverse effects following vaccination.23 The emergent non trivial risks of the COVID-19 vaccines in use in Canada/BC are expanded upon and detailed below in response to Question 13.

Table 2. Rates of COVID-19 hospitalizations by immunity status (vaccination and/or previous COVID-19 infection

Vaccinated	Previous SARS-CoV-2 Infection: YES	Previous SARS-CoV-2 Infection: NO
YES	0.0282	0.0693
NO	0.0276	1.1452

Source data (CDC): COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis — California and New York, May–November 2021
On January 19, 2022, this report was posted online as an MMWR Early Release: Weekly / January 28, 2022 / 71(4);125–131

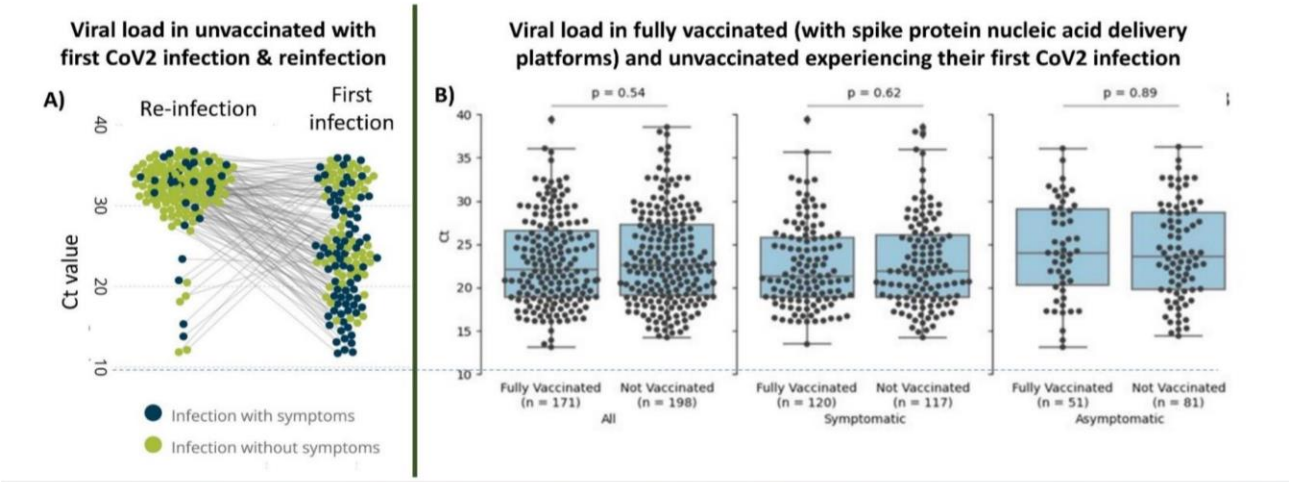
CDC analysis includes **21,734,330** people from the state of California from May to November 2021 (Delta variant in circulation).

Infectiousness once infected, vaccinated and unvaccinated

169. Dr. Kalyan referred to a study at page 14 of her report entitled "No significant difference in viral load between vaccinated and unvaccinated, asymptomatic and symptomatic groups when infected with SARS CoV-2 Delta variant" and provided an illustration from that report:

> In addition to the greater durability and strength of the comprehensive protection of infection-acquired immunity relative to that observed for the COVID-19 vaccines, it is also probable that those who had COVID-19 and recovered would be less likely to transmit infection if they get re-infected as their greater mucosal immunity (i.e. that which is present at the mucosal surface of the respiratory tract which is the port of entry of SARS-CoV-2) would better limit viral replication; unlike those fully vaccinated experiencing their first "breakthrough" infection who have viral loads similar to individuals with no previous immunity (as shown in Figure 8).

Figure 8. Viral load following SARS-CoV-2 infection by vaccination status



***Note: higher the Ct value, the lower the viral load (which represents the amount of viral replication)**

Data: A) from Office of National Statistics, UK (https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19infectionsurveytechnicalarticleanalysisofreinfectionsofcovid19/june2021)
B) Acharya CB et al, *No Significant Difference in Viral Load Between Vaccinated and Unvaccinated, Asymptomatic and Symptomatic Groups When Infected with SARS-CoV-2 Delta Variant (https://www.medrxiv.org/content/10.1101/2021.09.28.21264262v2)*

Potential of Future Variants to evade immune protection.

10. Further down the first page of the February 20 letter from Dr. Patrick et al. the following statement appears: "Combined, the potential for future variants that avoid the first stage of immune protection against infection is high". Will you please comment on this view if possible, indicating agreement or disagreement, and some explanation for such prediction if possible.

Answer: By "first stage of immune protection" – Dr. Patrick is specifically referring to COVID-19 vaccines and their generation of neutralizing antibodies against the virus (which is what he had stated earlier in the letter). I agree with Dr. Patrick's supposition that the neutralizing antibodies generated by the current COVID-19 vaccines will not provide immune protection against future SARS-CoV-2 variants. Variant selection is driven by changes (mutations) in the virus that are best able to avoid the population based immunity present (this can be thought of as being similar to the selection of antibiotic resistant bacteria when using one type of antibiotic). As noted previously, all the vaccines in use in Canada (despite their different platforms), target a single part of the virus (the spike protein) of the original Wuhan strain. This makes the task of immune evasion relatively easy for the virus as it only needs to change the spike protein to avoid vaccine-induced immunity. What we observed subsequent to mass vaccination was the development of variants that got better and better at avoiding this singular population-immunity. We saw increasingly frequent "breakthrough" infections in highly vaccinated populations with the Delta variant wave, which was our first indication that the vaccines in use were now quite leaky and losing effectiveness in preventing infections and transmission of SARS-CoV-2 strain in circulation. The Omicron variants have more mutations in the spike protein (at least 36) than any of the variants that came before it, 25 and have thus completely overcome the population-immunity conferred by the vaccines in use in Canada.

As a clarifying technical point, in the course of a real infection, the first stage and line of immune defence against infection for respiratory viruses would be innate and mucosal immunity (as described above in my response to Question 9 in respect to natural immunity).

These arms (innate and mucosal) of the immune system are trained through infection but less so by the vaccines we are using in Canada. [Side note: live attenuated intranasal vaccines – such as FluMist available in BC for influenza – would be able to better train these arms of the immune system, which can provide broad non-species or variant-specific protection after training.] Further, infection-acquired immunity and that obtained by whole vaccines (i.e. those that target the entire virus instead of just one part) are theoretically less likely to lend themselves to rapid evolution of variants that are able to evade population-based immunity.

Negative Vaccine effectiveness against Infection

11. In reviewing materials such as the UK vaccine surveillance reports, it appears in some cases that two-dose vaccine effectiveness for symptomatic Omicron may fall slightly below zero. What if anything does this indicate? Is there any explanation for why this occurs?

Answer: Yes, negative vaccine effectiveness (i.e. the observation that those who are fully vaccinated appear to be more likely to have symptomatic Omicron infection than those who are unvaccinated) has been reproducibly observed, including in Ontario8 and as shown in Figure 3 (from the US CDC) – particularly early on when Omicron first emerged and fewer fully vaccinated individuals had acquired infection-acquired immunity. This negative vaccine effectiveness for an immune escape variant should have been anticipated. It has been known for some time now that getting immunized with a vaccine that is mismatched to the current strain of the vaccine can potentially do more harm than good. As was noted in 2009: "During the 2009 H1N1 pandemic, researchers at the B.C. Centre for Disease Control originally thought seasonal flu shots from 2008 might offer extra protection against the new pandemic strain. **They were puzzled to find instead, seasonal flu vaccination almost doubled the risk of infection with pandemic flu."** This surprising and disturbing finding has been confirmed in other populations and reproduced in animal models. This phenomenon has been coined by some as "immune interference" or "original antigenic sin". There are a number of hypotheses for the underlying immunological mechanism for this greater susceptibility to infection in those who have been vaccinated previously *(and especially repeatedly)* with vaccines targeting outdated viral strains, but the consensus is that there is a critical need for more research to fully understand this phenomenon - especially given the importance of this issue to health policy and the cost to public health. As noted by Dr. Danuta Skowronski from the BC CDC, "The influenza immunization program is our largest, most costly annually repeated immunization program … it's so worth it to invest in understanding these [negative vaccine effectiveness] effects." However, research has been hampered by cost, time, and stagnant policies. In places like the U.S., where the CDC has had a policy in place since 2010 that everyone get the flu vaccine every year, it would be deemed "unethical" for researchers to conduct a randomized controlled trial in which they ask people not to get vaccinated. It appears we are in a very similar crossroads with Omicron and the questionable vaccination recommendations in place at this time in BC and Canada. There are many people, because the public health messaging has remained relatively stagnant in the face of emerging evidence regarding vaccine effectiveness, who still believe that being fully vaccinated means they cannot spread infection and are protected from getting infected. This false sense of security has obvious negative consequences. This is likely why the European Medicines Agency (EMA) has taken a very different approach at this time. In January (2022), Marco Cavalari, Head of Vaccines Strategy of the EMA, had spoken directly to the lack of data and sustainability of continuing down the path of multiple boosters of the nucleic delivery platform vaccines as a rational approach to the pandemic in the time of Omicron. 29 In this briefing, Cavalari indicated that the EMA is aware that such an approach has the potential to incur immunological harm. It is the EMA's position that further data for the Omicron variant, particularly in respect to the utility of the current vaccines and whether another variant specific vaccine was needed or those with different formulations.

170. It should be noted that the immediately preceding section of Dr. Kalyan's report is mainly directed towards the lack of data and sustainability of continuing with multiple boosters of the nucleic delivery platform vaccines as a rational approach to the pandemic in the time of Omicron. As the employer's SWP did not include a requirement to take booster shots, this portion of the report is not of much significance for the purposes of this case but is included anyway for the sake of completeness.

The Vaccine Approval Process

171. Dr. Kalyan was then asked about the approval process for vaccines in Canada and about the history as it related to the COVID-19 pandemic. Part of her answer included the following:

> The urgent need for therapies to prevent and treat COVID-19, led to the "Operation Warp Speed" public/private program by the U.S. government under the Trump Administration, which invested an estimated $18 billion in the development of COVID-19 vaccines.
>
> All of the approved COVID-19 vaccines in Canada, with the exception of Medicago's which received funding from the Canadian government, received support from Operation Warp Speed. The U.S. FDA put out guidelines for COVID-19 vaccines that stated regulatory and marketing approval would require a minimum of 50% efficacy (with the lower bound of the confidence level needing to be no lower than 30%).32 This minimum efficacy requirement is that recommended by the World Health Organization (WHO).
>
> To expedite the rollout of the vaccines, many regulatory agencies around the world, including the U.S. and Canada, put in new processes to expedite the approval process by enabling vaccine manufacturers to submit a rolling application for authorization before all their Phase III safety and efficacy data were complete. In the U.S., this was done through the FDA's Emergency Use Authorization (EUA) process.
>
> In Canada, the Minister of Health put in an Interim Order under the Food and Drugs Act for the Importation, Sale and Advertising for Use in Relation to COVID-19 (ISAD-IO), which was implemented on September 16, 2020. The Interim Order enabled Health Canada to authorize the use of these vaccines without the usual requirements for complete data by allowing rolling submission by drug companies to continue collecting data; as such COVID-19 therapeutics were authorized "under conditions", which functioned similar to the FDA's EUA.
>
> The following COVID-19 vaccines were authorized for use in Canada under the ISAD-01: Pfizer-BioNTech (BNT162b2) on Dec 9, 2020, Moderna (mRNA1273) on Dec 23, 2020, AstraZeneca (ChAdOx1) on Feb 26, 2021, and Janssen (Ad26.CoV2.S) on Mar 5, 2021. The ISAD-01 was put in place for 1 year and expired on September 16th, 2021. The Minister of Health did not renew the Interim Order, rather, Health Canada gave full approval to the mRNA-based vaccines (both Pfizer-BioNTech and Moderna) in use in Canada on September 16, 2021; shortly after when the FDA had granted Pfizer-BioNTech's mRNA vaccine full approval on Aug 23, 2021. The FDA did not give full approval to Moderna's COVID-19 mRNA vaccine until Jan 31, 2022 (the second COVID-19 vaccine to be given licensure by the FDA). In contrast, all COVID-19 vaccines in use in Canada have been given full approval under the Food and Drug Act since Sept 16th, 2021 (as noted in Table 1).

This has, intentionally or not, likely facilitated the fulfillment of the vaccine mandates promised by the Liberal Government (who formed minority government again on September 20th, 2021) as it may have been problematic for employers to mandate vaccines that are authorized under conditions/emergency use.

An unusual aspect of the full approvals granted by Health Canada for these vaccines is a statement in the Decision Letter for many of the COVID-19 vaccines that states:

"An important limitation of the data is the lack of information on the long-term safety and effectiveness of the vaccine."

This is typically what full regulatory approval would be assuring there is evidence for. The full regulatory approval of the COVID-19 vaccines in use, particularly of the relatively new nucleic acid delivery platform variety, has been questioned by some concerned medical experts for certain important oversights.34, 35 Prior to FDA's approval of the Pfizer-BioNTech mRNA vaccine, a petition by clinicians, scientists and patient advocates was submitted to the FDA36 that requested the following conditions be met before full approval be given to any nucleic acid delivery platform vaccine:

1) Completing at least 2 years of follow-up (as required by vaccine manufacturers)

2) Ensuring, prior to including in the list of populations for which a vaccine is approved, that there is substantial evidence of clinical effectiveness that outweighs harms in special populations such as: infants, children, and adolescents; those with past SARS-CoV-2 infection; immunocompromised; pregnant women; nursing women; frail older adults; and individuals with cancer, autoimmune disorders, and hematological conditions

3) Requiring thorough safety assessment of spike proteins being produced in-situ by the body tissues following vaccine administration, and spike proteins' full biodistribution, pharmacokinetics, and tissue specific toxicity

4) Completion of vaccine biodistribution studies from administration site and safety implications of mRNA translation in distant tissues

5) Thorough investigation of all severe adverse reactions reported following COVID-19 vaccination, such as deaths, reported in the global pharmacovigilance systems

6) Assessment of safety in individuals receiving more than two doses

7) Inclusion of gene delivery and therapy experts in the Advisory Committee overseeing the approval of these vaccines, in recognition of the fact that the novel COVID vaccines work on the premise of gene delivery, in contrast to conventional vaccines.

8) Enforcing stringent conflict of interest requirements to ensure individuals involved in data analysis and regulatory decision making processes have no conflict of interests with vaccine manufacturers

These conditions, which are reasonable and in line with standard regulatory guidelines for such new platforms, were not met.

> Moreover, the vaccines were approved under the original vaccine efficacy reported in the short-term trials – and did not address the significant loss of vaccine effectiveness that has been observed with the relatively rapid waning and new variants described above.
>
> Unfortunately, even the requirement for 6 months of safety and efficacy data for the Pfizer-BioNTech had been obscured by the fact that only 7% of trial participants remained blinded at 6 months. This is because in December 2020, Pfizer allowed all pivotal trial participants to be formally unblinded, and placebo recipients to get vaccinated – thereby removing a comparator group for assessment (Moderna similarly removed the placebo group in their pivotal trial).
>
> This is obviously problematic given that by early July (2021), data from Israel's Ministry of Health had indicated that Pfizer-BioNTech vaccine effectiveness had dropped to 64% (in contrast to the >90% on which authorization was based), and by late July (2021) it had fallen to 39%.37,
>
> This loss of vaccine effectiveness for symptomatic infection was minimized by health officials, who turned their emphasis on the vaccines' ability to prevent serious disease (hospitalization and death), but the vaccine trials were not designed to assess hospitalization, death or even the prevention of transmission; thus, there is no efficacy data to support any of these critical clinical parameters.
>
> Despite this, the policies and recommendations governing their use, including mandates, have at one time or another been purported to be based on their proven ability to address these clinical outcomes. In summary, I agree with Health Canada that the most significant limitation "is the lack of information on the long-term safety and effectiveness" of the COVID-19 vaccines given full approval.

Employer Workplace Vaccine Mandates

172. Dr. Kalyan was asked about the risks and benefits of 1 or 2 dose vaccine regimes including circumstances were a 1 or 2 dose vaccination series may be required of persons by virtue of employment rules, (which was point "c" in a lengthier question). Her answer was as follows:

> In respect to point (c), regarding circumstances where a one-or two-dose vaccination series may be required of persons by virtue of legislation or employment rules, my responses to points (a) and (b) would suggest that *the onus is on the employer enforcing such rules to regularly review the validity of such rules in respect to the purpose they are trying to serve and provide evidence that justify their implementation.* The vaccine effectiveness data provided in this report and the noted emergent non-trivial risks of vaccines, which appear to disproportionally affect those least likely to experience serious COVID-19, suggest the blanket requirement for COVID-19 vaccination for employment does not appear to be justified now (irrespective of the question of whether they ever were).
>
> Another major issue with this requirement from the beginning was the lack of recognition of infection-acquired immunity, which has demonstrably outperformed vaccination for immune protection against COVID-19. This is an important issue because the vaccines required for employment had never been tested for safety and efficacy in those who had already been infected with COVID-19 and recovered. In summary, I concur with the statement made in the letter by Dr. Patrick and colleagues:

"From a public health policy perspective, sanctions should normally be of limited duration, respectful of human dignity and subject to review with changing circumstances. Dropping serious sanctions against unimmunized … at a time when they no longer serve their original purpose is likely to increase a sense that the … actions are proportional and trusted."

[emphasis added]

Dr. Gabriel Rebick

173. Dr. Rebick I find to be well qualified to provide expert testimony in the field of public health and particularly infectious diseases. I do note however that contrary to the assertions of employer counsel he does not have formal qualifications in the field of Occupational Health and Safety.

174. I reproduce here his statement of qualifications from his report which is tendered in evidence dated August 30, 2022.

> I am board certified in Internal Medicine and Infectious Disease with the American Board of Internal Medicine, and am a Fellow of the Royal College of Physicians and Surgeons of Canada with specialization in Infectious Diseases and Internal Medicine. I have a license to practice medicine in Ontario. I hold a master's degree in public health in biostatistics and epidemiology. I have practiced infectious diseases as an attending physician in Canada and the US for 10 years. I have expertise in biostatistics and epidemiology with experience applying these concepts to study design and analysis of medical data. I have knowledge in disease transmission and infection prevention and control procedures, with experience during the COVID-19 pandemic addressing policies to prevent disease transmission in the hospital setting. I have worked as a business consultant for Cleveland Clinic Canada primarily addressing infectious disease issues during the pandemic with experience advising businesses on COVID-19 safety policies, and have sat on the COVID-19 safety committee for Air Canada. I have written extensively for Cleveland Clinic Canada on the COVID-19 pandemic, and have kept up to date with relevant literature addressing all aspects of science around COVID-19. I have taught medical students, residents and infectious diseases fellows, and given multiple talks in both academic and nonacademic settings on COVID-19.

Protection against Infection.

175. Dr. Rebick was asked what difference, if any, does vaccination make with respect to the likelihood an individual will contract a COVID-19 variant such as Omicron. His answer appears at section 6 of his report. I will start with a comment on his first sentence. He says:

> Vaccination, especially *recent vaccination*, likely continues to protect against infection by the Omicron variant, making it less likely overall that an individual will contract Covid 19.
>
> [emphasis added]

176. I find this argumentative rather than helpful. He must have known when writing his report that every vaccinated Purolator employee will have completed their two-dose vaccination by December 25, 2021. Thus, their vaccination series were completed six months prior to June 25, 2022, and eight months prior to the writing of the report. For protection against infection purposes these vaccinations were not "recent vaccinations", they were stale vaccinations. But he chooses to write about the continued effectiveness of recent vaccinations.

177. The same argumentative flavour is apparent from the penultimate paragraph at page 9 of his report.

> Another study from Qatar suggested minimal protection of a two vaccine series against Omicron, *however all vaccine recipients had received their series at least six months prior*, making estimating the relative contribution to loss of protection to waning immunity in the Omicron variant difficult. [emphasis added]

178. I see this as an unhelpful comment. The whole point of the Qatar study was that it established there was minimal protection provided by a two-dose vaccine series against Omicron, after six months. (The context makes clear that this referred to protection against infection). This did not make it more difficult to estimate the "relative contribution to loss of protection" caused by waning immunity. It established clearly that waning immunity coupled with the immune evasiveness of the virus virtually eliminated any protection at all after six months (which is close to the 25 weeks referred to more often in other studies). Again, there appears to be an argumentative flavour to this aspect of the report.

179. In further answer to question six, at the top of page 9 of his report Dr. Rebick says this:

> Omicron's greater ability to evade immunity acquired through vaccination and prior infection make the current vaccines less likely to prevent infection than they did for the prior variants. However it is clear in the preponderance of studies that have considered Omicron's transmissibility to vaccinated persons that some *significant* measure of protection is still provided against the acquisition of Omicron by the current vaccines.
>
> Because of a variety of factors, including the quality of available data on the effect of waning immunity (decreased immune protection with the passage of time, from either prior infection or vaccination) on the vaccinated population, it is difficult at present to say with confidence exactly how much protection vaccines provide against Omicron infection, it is *very likely* that it remains *significant*. [emphasis added]

180. The word "*significant*" appears twice in the above passage. However, Dr. Rebick does not quantify what he means by this. In all the studies to which I have been referred, two-dose vaccination after 25 weeks has a range of effectiveness against the Omicron variants in play around the spring of 2022, somewhere between zero and 17%. Averaged out for all three major vaccines the effectiveness is 9%. There is no ambiguity about the conclusion to be drawn from the overwhelming volume of data provided in Dr. Kalyan's report.

181. It is the effectiveness of the vaccines after 25 weeks which is at issue in this case, because it is fundamental to the employer's position that the mandate remained reasonable until May 1, 2023. The first 25 weeks of vaccinated protection, with great respect to the union's position on implementation, is of minimal consequence.

182. Dr. Rebick also uses the qualifier "*very likely*" that it remains significant. This is unusually vague terminology for an expert to be using without specific data to back it up. This also contributes to my lack of confidence in Dr. Rebick's comments on this aspect of the case.

183. If Dr. Rebick considers that range of effectiveness to be "*significant*" I must take issue with this characterization. If he is referring to some other criteria such as vaccination after three weeks, or even some other criteria not referred to elsewhere, there may be some reason to accept his characterization, leaving aside the fact that the comment would be of little relevance. However, I have not been referred to any such criteria, and so must reject it. Again, I see this passage as having an argumentative flavour. In cross-examination he was pressed by union counsel as to what he meant by "significant" in this context, and he failed to give a responsive answer.

184. In considering the lack of a responsive answer from Dr. Rebick when asked to define what he meant by "significant" I am reminded of what arbitrator Hayes said in *Sault Area Hospital and Ontario Nurses' Association,* 2015 CanLII 55643 (ON LA) *("Sault Area Hospital")*

> 340. *Irving* balancing demands nuance and it is not sufficient to claim that scant, weak, "some", or imperfect data is better than nothing. While the precautionary principle ("reasonable efforts to reduce risk need not wait for scientific certainty") surely applies in truly exceptional circumstances, one could not live in a society where only 'zero risk' was tolerated. It cannot be right that a labour arbitrator should effectively abdicate by simply applying Dunsmuir-type deference to expert opinion planted in shallow soil.

185. I found nothing else in the report or oral evidence of Dr. Rebick to undermine the overwhelming data reviewed and the conclusion arrived at, in Dr. Kalyan's report, that a two-dose vaccination series was discovered to be effectively useless for protection against infection by, at the latest, the spring of 2022. Insofar as her evidence on this key aspect of the case differs from that of Dr. Rebick, I prefer hers, and accept this critical conclusion as the right one.

<u>Protection against serious illness, hospitalization and death.</u>

186. On a separate related subject Dr. Rebick and Dr. Kalyan are substantially in agreement. This was that a two-dose series continued to provide meaningful protection against severe physical or fatal disease due to COVID-19. The final sentence of paragraph 6, and pages 8 and 9 of his report says:

> It is important to note as well that protection against severe infection due to Omicron has suffered much less diminution than that of symptomatic infection. In the above study from Qatar, protection of two doses of the Pfizer by an attack vaccine remained at better than 70% against severe critical or fatal disease due to Covid. Another study from the US found protection against mechanical ventilation or death remained as high as 84% for those more than a 150 days from a two dose vaccine series.

187. Dr. Kalyan had some reservations on the basis that this protection waned as well as protection from infection, but she was in agreement that the waning was substantially less. She was not in full agreement with Dr. Rebick on this issue but agreed that continued vaccinated protection against serious illness was "plausible".

188. Much more was said and written on the subject in this case but, as it is not controversial, I will not dwell on it. I accept that continued protection against serious illness was sufficiently established to satisfy me that vaccination was a reasonable precaution for any individual to take in the context of the COVID-19 pandemic. This does not, however, translate automatically into a reasonable basis for compelling any individual to take that precaution or lose their livelihood. More on that later. There are also relevant considerations concerning age demographics, and mortality rates which are covered earlier in my review of Dr. Kalyan's evidence. Just as a reminder, the median age for serious illness, hospitalization and death is 80 years, which of course is well outside the median or average age of the active employees of Purolator, and the mortality rate for Omicron as compared with earlier variants plunged by 80%.

Transmissibility or Infectiousness after Infection

189. Dr. Rebick was asked what difference if any, does vaccination make with respect to an individual's ability to transmit a COVID-19 variant such as Omicron.

190. His first answer contained in section 7 of his report at page 9 was as follows:

> The clearest way that vaccination affects an individual's ability to transmit Omicron is by decreasing the likelihood of becoming infected in the first place. Vaccination continues to provide meaningful protection against infection due to Omicron, and uninfected persons are unlikely to transmit Covid or its variants to others.

191. This statement repeats the questionable proposition that vaccination "continues to provide meaningful protection against infection due to Omicron". If modified to mean recent vaccination the proposition is not controversial. If intended to mean that two-dose vaccination after 25 weeks provides meaningful protection it runs contrary to the overwhelming data referred to earlier and I reject it.

192. He then addressed the second aspect of the question which concerns whether there is any difference between the infectiousness of a vaccinated infected person and an unvaccinated infected person.

193. He referred to a study of Danish Household Contacts by FP Lyngse, December 2021, which found that an unvaccinated person infected with Omicron was 1.41 times more likely to transmit to

a household member than was an infected person who had received two doses of vaccine. He translated this in his evidence at the hearing to approximately 29%. He referred also to another treatment study conducted in 35 prisons in California by Tan et al dated August 29, 2022 studying the risk of disease transmission from an infected inmate to a close contact, and this was found to be approximately 24% more likely if unvaccinated. He did not comment on the other four household studies included in his reference materials, but I will comment on them later.

194. These household and prison references were prefaced by his following statement at paragraph 2,

> Owing to the rapid emergence and proliferation of Omicron, and a lack of significant well conducted scientific research, there is currently limited information on the question of whether an unvaccinated person infected with Omicron is more likely to pass it on than a vaccinated person infected with the same variant.

Comment on the Infectiousness Evidence of the two Experts:

195. Dr. Kalyan's report was quite brief on this subject. It consisted of the graph shown above as Figure 8. This demonstrated that the viral load in the fully vaccinated was very similar to the viral load in the unvaccinated following their first CoV-2 infection. This was taken from a study by Acharya CB et al, which focused on the Delta variant.

196. Regarding the infectiousness evidence submitted through Dr. Rebick by the employer, I will quote a portion of the union's written Reply which I found helpful.

> 81. Purolator has relied on several studies which focus on the idea that with each COVID19 infection two issues are relevant, i.e., the susceptibility to COVID-19 infection on the part of the person who is infected, and the ability of an infected person to transmit the virus. Purolator seems to suggest that, after vaccine effectiveness against infection fades, there is still some effectiveness against transmissibility from an infected vaccinated person. However, the studies cited by Purolator have found that vaccine effectiveness to prevent infectiousness wanes, just as protection against infection does. Local 31 submits that, overall, the issue of infectiousness of a primary case is of little significance in the present proceeding for several reasons:
>
> a) VE-1 *[transmissibility]* is a smaller component of the total vaccine effectiveness than the more commonly measured VEs. *[susceptibility]*

b) Waning of VE-1, occurs similarly to waning of VEs. Local 31 's case regarding the increasingly clear lack of vaccine effectiveness involves both waning, and the increased immune evasiveness of the Omicron variant.

c) The ability of researchers to determine with precision the contacts of participants is quite subjective and the process of reaching effectiveness estimates for infectiousness of a primary case based on this information is not clear.

d) There is considerable disagreement and there is a lack of consistency in estimates of infectiousness, likely because of differences in methods of calculation.

82. There is no dispute that the original randomized blind clinical trials of the vaccines leading to their conditional approval in Canada and Emergency Use Authorization in the USA considered only vaccine efficacy for prevention of infection - not the infectiousness of vaccinated individuals. Even assuming there is some utility in the study of vaccine efficacy or effectiveness for controlling infectiousness, it is self-evident why this was not done in the clinical trials, i.e., it is not practical to conduct contact tracing on participants in clinical trials, so the likelihood of a vaccinated person infecting others was not studied in the clinical trials. Few studies on this issue were led in evidence in the present case; and these were household studies or prison studies where there is significant vaccination information and knowledge of the contacts of each infected person.

83. Several studies by Lyngse et al. were placed in evidence by Purolator. They addressed vaccine effectiveness for preventing infectiousness by retrospectively observing medical records in conjunction with co-habitation information.

84. In an early study involving the Delta variant, Lyngse et al. referred to the type of difficulty mentioned above and stated:

> This makes it difficult to empirically separate the estimates of vaccine effectiveness against infection in exposed contacts (VEs) from the estimates of vaccine effectiveness of infectiousness in primary cases (VE-1). A solution to obtain these estimates is to acquire secondary information on infected primary cases that allows them to be linked to their exposed contacts, and accounting for the vaccination status of both primary cases and exposed contacts in a statistical analysis.

85. As noted, the system requires linking primary cases to exposed contacts; this involves inferences about the source of secondary case infections. In the above-mentioned study the authors note (page 4):

> Therefore, the real-life observed VEs estimates are a composition of exposure from both vaccinated and unvaccinated primary cases. If vaccination not only protects the exposed contact against infection, but also against infectiousness from the primary case (as we show), then the VEs estimates are a combined effect of both VEs and VE-1.

86. This study, focusing on the Delta variant, considered the waning effect of vaccine effectiveness to prevent infectiousness (VE,). Over a 7-month time frame vaccine effectiveness for both infectiousness and susceptibility was roughly halved. Noting that this study took place before the Omicron variant was a factor, effectiveness for susceptibility decreased from 71 % to 32% over the time frame, with both numbers significantly higher than what we have seen in the Omicron era. The study noted that a comparable reduction of waning effect was found in vaccine effectiveness for infectiousness (VE-1).

87. It is noteworthy that the study period in this case was June 2021 to October 2021, suggesting that most vaccinations of participants were recent when the study commenced. VEs refers to vaccine effectiveness against susceptibility; it is vaccine effectiveness to prevent infection, except it is understood that this number is only part of the equation, which needs to include also the likelihood that the other party to this transmission event may be more or less likely than others to transmit the infection to others. Vaccines can also affect this risk in the person from whom one contracts the virus. VE-1, means vaccine effectiveness to control infectiousness, i.e., the likelihood of a vaccinated individual to transmit the virus to another person.

88. The study notes at page 5 that "vaccinations protect more against susceptibility to infection than against infectiousness."

89. The mathematical model employed by Lyngse et al. seems difficult to comprehend and not intuitively useful. The method for calculating the contributions of both parties to an infection event is opaque and appears to be quite subjective. Dr. Rebick stated that he did not know how this was done. One mystifying attribute of the methodology is that

vaccine effectiveness respecting one party to an infection event is said to change depending on the status of the other party:

> The pooled vaccine effectiveness against infectiousness in primary cases (VE-1,)--unconditional on the vaccination status of the contact--was 42% (95%-CI: 39-45). The VE-1 was 31% (95%-CI: 26-36) when the contacts were unvaccinated, compared to 10% (95%-CI: 0-18) when the contacts were fully vaccinated. The total vaccine effectiveness (VEt) was 66% (95%-CI: 63-68), i.e., when both the primary case and contact were fully vaccinated compared to both of them being unvaccinated. Note that the VE estimates across columns are not directly comparable as they are estimated on stratified samples.

90. This study noted that there is disagreement among various investigators into this issue.

> Other studies have estimated the VE-1, and VEs with large variation in the results. In a study by de Gier et al.~. they estimated the VE-1, from unvaccinated and vaccinated index cases to 63% and 40%, respectively. A study by Harris et al.11. found that the VE-1, from vaccinated primary cases was 52-54% of that from unvaccinated primary cases. Likewise, Singanayagam et al estimated the VE-1, to 34% and Jalali et al estimated the VE-1 to 42%. All these studies did not estimate the VEs. A study by Ng et al. found an adjusted VEs of 61.6% but did not estimate the VE-1. Few studies have estimated both the VEs and VE-1, for SARS-CoV2 Delta VOC from the same data. Prunas et al. estimated the VE-1, to 23.0% and the VEs to 89.4% in Israel. Similarly, Clifford et al. estimated the household VE-1, to 14-24% and the VEs to 31-42% in the UK.
>
> Currently, there is no consensus on the mechanism by which vaccination may affect infectiousness. [references omitted]

[I omit paragraph 91 because I am doubtful about the use of the confidence interval number, but this omission does not detract from the overall message of this extract]

92. The Lyngse study which the parties spent the most time discussing is perhaps the most surprising. This study showed a greater likelihood of transmission from the unvaccinated participants, i.e., 1.41 x greater likelihood of transmission. Dr. Rebick translated this number into the vaccine effectiveness scale (i.e., the percentage of events - in this case transmissions - prevented by vaccination) and came up with 29% VE. However, the study indicated no effectiveness for susceptibility. These two numbers (VE and Odds Ratio) can be translated into one another because they both measure the same event from different perspectives. The surprising thing about this study is that while VE1 is 29%, VEs is not statistically significant. The only benefit shown by the study is on the infectiousness side, with none on the susceptibility side.

93. The last case referred to by Dr. Rebick is the prison study of infectiousness by Tan et al. The study estimated at page 6 that "the index cases who had received one or more COVID-19 vaccine doses had a 24% (9-37%) lower risk of transmitting infection than unvaccinated index cases."

94. On the same page the authors considered the issue of waning effectiveness:

> We assessed the relationship between time since last vaccine dose and/or natural infection on infectiousness of a SARS-CoV-2 infection and found that time since last dose of a COVID-19 vaccine was inversely associated with infectiousness of SARS-CoV-2 infections; **for every 5 additional weeks since last vaccine dose, SARS-CoV-2 breakthrough infections were 6% (2-10.2%) more likely to transmit infections to close contacts.** We did not observe a statistically significant relationship between the time since last SARS-CoV-2 infection and risk of transmission (Table S5 and Figure S2).

95. A meta-study based upon a broad group of studies involving both VE-1, and VEs concluded (page 6/17) that secondary attack rates across studies respecting Omicron variant showed almost no difference whether index cases were fully vaccinated or unvaccinated. This is a peer-reviewed study published by the Journal of the American Medical Association. As noted, the separate Lyngse et al. study discussed above respecting BA.1 and BA.2 subvariants (Exhibit 31 tab 18) reached a similar result, showing no statistically significant difference in infectiousness between vaccinated and unvaccinated index cases.

[Tan et al., Infectiousness of SARS-CoV-2 breakthrough infections and reinfections during the Omicron wave. Pre-print, August 9, 2022, p. 6;

Madewell et al., Household Secondary Attack Rates of SARS-CoV-2 by Variant and Vaccination Status, JAMA Network Open, 2022.]

96. Local 31 submits that, since the studies cited by Purolator's expert witness show significant waning when Delta VOC was dominant, and also when Omicron was dominant, there is no reason to believe that waning of vaccine effectiveness for infectiousness is not subject to waning in much the same way as it is for VE for susceptibility.

[end of extract]

197. There are a number of key facts and data referred to in this extract from the union Reply. While most of the points covered are persuasive, the facts I find most telling are set out below:

198. First, the *Madewell* meta-study summary of four Omicron studies at page 6 demonstrates overall only minor differences in the secondary attack rates (SARs) applicable to vaccinated and unvaccinated primary cases. Just to particularize: *(the vaccinated SAR is given first followed by the unvaccinated SAR. The lower number is better, meaning less infectious).*

199. In Baker et al, (Baker JM, Nakayama JY, O'Hegarty M, "Omicron Variant Transmission Within Households November 21 to February 2022", the SAR difference was .**51 versus .64**;

200. In Aguila Mejia JD, Wallmann R, Calvo Montes J, "Secondary Attack Rates of first SARS-CoV-2 Omicron Variant cases in Northern Spain", the difference was .**50 versus .48;**

201. In Jalali N, Brustad HK, et al "Increase household transmission and immune escape of the Omicron variant compared to Delta; evidence from Norwegian data, Pre-print posted online February 18, 2022, the difference was .**51 versus .57;**

202. In Lyngse FP, Kirkeby CT, et al "Transmission of Omicron subvariants BA.1 and BA. 2; evidence from Danish Households." Pre-print posted online January 30, 2022, the difference was, Vaccinated estimate: **.508, versus** Unvaccinated estimate: **.512.**

203. The percentage difference between vaccinated and unvaccinated SARs is small, and nowhere near the percentage difference reported in the Lyngse study of December 2021 picked out for comment by Dr. Rebick and the employer,

204. Second, two-dose vaccine protection against infectiousness is subject to a similar rate of waning as for protection against infection. This is apparent from the observation at page 4 of the earlier Lyngse study involving the Delta variant.

205. Third, the methodology for assessing infectiousness is not settled. It is a difficult assessment to make because there are always two people involved in an alleged infection event and the source of the supposed secondary infection is uncertain and variable. In commenting on one of the Lyngse studies Dr. Rebick stated he did not know how the mathematical model worked.

206. Independently of the points raised in the union Reply I have an additional observation to make related to household secondary attack rate studies.

207. The concluding paragraph of the *Madewell* meta-study includes the following statement:

> This meta-analysis of 135 studies suggests that there is increased transmissibility of emerging SARS CoV-2 variants of concern in the confines of the household where there is *prolonged close contact* between household members and index cases. [emphasis added]

208. It should be noted as a preliminary point that this study conclusion applies to overall transmissibility not just unvaccinated transmissibility. The main point is that all these studies were conducted in an environment which is quite far removed from the typical workplace during the

pandemic where normal safety protocols were observed. These protocols, which were in place at Purolator, required any worker who tested positive or showed symptoms to:

a) If not at work to decline to go to work;

b) if at work to leave immediately.

209. *Prolonged close contact* in spite of infection is the norm for a household, as well, in all likelihood, as it is for cellmates in prisons. These studies are accordingly of limited use in assessing and comparing secondary rates of infection in such a protocol conscious workplace as Purolator's.

210. When I raised this point at the hearing, counsel for the employer suggested that I would need expert guidance before I should feel confident in making such a distinction. I disagree. It does not take an expert to distinguish between "prolonged close contact" and contact eliminated or brought to a quick end by promptly leaving the workplace. Such action of course does not eliminate the possibility of secondary infection, because there can be presymptomatic and asymptomatic infection which is in turn infectious.

211. However, the viral loads for vaccinated and unvaccinated asymptomatic cases, are according to Dr. Kalyan's Figure 8 above, not much different. As for pre-symptomatic cases, the consensus, supported by Dr. Rebick, seems to be that this lasts for approximately two days before symptoms start to appear and this cannot be described as a "prolonged" period.

212. The SARs for vaccinated versus unvaccinated in the household studies (apart from the one Lyngse outlier picked out for special attention by the employer and Dr. Rebick), are not significantly different, and the lack of prolonged close contact associated with households and prison cells, in a protocol-conscious workplace, would likely tend to reduce whatever small difference there was.

213. Finally, it is worth highlighting what Dr. Rebick stated at the conclusion of section 16 of his report on page 16:

> While reduction of transmission of Covid is another potential benefit of vaccination, current health agencies in Canada and the US do not list this as a specific reason to get vaccinated.

<u>Conclusion with respect to the expert evidence on Infectiousness.</u>

214. The net message from Dr. Kalyan's and Dr. Rebick's evidence was that the possible vaccination benefit of reduced infectiousness was not clearly established. Whatever the benefit, the effectiveness of the vaccines waned noticeably along with protection against infection. It was

not listed by the health authorities as a reason to get vaccinated. It was also insufficiently established to cross a reasonable threshold over which to activate the precautionary principle.

215. In these circumstances this unproven possible benefit was nowhere near adequate, standing alone, by the late spring of 2022, to justify a workplace vaccine mandate when balanced against the massive adverse impact of depriving the grievors of their livelihood by placing them on unpaid LOAs.

Safety of the vaccines

216. To return to the report of Dr. Rebick, at paragraph 12, I quote from his report:

> Are COVID-19 vaccines considered safe? Yes. In the assessment of health and regulatory agencies in Canada and around the world; by the near universal consensus of the scientific, medical and public health communities; and in my own opinion as a clinician and as an individual, COVID-19 vaccines are safe. COVID-19 vaccines, like all vaccines and therapeutics, bring with them the possibility of side effects. The question of whether a vaccine or therapeutic is "safe," assuming regulatory approval, tends to 14 concern the nature and probability of its adverse side-effects. For a vaccine or therapeutic to be considered safe, any common adverse side effects should be mild or transitory, and serious ones should be very rare (generally less than 1/100,000)
>
> Mild side-effects associated with COVID vaccines, such as arm soreness, fatigue, headache, chills, muscle pain and joint pain, a fairly common. These are similar in rates to other vaccines given to adults, such as the influenza vaccine.
>
> While serious side-effects have been associated with some COVID vaccines, they are very rare. The most serious side effect associated with Covid vaccines has been observed only with the viral vector vaccines (AstraZeneca, Johnson & Johnson). These have been associated with rare and potentially life-threatening disease characterised by low platelets and blood clots called "vaccine induced from Boutique thrombocytopenic year" (VITT) estimated to occur after approximately one in 100,000 – one in 250,000 doses.
>
> A signal of increased rates of myocarditis (inflammation of the heart) and pericarditis (inflammation of the lining of the heart) has been found related to mRNA vaccines. Though typically associated with mild disease, myocarditis can sometimes be serious and lead to hospitalizations, and while most people have a full recovery some can go on to have chronic illness. A large study in Israel found an excess risk of myocarditis of three excess events per 100,000 persons (1 to 5 excess events per 100,000 persons). Most of this increased risk is in persons under 40, with men having higher risk than women.

217. Dr. Kalyan emphasized these risks in her report and oral evidence. However, I accept the data and the conclusions of Dr. Rebick on this subject. The overall benefit of vaccination to public health generally outweighs the risks of serious complications, so it is appropriate for public health authorities to encourage and educate the general public in the direction of being vaccinated. Whether this public health benefit justifies compulsory vaccination is a question which has many answers depending on the timing and circumstances surrounding such a measure. It is not

necessary for me to dwell generally on these questions because I regard them as secondary to the specific questions I have to address in adjudicating this case.

218. The union supported by Dr. Kalyan says that the risks of serious complications, and the fact that they endanger the younger demographic, for whom the protection of vaccination against serious illness or death is least necessary, is a strong argument against a workplace vaccine mandate.

219. I am not persuaded by this argument for two reasons.

220. Firstly, one UK study referenced in the reports compares the risk of dangerous blood clots from being vaccinated with the risk of encountering the same side effects as a result of being infected with COVID-19. It establishes that the former in terms of events per ten million was 66 extra cases, while the latter in terms of events per ten million was 12,614 extra cases. (University of Oxford Study, announced August 26, 2021). Similar ratios have been observed with respect to other adverse side effects of being vaccinated.

221. Secondly, the initial implementation of the mandate was driven by a belief that allowing unvaccinated workers into the workplace endangered workers already there. I have found elsewhere that this belief was reasonable, and the application of the precautionary principle given the uncertainties surrounding the evolution of the virus and vaccine science at the time, was reasonable. The arguments about a very low percentage risk of serious complications did not render the vaccine mandate unreasonable at that time and have no traction in the context of that finding.

X <u>The Precautionary Principle</u>

222. It is appropriate at this stage to comment on the precautionary principle. It is referenced in six of the vaccination cases relied upon by the employer. I use generally the abbreviated titles found in the list at paragraph 313 below: These were *Bunge Hamilton, Power Workers (Elexicon), BC Hydro, Maple Leaf Foods, CKF v Teamsters,* and *Elementary Teachers;* A seventh, *Coca-Cola (Noonan)* referred to an absence of scientific certainty which is closely related.

223. The factors which engage the precautionary principle were set out in *R v. Michaud* 2015 ONCA 585 (CanLII):

> [102] There is good reason to favour *ex ante* rules where human life or safety is at stake and where there is scientific uncertainty as to the precise nature or magnitude of the possible harms. In such cases, regulators utilize a "precautionary principle", which, the authors of *Risk Management* note, "tackles the problem of an absence of scientific certainty in certain areas of risk and directs that this absence of certainty should not bar the taking of precautionary measures in the face of possible irreversible harm" The Supreme Court has recognized the

precautionary principle in the context of environmental protection regulations: *114957 Canada Ltée v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241, [2001] S.C.J. No. 42.

224. In all the cases referred to by the employer the precautionary principle was engaged because of an element of scientific uncertainty with respect to the effectiveness of the vaccines to provide protection against COVID-19 coupled with a dominant concern about health and safety in the workplace.

225. This has led to the application of the precautionary principle and in most cases the application was reasonable. However, based on the evidence presented in this case, as well as *FCA,* there was, by the late spring of 2022 no longer any scientific uncertainty about the fact that two-dose vaccination after 25 weeks provided statistically insignificant protection against infection. The precautionary principle no longer had any application with respect to protection against infection. Insofar as any of the awards continued to apply the principle to the risk of infection after the spring of 2022, they were persuaded by expert evidence quite different from the evidence heard in this case.

226. I will now review the applicability of the precautionary principle to the three other reasons besides protection from infection, which were claimed by the employer to justify the mandate.

227. In the case of third-party requirements the precautionary principle had no relevance.

228. Insofar as any of the awards applied the principle to the risk of serious illness in the workplace after the spring of 2022, justifying a vaccine mandate, I respectfully disagree with them for the reasons I set out later in the relevant section of this award.

229. It might have had some application to the remaining reason which was infectiousness once infected, but for the reasons I set out in a portion of section VIII of the award, I did not find this to reach even the minimal threshold of possibility or potential impact required to engage the precautionary principle.

XI The Lifting of the Federal Vaccine Mandate and other Public Health Authority Restrictions

230. On June 14, 2022, the Government of Canada announced:

> As of June 20, 2022 employers in the federally regulated air, rail, and marine sectors will no longer be required to have mandatory vaccination policies in place for employees.
>
> .. Furthermore, the Government of Canada is no longer moving forward with the proposed regulations to make vaccination mandatory in all federally regulated workplaces.

231. On page 2 of the announcement the following paragraph appears:

Science-based decision-making

Following a successful vaccination campaign 32 million eligible Canadians have been vaccinated against Covid 19. The Government of Canada's decision to suspend the mandatory vaccination requirements for the domestic transportation sector *was informed by key indicators*, including:

- *the evolution of the virus;*
- *the epidemiologic situation and modelling (stabilisation of infection and hospitalisations across the country)*
- *vaccine science;*
- *high levels of vaccination encountered against Covid 19.* [emphasis added]

232. There can be no doubt that the references to "the evolution of the virus" and to "vaccine science" are related to the overwhelming evidence accumulated as described earlier, that vaccination, particularly two-dose vaccination after 25 weeks, provides statistically insignificant protection against infection.

233. It is also self-evident from this announcement that the Federal Government considered that high levels of vaccination rendered quite minimal the potential safety benefit of keeping the small percentage of the unvaccinated employees out of the workplace. Their underlying reasons for making that assessment are not certain. On the other hand it is undeniable that making that assessment about minimal impact on workplace safety because of high levels of vaccination contributed to their decision to lift the mandate, because they say so.

234. The lifting of the Federal workplace vaccine mandate reflected the public announcements and published public agency studies referred to earlier reinforcing the ineffectiveness of two-dose vaccines after 25 weeks at preventing infection. In addition, the factual background included the following.

235. On about February 3, 2022, shortly before Ontario's public vaccine restrictions were lifted, the Chief Public Health Officer of Canada, Dr. Kieran Moore publicly stated as reported in a CTV News report, "the vaccine isn't providing significant benefit at two doses against the risk of transmission, as compared to someone unvaccinated". The same news report also attributed to Dr. Moore the statement that "Two doses doesn't do much to limit the spread".

236. All or most of the provincial public restrictions respecting vaccine passports and similar certificates were rescinded prior to the Federal announcement, including those in Ontario (March 1, 2022, announced February 14); Saskatchewan (February 28, 2022, announced February 14); New Brunswick (February 27, 2022); Manitoba (March 1, 2022); British Columbia (April 8, 2022); Nova Scotia (March 2021) and Québec (March 14).

237. A number of healthcare facilities' vaccine mandates were withdrawn as well, prior to the lifting of the Federal mandate, (with the exception of Alberta): Manitoba's hospital employees' vaccine mandate was withdrawn effective March 1, 2022; Ontario's Directive #6 was withdrawn on March 9, 2022, followed by New Brunswick, announced April 1, 2022 and Alberta, who rescinded their immunization policy effective July 18, 2022.

238. It will be recalled that the union communicated with Purolator by letter dated April 12, 2022, advising of the evidence respecting changes in vaccine effectiveness. This correspondence included the December 13, 2021 statement from Dr. Teresa Tan, Chief Public Health Officer of Canada, that "a two dose primary series does not offer good protection against infection". The union also included public correspondence from the public health officials of the Vancouver Coastal Health Authority suggesting, in reference to two-dose vaccines, that "there is no material difference between vaccinated or unvaccinated UPC students and staff in terms of the likelihood of spreading the infection".

239. I quoted from this correspondence earlier in the award under the heading of public health authority statements and guidance. I refer to it again here to underline the fact that Purolator could not credibly claim to be ignorant of the overwhelming data by the spring of 2022 regarding the ineffectiveness of a two-dose regime of vaccination after 25 weeks or to have misunderstood the rationale for the lifting of the Federal mandate.

XII Management Discussions about Continuing or Lifting the Mandate in June 2022

240. On May 27, 2022, Mr. Hayashi sent a draft confidential brief to his management colleague Simon Pierre Paquette, with a note saying "Submitting the straw man for discussion and expansion". It was as follows:

> DRAFT CONFIDENTIAL BRIEF SAFER WORKPLACES POLICY
>
> Question: when/ if ever, should Purolator remove its mandatory COVID-19 vaccination requirement for its employees?
>
> Medical considerations: (Source; Dr. Chugh). Current Canadian health data suggests that current variants of concern pose less serious health risks than previous variants, vaccination is less effective in reducing transmission of these variants but still provides some protection from the worst health outcomes. This has been true for several months.
>
> Statutory Workplace Safety requirements: (Source: D. Hayashi) Canada Labour Code requirements are unchanged.
>
> Change Management considerations: Once removed, reinstituting the requirement, if necessary, will cause additional confusion.

Workforce impact considerations: (Source: Consultations with Ops Directors, HRM's) The consensus is that the removal of the requirement will create anxiety for a group within the workplace that are comforted by the requirement.

Additionally, there is a consensus that the workforce would resent the return of any unvaccinated employees to the workplace.

Staffing impact considerations: Volumes vary across the network and we are still recruiting for many positions. However, it is likely that a return of unvaccinated employees to the workplace will result in over-staffing and subsequent layoffs.

Reputational [market) impact considerations;.

Reputational [employer] impact considerations;

On-going litigation considerations.

241. This led to a fuller draft document forwarded from Mr. Hayashi to Mr Paquette and Mr. Johnston on June 6, 2022, with the comment "Please find attached the draft document. I welcome your additional insights in finalizing the recommendation."

DRAFT CONFIDENTIAL BRIEF
SAFER WORKPLACES POLICY

When, if ever, should Purolator remove its mandatory COVID-19 vaccination requirement for its employees?

Summary:

It is recommended that, at this time, Purolator *not remove its mandatory COVID-19 vaccination requirement for its employees.* The most relevant reasons are Customer Expectations, Workforce Implications and Legal Considerations, discussed below.

Medical Considerations: Current Canadian health data suggests that current variants of concern pose less serious health risks than previous variants, vaccination is less effective in reducing transmission of these variants but still provides some protection from the worst health outcomes. This has been true for several months.

Statutory Workplace Safety requirements: Canada Labour Code requirements are unchanged. The Federal Government has not changed its position that it intends to bring forward a requirement for mandatory vaccination in all federal workplaces. This seems unlikely to actually happen at this time.

Workforce Impact: Volumes vary across the network and we are still recruiting for many positions. However, it is likely that a return of unvaccinated employees to the workplace will result in over staffing and subsequent layoffs. There are effective mechanisms in the relevant collective agreements to administer these layoff.

Customer Expectations/Requirements: Forty plus (40+) major customers with hundreds of locations continue to require Purolator employees attending their locations to be fully vaccinated. Because these customers (and many others) have not yet rescinded their vaccination requirements for services providers like Purolator accessing their property, Purolator would need to either incur logistical overhead necessary to ensure to only send vaccinated employees to these locations, or risk finding Itself in breach of its commercial agreements.

Third Party Site Considerations: All of our airside locations continue to have a mandatory vaccination requirement for those on site (i.e Mount Hope)

Change Management/Workforce Impact Considerations:

Once removed, reinstituting the requirement, if necessary, will cause additional confusion.

Employees compliant with Safer Workplaces Policy may react to voluntary reinstatement of noncompliant employees with resentment or perceive this measure as minimizing their efforts and the risks - to themselves and their families - taken to get vaccinated, continue working and keep the business operating through the pandemic.

Conversely, voluntary removal of the Safer Workplaces Policy may be perceived by non-compliant employees on unpaid leave as vindicating their challenges against the policy in various forms - including lawsuits, repeat grievances, vexatious legal claims, social media pressure, complaints to Labour Canada, threats against supervisors, protests, and withholding of their services while it remained in effect.

For the above reasons, at least in the short-term, co-existence of compliant and non-compliant employee populations can be anticipated to lead to an Increase In conflict In the workplace, as well as allegations of harassment or workplace violence. It is recommended that, as part of the change management process involved in voluntarily withdrawing the Policy, the Company take the opportunity to require employees to receive training aimed at lessening those risks, such as re-taking training associated with its code of business conduct or its new harassment and violence prevention policy.

From a more long-term perspective, perceived vindication of their position by the minority of employees opposed to the Policy may translate into their being emboldened to increasingly challenge employer initiatives with which they disagree through similarly disruptive or insubordinate means in the future.

Legal considerations;

Purolator has a standing legal duty to provide a safe and healthy working environment for its employees under Pt. II of Canada Labour Code and the Criminal Code. Similarly to removal of its mask mandate, voluntary removal of Company's vaccination requirement entails increased risk to workplace health and safety stemming from infection from COVID-19. While large scale vaccination has somewhat lessened the resulting risk of serious complications and death, these risks as well as those associated with "Long COVID" do continue to exist, This is particularly so regarding employees suffering from co-morbidities making them more susceptible to the effects of the virus, and as latest COVID wave has yet to fully abate.

In the event of legal challenge involving removal of its Safer Workplaces Policy, Purolator will be required to demonstrate having conducted due diligence concerning the potential impact of such a measure. It is very strongly recommended that Purolater only take further steps involving removal of COVID mitigation measures based on the formal, written opinion of its CMO.

On-going litigation considerations:

Voluntary withdrawal of the Safer Workplaces Policy before the pandemic is formally deemed to be ended by government health authorities can be anticipated to be portrayed by opposing parties as a tacit acknowledgment by Purolator that the policy was either unfounded or based on questionable science to begin with. This can be further anticipated to have certain downstream effects on litigation, such as:

> Anticipated unfavourable impact on Purolator's ability to successfully defend against individual civil claims alleging wrongful dismissal, on the part of non-unionized employees put on unpaid leave due to non-compliance with Safer Workplaces Policy;
>
> Anticipated unfavourable impact on Purolator's ability to successfully defend against continued union efforts (mainly by Teamsters) to challenge Safer Workplaces Policy, and secure compensation for 563 unionized employees placed on unpaid leave as well as additional moral and punitive damages arising from application of the policy.

242. Mr. Hayashi testified that the first two considerations were coloured in green as they were considered for discussion purposes to be favourable to the lifting of the vaccine mandate. The third consideration, Workforce Impact, coloured in yellow, was considered neutral, and all the remaining considerations, coloured in red, were considered favourable to the continuation of the mandate.

243. I will comment on some of the considerations listed in the brief.

244. The first consideration indicates that management was aware of current data that vaccination was less effective in reducing transmission of these variants, but still provided some protection from the worst health outcomes. As this consideration was treated by management as favourable to the lifting of the mandate, it appears to have focused on the loss of effectiveness in protection against infection as inclining towards lifting the mandate. It appears that it did not consider the fact that vaccination provided some protection from the worst health outcomes was a sufficient basis to continue the mandate. This issue is treated more fully in the next section.

245. The second consideration requires little comment. It was obviously well known by then that the Federal government was not going to go ahead with its requirement of mandatory vaccination for all federally regulated workplaces. This was obviously in recognition of the same "vaccine science" and "evolution of the virus" and other considerations which were referenced in the announcement of June 14, 2022, lifting its mandate on its own employees.

246. The third consideration requires no comment.

247. The fourth consideration provides an unjustified premise. The brief states that 40+ major customers with hundreds of locations *continue to require Purolator employees attending their locations to be fully vaccinated.*

248. The basis for this assertion was an assumption that the information contained on the spreadsheet compiled in the fall of 2021 and other information about customers' vaccination requirements also collected in the fall of 2021, continued to be accurate and current as of June 2022. In cross-examination Mr. Hayashi stated that information in the spreadsheet was not updated over time, and that unless he received notice that a customer's vaccination policy was rescinded, he presumed the policy continued. He did not receive any such notice respecting any of the

companies named on the spreadsheet. He stated that customer policies could come to an end, but he did not have a record of that. He further stated: "unless we had information to the contrary, they stayed on the list of vaccination controlled customers".

249. Given the then current environment, with so many public sector employers and public health authorities lifting their mandates and other restrictions in a steady stream since the early spring of 2022, it was an unfortunate failure of due diligence on the part of the employer to make no effort to verify the current status of its major customers' vaccination requirements. It was a significant pillar of its initial decision to implement the vaccine mandate. The failure to verify its continued existence in any substantial way counts quite heavily against its position that was a reasonable contributory factor in continuing the mandate in June 2022.

250. The next consideration, third party site considerations, suffers from the same lack of evidence of any attempt to confirm and verify the current status of these vaccination requirements.

251. The next consideration, Workforce Impact Considerations, amounts to no more than a series of speculations about the possible adverse consequences for the employer of lifting the mandate. These speculations had no place in an assessment of the current effectiveness of the ban in contributing to the goal of improved workplace safety, and if it did so contribute, how the ban measured up in the balancing process between the employer's interests and the interests of the affected employees who were still out of work because of the mandate. All the speculations were entirely focused on the interests of the employer's side only. This portion of the brief provides an unfavourable insight into the employer's lack of recognition and appreciation of its *KVP/ Irving* responsibilities.

252. The same comment applies to the final consideration which was Ongoing Litigation Considerations. This final consideration contributed nothing towards demonstrating the reasonableness of the employer's continuation of the vaccine mandate as of June 2022.

253. As for any other management discussion about continuing the mandate around that time, there was very little evidence of it. It is not entirely clear from the evidence of Mr. Hayashi as to when a firm decision was made to continue the mandate, following the discussion generated by the confidential brief. The announcement by the Federal Government of the lifting of its workplace vaccine mandate was on June 14, 2022, eight days after the confidential brief was first circulated to senior management for discussion.

254. Mr. Hayashi was asked in cross-examination why the lifting of the federal mandate did not impact the employer's resolve to continue its mandate. He gave a number of reasons, but in his

testimony there was no reference to any meetings or discussion papers at the time in which these reasons were discussed amongst members of management. They were more along the lines of justification after the fact. That alone is not a reason to discount them and so I will review them now.

255. He stated that the Federal Government's decision was based on valid considerations. He agreed with them. He then listed 4 reasons why Purolator did not follow the Federal Government's lead.

1) "We had to consider unique factors specific to us as employer" He referred to the specifics of the Purolator work environment. He said there were risks in that environment. The implication was that these risks were unique and not shared with the workforce of the Federal Government.

2) He next mentioned "Our view of our obligations regarding the health and well-being of our employees". He said that Purolator's view was that a diminished effect is not the same thing as no effect, and there was advice consistent with this view. It is clear that here he was referring to the effectiveness of the vaccines to prevent infection.

3) He stated there were other considerations as well, which included the risks of employees contracting "long Covid"; the possibility of new variants and their effects;

4) He also stated that the Federal government had considerations that Purolator did not have. In this context he stated that the Federal Government had a percentage of its workforce able to work remotely, whereas at Purolator the vast majority of workers could not work remotely.

I will now comment on these reasons.

1) The unique workplace environment was not explained by him at all, and it was not referred to in the evidence of Dr. Rebick. He did not amplify what those unique risks were.

2). He said "a diminished effect is better thn no effect". By this he is apparently maintaining that a statistically insignificant increased chance of infection is a sufficient detriment to workplace safety to justify excluding the unvaccinated grievors from the workplace.

3) “Long Covid “and the possibility of new variants are health concerns faced by the vaccinated, and the unvaccinated alike. There was no evidence that vaccination protected against Long Covid, but even if it did, this would not be a reasonable contributing factor justifying the ban, for the reasons described in the section of the award addressing protection against serious illness.

4) He agreed when cross-examined that the Federal Government did not mention remote working possibilities as one of the reasons for the lifting of the mandate.

256. I do not find any of these reasons to be a reasonable explanation for why Purolator declined to follow the lead of the Federal government in lifting their workplace vaccine mandate. The lack of convincing reasons tends to support the conclusion that the decision to maintain the mandate was not a reasonable decision. By saying that I do not wish to imply that in taking a different view than the Federal government or other employers and health care facilities, the employer’s decision to continue the mandate is automatically established as unreasonable. A number of arbitrators have made this point, and I agree with them. However, it should be recalled that the employer regarded the imposition of the Federal workplace mandate as a highly significant factor in its decision to impose a mandate in the first place. The lead of the Federal government was a major consideration for them. With this specific factual background, it becomes an appropriate feature of my enquiry into the reasonableness of the employer’s decision to continue the mandate, to examine the reasons provided by Mr. Hayashi on behalf of the employer for choosing to follow a different path. As I have said, the reasons he provided were less than convincing. Not only were those reasons less than convincing, but I also take into account the reasons provided in the Draft Confidential Brief for continuing the mandate, circulated at about the same time as the Federal announcement. These do not mesh very well with Mr. Hayashi’s reasons for not following the Federal lifting of its ban. Taken together they demonstrate a somewhat directionless management response to the evolution of the virus, vaccine science, and a high level of vaccination in the workforce. This led to a failure at that critical time to evaluate the ban consistently with the *KVP* and *Irving* rules.

XIII Protection from Serious Illness, Hospitalization and Death

257. This is the third of the list of reasons I identified at paragraph 25 which were advanced by the employer to support its contention that the workplace vaccine mandate remained reasonable through its duration.

258. The *Irving* balancing analysis applies to test the reasonableness of the ban at all times. To what extent did the ban as of June 2022 achieve the goal of improved workplace safety? At what cost to other legitimate interests? It is in this context that the continuing validity of the vaccine mandate as a workplace safety measure must be assessed. The employer says one of the reasons the ban continued to be reasonable is that vaccination provided protection against serious illness, hospitalization and death. The following considerations are relevant to this issue.

259. Firstly, the unvaccinated percentage of the workforce was at the most 4%. The union used a figure of 2% which might have been derived from the BC numbers. But this was a national policy so the national numbers should be used. The total number of unvaccinated was declared in the employer's confidential brief to be 563. Applied as a percentage of the total workforce of approximately 14,000, this is 4%. This meant that the impact of re-introducing them to the workplace in the spring of 2022 was very small. It should be remembered that one of the factors declared by the Federal government to have influenced it in lifting its mandate, was the high level of vaccination by the spring of 2022 in its workplaces.

260. To calculate the impact on workplace safety of re-introducing the 4% unvaccinated to the workplace, it is necessary to estimate the percentage of that 4% who might a) be infected with COVID-19, and b) go on to experience severe symptoms, or serious illness. The average number of such cases for any given number of unvaccinated employees was not available but whatever percentage of that 4% is applied, the number must inevitably be very much smaller than 4%. Consider the math.

261. It was estimated in some studies that the unvaccinated have a 70% higher chance of being infected with serious illness than the vaccinated. However, that does not mean 70% of unvaccinated persons who contract COVID-19 become seriously ill. It is only the difference in risk of serious illness between vaccinated and unvaccinated which is the percentage to be applied. This is simple mathematics, and it is necessary to do the sums to determine what the actual increased risk is within the workplace.

262. There were no firm figures advanced for the risk of serious illness for the vaccinated, but to follow the math let it be assumed for example that it was 5%. The risk for the unvaccinated of serious illness was estimated to be 70% higher so that means their risk is approximately 8.5% versus 5.0%.

263. When this 3.3% actual risk difference is applied to 4% of the workforce, the percentage of increased risk to the workforce as a whole is vanishingly small. It comes nowhere close to

justifying a workplace vaccine mandate. The 5% risk in the example is not factual but whatever the correct numbers are, there will be a small percentage to be applied to another small percentage, which will not yield a figure which could come close to justifying continuation of the mandate.

264. To those who might say it is unfair to include a high proportion of vaccinated employees on the side of the scales against continuing the mandate, because it was the mandate which contributed substantially to the high percentage of vaccination in the workforce in the first place, it should be noted that this contribution was made at a time when all the arbitrators, including Wilson, Morin, and myself are unanimous in finding the mandate was initially reasonable, and the key evidence dictating this finding is that it provided at that time effective protection against infection. This was no longer the case by the spring of 2022.

265. Secondly, the age demographic overwhelmingly impacted by increased risk of serious illness, hospitalization and death was in the 80 years plus age bracket. The median age for this is calculated at 80 years. This was not the age bracket of any members of the Purolator workforce, vaccinated or otherwise.

266. Thirdly, regardless of the age demographic, mortality rates under Omicron plunged by about 80-90%.

267. Next, it will be recalled that in the June 2022 management discussions about possibly lifting the mandate, protection against serious illness was mentioned but only in the context of much reduced protection against infection. The combination of these two elements was coloured green, which was coded to mean elements considered favourable to the lifting of the mandate. This suggests personal protection against serious illness was not a significant feature of the management discussion at the time.

268. As a further matter to be considered the employer claimed a concern over possible civil or criminal liability for allowing unvaccinated workers into the workplace who might contract serious illness there: Three factors militate against this concern being realistic or justified:

1. There is a deliberate choice on the part of the unvaccinated worker to assume that risk.
2. There is no special risk or danger of exposure associated with the Purolator workplace for any worker.
3. Attendance at work involves no increased risk beyond everyday risk for the unvaccinated worker.

269. Thus, a concern over civil or criminal liability for allowing an unvaccinated employee to come to work after June of 2022 is *prima facie* quite far-fetched.

270. To establish that concern, as to any degree justified, would need evidence of at least a handful of successful civil lawsuits or criminal convictions out of the hundreds of thousands of examples of infection followed by serious illness where employers across Canada allowed unvaccinated employees to come to work. While it is possible that such claims exist, not a single example was produced in evidence nor even a single example of the commencement of such a lawsuit or criminal prosecution and I am not going to presume their existence. Accordingly, I judge this concern to weigh very little in the balance on the scales of competing interests.

271. There is an additional related point which was touched on by the employer. Some of the cases refer to an employer interest in having a healthy workforce to reduce absenteeism and render its operations more efficient. This has sometimes been included as a factor supporting the reasonableness of a vaccination mandate. It has a possible indirect benefit for the employer by marginally reducing levels of absenteeism. However, no evidence was led by the employer about the extent to which an increased chance of serious illness among the 4% of unvaccinated workers might affect levels of absenteeism, either in theory or in fact. There was nothing presented to indicate that absenteeism from Long Covid or any other serious illness consequence amongst the unvaccinated could have appreciably impacted the numbers for absenteeism on any other grounds. No numbers for absenteeism were offered specifying different absenteeism reasons and no numbers were offered regarding the percentage of the unvaccinated 4% who might have contracted serious illness and how that number stacked up against overall absenteeism rates. It was not and is not a credible or reasonable basis for a vaccine mandate.

272. The employer also mentioned avoiding increased insurance premiums as a factor supporting the reasonableness of the mandate. However, no evidence was led supporting this assertion. I do not regard it as a persuasive point.

273. For the above specified reasons alone, I find that the workplace safety improvement occasioned by the exclusion of the 4% of unvaccinated workers, was by the spring of 2022 so marginal or small that it failed to justify a vaccine mandate. It was not a reasonable and proportionate safety precaution, given the devastating impact on those workers affected by the ban.

274. At this point I should comment on the view of arbitrator Goodfellow expressed in *Central West Local Health* (citation at para 314) about “no free rides” whereby he stated that the relatively few unvaccinated should not ride on the backs of the vaccinated to enjoy their personal autonomy rights. This assertion appears to fail to take into account that workplace vaccine mandates are required to be evaluated on a continuing basis to determine if they achieve the goals they are

designed to achieve. I have reviewed and considered a substantial number of factors in making the assessment that the SWP was no longer reasonable as of late spring of 2022. If arbitrator Goodfellow's points were carried through literally, one of those factors would have to be eliminated; i.e. the very small contribution to workplace safety made by excluding the unvaccinated 4% of employees from the workplace as of the late spring of 2022. His view is that a policy is "either reasonable or it is not ". This approach suggests that a policy once implemented is set in stone and immune from review. I respectfully disagree with this approach to the assessment of reasonableness.

275. There is however an additional reason why protection from serious illness did not reasonably justify continuing the mandate, discussion of which will take up a larger portion of the award than the other reasons above set out. This reason was partially raised by me in the course of the hearing. The union had not raised it and as I had concerns about it, I wanted to make sure the employer had an opportunity to respond and persuade me that I was wrong to have those concerns. Employer counsel duly responded in a letter referencing my concerns, which I will reproduce here:

> December 12, 2022
>
> Dear Arbitrator Glass: Re: Teamsters Local 31 (the "Union") and Purolator Canada Inc. ("Purolator")
>
> We write further to your correspondence dated December 2, 2022. In your correspondence, you distinguish between "statistically significant protection from infection and transmission," and "statistically significant protection from lengthy or serious illness or death."
>
> You state that "protection from lengthy or serious illness or death, bears directly on PERSONAL SAFETY, and has almost no bearing on workplace or customer safety," and that "electing to take or not take measures to prevent bad consequences is a matter of personal safety" and " has almost no direct bearing on workplace and customer safety."
>
> It is Purolator's position that, as Dr. Rebick has and will testify when he re-takes the stand, COVID-19 vaccines provide meaningful protection against both infection and transmission, and serious illness and death.
>
> Without prejudice to this position, Purolator submits the proposition that "electing to take or not take measures to prevent bad consequences is a matter of personal safety" and "has almost no direct bearing on workplace and customer safety, does not reflect the state of the law.
>
> There is a clear nexus between safety measures an employee takes to protect their personal safety while at work and the workplace. This nexus is supported by statutory authorities, including the Canada Labour Code (the "Code"),1 the Workers Compensation Act,2 and recent arbitral jurisprudence. 1 Canada Labour Code, RSC, 1985, c. L-2 (the "Code"). 2 Workers Compensation Act, RSBC 2019. 103 2

Canada Labour Code – Health and Safety Duties

As a federally regulated entity, Purolator has duties with respect to the protection and safety of its employees. According to the Code, 3 Purolator "shall ensure the health and safety at work of every person [it employs] is protected". This includes protection of a worker from contracting an infectious disease, which may have long-lasting impact on the worker both at work and outside work.

In *Canada Border Services Agency v. Donohue*, for example, the Canada Occupational Health and Safety Tribunal was faced with the question whether the Canada Boarder Services Agency had developed an adequate hazard prevention program addressing unique hazards of violent detainees in holding cells at an airport. The Tribunal held even though the risk of becoming ill from being spit upon by a traveler was extremely low, the Canada Boarder Services Agency was still required to take precautions:

> The evidence from both expert witnesses was that the probability of a BSO becoming ill from being spit upon by the traveler was extremely low. While the possibility of harm may not amount to a "danger" there is still a small chance of disease transmission.
> What jumps out from all the cases involving employees being spit upon is the severe anxiety and stress the employees go through, not knowing whether they will contract a serious disease. Health effects can arise from stress. Spitting may constitute an assault, and it is clear that employers have an obligation to reduce the risk of assault; a form of work place violence. As the respondents' witness, Dr. Katz recommended, even though the risk of transmission of an infectious disease is low, precautions should still be taken.

The Code therefore does not distinguish between safety at the workplace, and personal safety, in particular where an infectious disease is concerned. Federally regulated employees likewise have duties first and foremost to themselves while at work in addition to their co-workers and anyone else (including customers and/or members of the public) who might be affected by their acts or omissions: Similarly, the Code requires that "while at work, every employee shall take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees, and any person likely to be affected by the employee's acts or omissions".7 (Emphasis added).

The Code recognizes a nexus between personal safety and the workplace and customer safety. Notwithstanding their duties to protect the health and safety of co-workers and customers from possible exposure and long-term implications of exposure, every Purolator employee has a statutory obligation to protect themself from exposure to COVID-19 and the long term implications of such exposure, in the workplace.

An employee who elects not to wear a hardhat at the workplace and sustains a serious head injury that may later result in permanent or long-term or traumatic brain injury likewise contravenes their statutory obligation to protect their own personal safety while at work.

It would not logically follow that their later-developed trauma has no nexus to the workplace. It may well be the case that an employee who protects them self from harm in the workplace by becoming vaccinated also inadvertently protects them

self from exposure outside the workplace (unlike an employee who can elect to take their hard hat off at the end of a shift).

However, this does not detract from the value of (or requirement for) the protection while at the workplace, particularly when there is real risk of exposure to harm.

Workers Compensation Scheme

Due to the very nature of COVID-19 and its transmission (including through asymptomatic individuals), there is no guarantee an employee will not be at risk of exposure in the workplace or be the source of exposure to another employee or member of the public in the workplace. As a result of the 2020 amendment to Schedule 1 to include infections caused by communicable viral pathogens and section 137(2) of the B.C. Workers Compensation Act, 8 there is a statutory presumption that a worker who files a claim based on COVID-19 will be presumed to have contracted it in the workplace where their work involves a significantly greater risk of exposure. WorkSafe BC's FAQ similarly addresses this issue. WorkSafe BC indicates it will have regard to whether the nature of a worker's job places them at a higher risk of coming into contact with individuals who may be COVID-19 positive, or where there are regular, close interactions with the public in a manner that places them at risk of exposure to COVID-19 droplets (including aerosols), particularly in indoor spaces. The statutory presumption inherently recognizes the connection between exposure to COVID-19 and the consequences of exposure and the workplace; this applies especially where the workplace requires an employee have prolonged indoor interactions with other employees and members of the public.

Recent Caselaw

The proposition that there is no nexus between personal safety and the workplace has been explicitly rejected in recent arbitral caselaw. *Coast Mountain Bus Company and Unifor Local 1119* considered the reasonableness of a mandatory vaccination policy that applied to a group of transit operators working for a bus transportation company. Despite easing provincial restrictions, the employer decided to maintain its mandatory vaccination policy on the basis that vaccination continues to be the most effective means of providing protection to its employees against serious illness, including long-COVID, hospitalization and death. The Union argued the risks posed by an unvaccinated employee in the current pandemic context have no workplace nexus because an unvaccinated employee poses no greater risk of infection to other employees than a vaccinated employee. It argued "how sick [a transit operator] gets from contracting the virus, or any other illness, is an off-duty health choice that is not a proper concern for the Employer because it does not affect other employees". In short, serious illness arising from infection by COVID-19 is "their problem, not a workplace problem".

Arbitrator De Aguayo rejected this argument and found the employer established a workplace nexus, particularly because of an employer's obligations under B.C.'s workers compensation scheme and in light of the unique context of the COVID-19 pandemic:

> "… I find that the Employer has established a workplace nexus. The Employer's stated interest in maintaining the Policy is based on its duty to protect employees from serious illness under the Act and the

> presumption of occupational disease set out in Schedule 1. I appreciate the Union's concerns with respect to an extension of Employer rules into areas that intrude into fundamental employee interests such as autonomy over medical decisions and health risks. I also recognize the spirit of the Union's arguments on this point, being the importance of ensuring that exceptional circumstances exist that warrant employer intrusion into fundamental employee rights and interests. However, for the reasons given, I find that in the unique and exceptional circumstances of the COVID-19 pandemic, the Employer's duties under the Act establish a workplace nexus in this case." (Emphasis added)

The arbitrator upheld the policy as reasonable and dismissed the grievance. This decision and its reasoning was later adopted in another mandatory vaccination policy grievance. *British Columbia Rapid Transit Co. and CUPE, Local 7000 (COVID-19 Mandatory Vaccination Policy), Re,* (BCLA) (Randall J. Noonan).

Workplace Implications

Further, there is a tangible cost to the workplace due to long-term consequences associated with long-COVID. These costs are reflected in increased premiums and added labour costs. WorkSafeBC clarifies that for employers who incurred direct COVID-19 claims costs in 2020, those costs were reflected in their rate group balance, and amortized over a period of five years, as adjustments to the rate groups future premium rates. The impact of lengthy periods of absence caused by COVID-19 are significant. The costs associated with maintaining service standards are not to be understated. Purolator would be required to hire replacement workers, cover labour shortages through increased hours of work and overtime, and undergo considerable administrative and operational burdens. Further, the direct impact of reduced absenteeism on the workplace due to healthy employees has been recognized in arbitral caselaw as a factor to be considered when assessing the reasonableness of a workplace health and safety policy.12

Conclusion

The personal protection offered by vaccination is two-fold: (i) it mitigates the risk that an employee will be exposed to COVID-19 in the workplace (including via transmission through an unvaccinated and asymptomatic co-worker) and (ii) it protects the employee from serious long term health implications as a result of exposure while at work. Vaccination as a measure of protection from serious long term health consequences has a direct bearing on the workplace which is reflected in statute, recent jurisprudence and operational costs.

Procedural Fairness

Although we provide our position above, we briefly note our concern with respect to the manner in which these issues have been raised. We understand the issue regarding whether an employee's election to take/refuse safety measures is a matter of personal versus workplace safety has not been previously raised by either party. Further, we understand the Union has not yet taken a position with respect to this issue. There is some suggestion in your December 2, 2022 correspondence that a conclusion with respect to this issue has already been reached. We trust it is not the case that there has been a presumption or conclusion reached with respect to this issue which Purolator is now required to rebut as, viewed objectively, such a presumption gives rise to a reasonable apprehension

> of bias. We reserve the right to make further submissions with respect to all above-noted issues.
>
> Yours truly, SHERRARD KUZZ LLP
> Michael G. Sherrard*

276. Two preliminary points need to be made.

277. Firstly, the employer placed unvaccinated employees on leaves of absence as opposed to terminating them. This means that the employment relationship persisted. The employer continued to be obliged under statute and the collective agreement to take every reasonable precaution to ensure their safety and well-being, because they continued to be employees. It was the affected employees themselves, not an abstract workforce in a utopian workplace, to whom the employer owed its statutory and collective agreement safety obligations and the equitable application of its corporate values.

278. Secondly, enforcing the mandate does not mean forcing all employees to be vaccinated. It means excluding the unvaccinated from the workplace on grounds of safety. It is not a punishment for non-compliance. It is a safety measure, and it can only be justified as a safety measure. What safety benefit or improvement was achieved by excluding them from the workplace as of June 2022? This is the correct, indeed the only question to be addressed. It is the foundation for analysis of this issue. Did this exclusion constitute a reasonable precaution to ensure their safety and well-being and the safety of others in the workplace?

279. Turning then to the merits of the point. For clarification, in this section I use the term "serious illness" as shorthand for the full phrase "serious illness, hospitalization and death".

280. "Every reasonable precaution" obviously does not include the use of force. The employer certainly could not strap down the workers who elected not to get vaccinated and forcibly jab a needle into them. At first glance the most that could reasonably be done was to try and persuade them by education and argument to change their minds and get vaccinated. They could not be dismissed, or the employer would have come up against the oft cited Rogers rejection of discipline in *Firefighters*, (referred to later) as a measure which was unreasonable because more intrusive than necessary to achieve the goal of workplace safety. See also *BC Hydro v. IBEW Local 258,* 2022, CanLII 25764 and *La Conference Ferroviare de Teamsters Canada et Via Rail Canada,* 2023 CanLII 18498 (Clarke).

281. However, the employer argues that there was more that could reasonably be done. It could ensure the safety and well-being of these unvaccinated employees by excluding them from the

workplace. There was a risk they might contract a serious illness there and by excluding them that risk was removed.

282. There is a basic problem with this argument. The risk of contracting a serious illness was the same for these unvaccinated employees whether they were in the workplace or elsewhere. Excluding them from the workplace did not contribute to their safety and wellbeing in any way because it did not reduce their exposure to the risk of serious illness. They were simply excluded from the workplace so that they could go and face exactly the same exposure somewhere else.

283. The other side of that coin is, allowing them back into the workplace would not have adversely impacted their safety and well-being in any way, or the safety of their fellow workers in a statistically significant way.

284. *KVP* and *Irving* say that assessing the impact of the rule on those affected is a big part of the balancing exercise in considering the validity of the rule. One of the best ways to make a point is to tell a human story. Here is one:

> "I am an unvaccinated worker. My shift is 8.00 am to 4.30 pm Monday to Friday. As of June 2022, (my being a danger to others now eliminated) my employer tells me he has a duty to protect me from the risk of contracting serious illness in the workplace so he has ordered me to stay away from work and has hired vaccinated replacement workers. So meanwhile during those working hours I go shopping, ride the bus, go to the movies or the park, and experience the exact same risk I would be facing if I went to work. The only difference is my truck is being repossessed, I am being evicted for non-payment of rent, and my family is trying and failing to live a reasonable life without any income from my job."

285. The question has to be asked: Does keeping that worker away from work seem like a reasonable and proportionate workplace safety measure?

286. The reality in this case was that the employer continued to maintain as of June 2022 a safety measure which by then did no more than marginally improve the serious illness statistics of an abstract idealized workforce and did absolutely nothing to improve the safety and wellbeing of the employees actually affected. These employees chose to stand up for their personal autonomy and bodily integrity and were met with the devastating consequence of continued denial of their livelihood.

287. When that kind of so-called improvement in workplace safety is balanced against that kind of adverse impact, the *Irving*/*KVP* scales tip heavily against the alleged improvement in workplace safety.

288. The employer says that the workplace is one of the places along with the rest of the world where the vaccinated employee will be safer than the unvaccinated and therefore the precaution is a valid workplace safety precaution. However there needs to be a demonstrable improvement in

safety at the workplace for the affected employees, not putative or theoretical employees, for this measure to qualify as a reasonable workplace safety measure. There was none.

289. When examined closely, what the employer was attempting to do was to regulate a lifestyle choice by imposing the penalty of loss of livelihood. The point can be illustrated by considering the example of gaining excess body weight 20% above the actuarial tables. Suppose the employer introduced a rule that no one would be admitted to the workplace if they weighed 20% above their correct actuarial weight.

290. How well would a rule of that nature fare if subjected to the *KVP*/*Irving* test? It is obvious that such a rule would be struck down. It is not quite so obvious in the case of a rule about getting vaccinated because in some circumstances such a rule, is reasonable. I found it to be reasonable as have many other arbitrators, when the unvaccinated pose a danger to others in the workplace because of the increased likelihood of getting infected and passing it on.

291. However, once that danger is eliminated to the point of being statistically insignificant, the rule which requires workers to get vaccinated or lose their livelihood falls into the same category as a rule about bodyweight.

292. It is worth following through and comparing step-by-step the reasoning and logic behind an excess body weight ban and an unvaccinated ban.

a) The two conditions are accompanied by an increased health risk. In one case the risk is heart attack or stroke, and in the other case it is the possibility of serious illness following infection from COVID-19.

b) They are both continuing conditions which cannot be modified temporarily to accommodate the 40 hours of a typical work week, as opposed to the rest of the 168 hours which a week comprises.

c) A worker experiencing either of these conditions brings with them to the workplace the increased risk described.

d) They both interfere with the employer's commendable aspiration to have a healthy and risk-free work force.

e) The employer's response to this potential interference is in the one case to ban workers with 20% excess body weight, and in the other case to ban workers who are unvaccinated.

e) The employer now claims in each case to have a safer workplace because of the ban.

293. The logic and reasoning in the two examples above is identical. The thinking in one case is inseparable from the thinking in the other case.

294. It is true that you cannot catch obesity in the workplace, but you can catch COVID-19. However, that does not alter the fact that there are similar vulnerabilities in play. In one case the overweight individual might have a heart attack at work, but he might equally well have a heart attack elsewhere. The unvaccinated individual might catch COVID-19 at work, but he might equally well catch it elsewhere.

295. By comparing the thought process or logic behind a ban in the two cases, it becomes obvious how misguided the reasoning is. What the employer is actually doing, is attempting to modify lifestyle. It has nothing to do with workplace safety but simply boils down to a benignly tyrannical and paternalistic attempt to force some of its employees to alter a questionable lifestyle choice and thus be able to claim it employs a safer and more healthy set of workers. Motivation of this kind never has and never will justify a measure compelling employees to make a lifestyle choice preferred by the employer or lose their livelihood. It matches the paternalism described in the CCDC Ethics Framework and Decision Making Guide quoted at paragraph 69 above.

296. Such rules have been considered in many cases and are invariably struck down. See for example *Trimac Transportation Services--Bulk Systems v. Transportation Communications Union* [1999] CLAD No. 750 (Burkett) para 65.

> The fundamental fact relied upon in the mandatory random drug testing cases to tilt the balance in favour of employee privacy is that urinalysis does not determine whether an employee is under the influence at work. It was confined as the "sticking point" in Sarnia Cranes. It is a fact that is not disputed before me. The arbitrators in these other cases, while accepting that the employer has an overriding interest in preventing employees from working in an impaired state in a safety sensitive work environment, reasoned that because urinalysis cannot detect whether an employee is impaired at work, the employer's real interest, as was acknowledged by Dr. Zabrodski before me, is in modifying lifestyle away from work and, therefore, given its invasive nature, employee privacy must take precedence. It follows, therefore, that in order to succeed before me, the employer must either convince me to depart from the jurisprudence or convince me that this case is distinguishable from those that have already been adjudicated.

297. There will be those who would say that being overweight is not something that can be cured with the quick jab of a needle like being unvaccinated. But the right to choose your caloric intake should not be better protected than the rights of privacy, personal autonomy and bodily integrity invoked by the unvaccinated. There is, therefore, no reason to treat an unvaccinated individual differently than an overweight individual when it comes to assessing workplace risk and safety and balancing it against their rights.

298. This approach to the issue is arguably undermined by the decision in *Coast Mountain Bus Company v Unifor, Local 111*, 2022 CanLII 9447 (Aguayo, September 19, 2022) but I find it to be distinguishable.

299. In that case the arbitrator found a nexus between vaccination and workplace safety because vaccination provided protection from the risk of serious illness at work. She conceded that protection from infection, being then recognized as virtually eliminated, might no longer justify a mandate, but protection against serious illness continued to justify it. The nature of the work was an important factor which led to this conclusion, and the nature of that work clearly distinguishes it from the Purolator workplace which had no such special features. An extract from the award at paragraph 37 makes this clear:

> The Employer operates a fleet of approximately 1,600 vehicles with about 1,500 of them on the road providing bus service on any given weekday. The bus service has continued throughout the pandemic and at no time has there been a requirement that members of the public show proof of vaccination to board a bus.
>
> For the period of time covered by the Grievance, the public are also not required to wear a mask to use the bus service and TOs are not required to wear masks while operating a transit vehicle.
>
> 38 The bus system has a high level of usage with an average of 633,000 boardings each weekday at the time of the hearing, reflecting ridership of about 75% of pre-pandemic levels. Approximately 3% of trips are defined as overcrowded.
>
> 39 There are several different types of transit vehicles, from smaller shuttle buses, 40-foot buses, and 60-foot articulated buses. TOs spend almost their entire shift operating a transit vehicle. As Burchardt put it, "my workplace is the bus" and people can get "pretty darn close" as the fare box at the entrance is within arm's reach of the TO. A TO may also be called upon to assist a member of the public, by answering questions or securing a mobility device on the vehicle. Burchardt also testified that on a daily basis, the vehicle would be so full that people without masks would be standing past the red line (at the front door, next to the TO) for over half an hour, describing the volume of passengers as "almost to the front window".
>
> 40 Burchardt confirmed that, over the course of their workday, TOs are in contact with a large number of members of the public who could be infected and contagious, whether knowingly or not. It is also not in dispute that in 2021, based on the nature of the work and contact tracing, Vancouver Coastal Health and Fraser Health supported prioritizing access to a primary series of vaccine for TOs.

300. At paragraph 65, the connection is made by the employer witness Stewart to the increased workplace risks associated with the TO's role. The employer maintained and the arbitrator agreed that this was a workplace where their work involves a *risk of exposure significantly greater than ordinary exposure risk.*

> 65 Stewart testified that the vaccine requirement is further to the Employer's statutory duty under Section 21 of the Act to ensure the health and safety of its employees and to remedy workplace conditions that are hazardous to their health or safety.
>
> 66 In addition, Schedule 1 to the Act lists a range of occupational diseases which, if contracted, give rise to a presumption that the cause arises from the nature of the work performed. Schedule 1 was amended in 2020 to include communicable viral pathogens that are subject to an order, including a PHO Notice under the Public Health Act that a viral pathogen constitutes a public

> health emergency. As noted above, the PHO issued a Notice under the Public Health Act in 2020 declaring COVID-19 constitutes a public health emergency and it remains in force.
>
> 67 As set out in the Schedule, and in WorkSafe BC's FAQ, the effect of the amendment is that a worker who files a claim based on COVID-19 *will be presumed to have contracted it in the workplace where their work involves a risk of exposure significantly greater than the ordinary exposure risk. WorkSafe BC indicates that it will have regard to whether the nature of a worker's job places them at a higher risk of coming into contact with individuals who may be COVID-19 positive, or where there are regular, close interactions with the public in a manner that places them at risk of exposure to COVID-19 droplets (including aerosols), particularly in indoor spaces*. If so, illness or death from COVID-19 is compensable under the Act as an occupational disease. As noted, over the course of the pandemic, *the Employer has active WorkSafe claims and has accepted claims under the presumption clause.* [emphasis added]

301. At paragraph 71 of the award the arbitrator confirms that the presumption of occupational disease in Schedule 1 applies to the *Coast Mountain* workplace in issue.

> However, I find that the Employer has established a workplace nexus. The Employer's stated interest in maintaining the Policy is based on its duty to protect employees from serious illness under the Act *and the presumption of occupational disease set out in Schedule 1.*

302. In an expedited arbitration following closely on the *Coast Mountain* decision, arbitrator Noonan declined to distinguish the facts of that case regarding the workplace and the work environment of employees of the *Rapid Transit Company* who also work in crowded spaces. However, his main reason for following *Coast Mountain* was that the decision's primary rationale was the employer's general duty to protect employees from serious illness under the *Act*. I am inclined to disagree with his interpretation of the award in which he argues that arbitrator Aguayo was stating two independent factors supporting the reasonableness of the mandate. The way I read the award, the arbitrator is matching up the employer's statutory duties with the applicability of the presumption in Schedule 1, and the particular risks associated with that workplace.

303. As far as the increased risk of infection and consequent serious illness in the workplace is concerned, arbitrator Aguayo's finding in that case may be usefully compared and contrasted with the nature of the workplace at issue in the present case. There was no evidence of any kind submitted by the employer suggesting that its warehouse or courier operations involved the risk of exposure to infection and consequent serious illness significantly greater than ordinary exposure risk. Unlike the *Coast Mountain* case there was no evidence that Purolator had any accepted claims under the presumption clause in Schedule 1. Arbitrator Noonan says this was not the key point in the decision, but when the underlying principles are considered, it was clearly a highly significant point, and I will explain why.

304. In debating the reasonableness of a workplace vaccine mandate an essential element is establishing that there is some improvement in workplace safety achieved by the measure. In the

case of the simple risk of infection this improvement as a result of the vaccine mandate was established and continued until approximately the spring of 2022, when it was eliminated, to the point of being statistically insignificant. From a general public health standpoint vaccination remained and still is a valuable health measure to be encouraged in the general population in that it does continue to provide significant protection against serious illness. But at this point, when it comes to justifying a workplace vaccine mandate, the employer must show that banning unvaccinated workers from the workplace improves workplace safety to an extent which justifies the extremely adverse consequences of being excluded.

305. It is at this point that in many cases the mandate ceases to be reasonable. As I have already pointed out, the unvaccinated worker in many cases is not protected in any way from the risk of serious illness by being banned from the workplace. He carries that risk with him at all times whether at the workplace or not. But there is an important caveat to this. He does experience a *greater* exposure at work, when the workplace risk is greater than the risk associated with ordinary everyday living.

306. That is the rationale underlying the policy framework for WorkSafe compensation, but it is also a very serious component in the process of balancing the interests of the employer and the interests of the affected employees.

307. The COVID-19 compensation criteria in WorkSafe Schedule 1 are adopted for different reasons than the criteria I must adopt in carrying out the *Irving KVP* balancing exercise, but they do have something in common. There is a focus in both cases on identifying increased risks or dangers particular to the workplace.

308. In the case of *Coast Mountain* exposure to the risk of serious illness for all employees whether vaccinated or unvaccinated in that workplace was accepted by the arbitrator to be greater than the risk associated with everyday life exposure. It is true that the risk of serious illness was greater for the unvaccinated. But the compensation rationale depends on the increased dangers or risks faced in a particular workplace compared with everyday life. As the risks for the vaccinated and the unvaccinated in that workplace were both greater than the risks faced in everyday life, infection resulting in serious illness would be compensable under Schedule 1. *Pace* arbitrator Noonan that was the key element in the case which justified the *Coast Mountain* conclusion that the continued mandate was reasonable.

309. At this point it becomes apparent that *Coast Mountain* is not an authority supporting vaccine mandates on the footing that vaccination protects against serious illness generally, but is authority

for a much more limited proposition, which is, if the workplace poses risks or dangers of exposure beyond those expected in everyday life, a vaccine mandate is warranted and is reasonable.

310. In the case of Purolator, as I have already indicated, risk of exposure in the workplace was no different than the risk of exposure in everyday life so that exception did not apply. Protection from serious illness was therefore not a reasonable justification for continuing the mandate.

311. I should add that if the rationale in *Coast Mountain* includes a separate finding that a vaccine mandate is justified in a regular exposure as well as a special greater exposure workplace, on the grounds that vaccination provides individual 24/7 protection against serious illness, I respectfully disagree with this.

312. I am aware that in taking this view this award might be seen as parting company with some other awards. It is accordingly appropriate to clarify that, even without this additional reason discussed in paragraphs 275-312, and applying the previous reasons, I would find there to be insufficient enhancement to workplace safety to justify the mandate after June of 2022.

XIV The Vaccination Cases

313. The employer relied on 24 COVID-19 vaccination awards. It claimed that these awards establish an arbitral consensus concerning the reasonableness of mandatory vaccination policies and that this consensus has survived the arrival of the Omicron variant. Future reference to these cases will be in the shortened form enclosed in square brackets at the end of the citation for each case found in the list below. They are as follows:

1 *United Food and Commercial Workers International Union, Local 333 v Paragon Protection Ltd.,* 2021 CarswellOnt 16048 (Ont Arb) (Arbitrator: von Veh) [*Paragon*]

2 *Bunge Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175,* 2022 CanLII 43 (Ont Arb) (Arbitrator: Robert J Herman) [*Bunge Hamilton*]

3 *Maple Leaf Sports and Entertainment v Teamsters, Local 847,* 2022 CanLII 544 (Ont Arb) (Arbitrator: Norm Jesin). [*Maple Leaf Sports*]

4 *Power Workers' Union v Elexicon Energy Inc,* 2022 CanLII 7228 (Ont Arb) (Arbitrator: C Michael Mitchell) [*Elexicon*]

5 *Coca Cola Canada Bottling Inc. v Teamsters, Local 213,* 2022 CanLII 60956 (BC Arb) (Arbitrator: Randall J Noonan) [*Coca Cola Noonan*]

6 *Toronto District School Board v CUPE, Local 4400,* 2022 CanLII 22110 (Ont Arb) (Arbitrator: William Kaplan) [*Toronto District School Board*]

7 *BC Hydro and Power Authority v IBEW, Local 258,* 2022 CanLII 25764 (BC Arb) (Arbitrator: Gabriel Somjen) [*BC Hydro*]

7A *Extendicare Lynde Creek Retirement Residence v UFCW 175* 9 (Arbitrator: Raymond, April 1, 2022) [*Lynde Creek*]

8 *Maple Leaf Foods Inc, Brantford Facility v UFCW, Local 175,* 2022 CanLII 28285 (Ont Arb) (Arbitrator: Peter Chauvin) [*Maple Leaf Foods*]

9 *Canada Post Corporation v Canadian Union of Postal Workers,* 2022 CarswellNat 1662 (CA Arb) (Arbitrator: Thomas Jolliffe) [*Canada Pos*t]

10 *CKF Inc v Teamsters Local Union No 213,* 2022 CanLII 60954 (BC Arb) (Arbitrator: Allison Matacheskie) [*CKF*]

11 *Alectra Utilities Corporation v Power Workers' Union,* 2022 CanLII 50548 (Ont Arb) (Arbitrator: Susan L. Stewart) [*Alectra*]

12 *Elementary Teachers' Federation of Ontario v Ottawa-Carleton District School Board,* 2022 CanLII 53799 (Ont Arb) (Arbitrator: Michelle Flaherty) [*Ottawa-Carleton DSB*]

13 *UNIFOR, Local 973 v Coca-Cola Canada Bottling Ltd,* 2022 CanLII 25769 (Ont Arb) (Arbitrator: Mark Wright) [*Coca Cola Wright*]

14 *Wilfred Laurier University v United Food and Commercial Workers Union,* 2022 CanLII 69168 (Ont Arb) (Arbitrator: Mark Wright) [*Wilfred Laurier*]

15 *Toronto Professional Fire Fighters Association, IAAF Local 3888 v Toronto (City),* 2022 CanLII 78809 (Ont Arb) (Arbitrator: Derek Rogers) [*Toronto Professional Fire Fighters Association*]

16 *Coast Mountain Bus Company v Unifor, Local 111,* 2022 CanLII 94447 (BC Arb) (Arbitrator: Jacquie de Aguayo) [*Coast Mountain*]

17 *Coca-Cola Canada Bottling Limited v United Food and Commercial Workers Union Canada, Local 175,* 2022 CanLII 83353 (Ont Arb) (Arbitrator: Robert J Herman) [*Coca Cola Herman*]

18 *British Columbia Rapid Transit Company Ltd. v Canadian Union of Public Employees, Local 7000,* 2022 CanLII 100819 (BC Arb) (Arbitrator: Randall J Noonan) [*Rapid Transit*]

19 *Cameco Corporation, Port Hope Facility v United Steelworkers, Locals 8562 and 13173,* 2022 CanLII 108947 (Arbitrator: Peter Chauvin) [*Cameco*]

20 *Toronto (City) v Toronto Civic Employees' Union, CUPE, Local 416,* 2022 CanLII 109503 (Ont Arb) (Arbitrator: Robert J Herman) [*Toronto Civic Employees*]

21 *Unifor, Local 1999 v Reliance Comfort Limited Partnership,* 2023 CanLii 2 (Ont Arb) (Arbitrator: Derek Rogers) [*Reliance Comfor*t]

22 *Lakeridge Health v CUPE, Local 6364,* 2023 CanLII 33942 (Ont Arb) (Arbitrator: Robert J. Herman) [*Lakeridge*]

23 *Central West Local Health Integration Network v Canadian Union of Public Employees, Local 966,* 2023 CanLII 58388 (Ont Arb) (Arbitrator: Russell Goodfellow) [*Central West Local Health*]
[Note there is an unreported case numbered 7A to make up the total of 24 decisions]

314. The starting point for discussion of these cases requires reference back to the chronology and narrative section of the award above. Up until the time when it became the prevailing medical opinion that two-dose vaccination after 25 weeks provided statistically insignificant protection against infection, there is an arbitral consensus that workplace vaccine mandates were reasonable. I agree with this consensus. The awards review and analyze a great variety of evidence and argument presented by the two sides. Many of the points made by the employers and accepted by the arbitrators contributed to the consensus about the reasonableness of these mandates at that time. However, the key point in all of this was that allowing unvaccinated workers into the workplace created a hazard for others there. This hazard in each case was that unvaccinated workers were more likely to be infected by one of the COVID variants, and therefore more likely to pass it on to others in the workplace. While the union side attempted to develop various arguments against a mandate, the conclusion in virtually every case was that the safety and well-being of employees in the workplace was threatened and endangered by allowing this to happen, and the interests of the employer in ensuring the safety and well-being of its employees weighed more heavily in the *KVP/ Irving* balancing exercise than the rights of personal autonomy and bodily integrity motivating some workers to decline the vaccination. The very adverse impact of being denied access to the workplace and losing their livelihood was also regarded as insufficient to tip the scales against the mandate.

315. However, once the available data overwhelmingly demonstrated, and prevailing medical opinion graduated to acknowledgement that a two-dose vaccination series after 25 weeks provided statistically insignificant protection against infection, the situation with regard to workplace safety and workplace vaccination mandates fundamentally changed. Two dose vaccination continued to be acknowledged and encouraged as providing useful protection against serious illness, hospitalization and death. It continued to be, and I am entirely in agreement about this, a reasonable precaution for any individual to take, in order to lessen their chances of contracting serious illness. However, as I have explained elsewhere, this did not translate, standing alone, into a reasonable justification for a workplace vaccine mandate by which unvaccinated workers were compelled to take this personal 24/7 precaution or be excluded from the workplace and lose their livelihood.

316. I will now review the cases cited by the employer addressing vaccine mandates and refer to descriptions of them and their rationale as provided by the parties.

317. Employer counsel provided a short précis and longer review of each one of these 24 cases. Union counsel also provided a short summary of them and some submissions on the relevance and rationale of these cases. I will start with the union submission, which I found helpful and persuasive, and which rejects the assertion that there is an arbitral consensus on the reasonableness of workplace vaccine mandates once the available data clearly, as opposed to arguably, demonstrated no effective protection against infection. In order to make sense of this submission, it is necessary to know that *FCA Canada Inc. v. Unifor, Local 195 (COVID-19 Vaccine Mandate Grievance),* [2022] O.L.A.A. No. 187 (Nairn) was the first award to find a workplace vaccination mandate reasonable to start with, but which graduated to unreasonable by June 2022~~:~~

> COVID-19 VACCINATION CASES
>
> Beginning at paragraph 882 of its submission, Purolator argues that there is an arbitral consensus concerning the reasonableness of mandatory vaccination policies and that this consensus has "survived the arrival of the Omicron variant".
>
> There is clearly considerable agreement concerning the applicable legal principles as endorsed in *KVP* and *Irving*. However, there is no clear consensus respecting the reasonableness of unilaterally imposed vaccine mandates. In support of its claim, Purolator cites a series of arbitration awards; but a review of these authorities demonstrates that this consensus is less well-established than Purolator suggests. Scientific opinion became increasingly clear that the primary series of vaccinations provided drastically reduced effectiveness against the Omicron subvariant.
>
> The Employer relies upon 24 decisions to support its claims, excluding two cases, *FCA* and *Electrical Safety Authority,* which clearly do not fit the claimed consensus.
>
> i. The early decisions
>
> Of the 24 cases relied upon by Purolator, 14 were heard before Arbitrator Nairn issued her award in *FCA*. They either deal with the period before the Omicron subvariant had become the dominant strain of COVID-19 in Canada, or else they were heard in the immediate aftermath of Omicron's advent.

These early cases generally did not involve expert evidence (only 3 did), and when they did, the expert witnesses provided only limited evidence concerning the effectiveness of the primary series of vaccination against the Omicron subvariant.

In *Paragon, Bunge-Hamilton, Maple Leaf Sports* and *Lynde Creek* there was no expert evidence and no mention of Omicron.

In none of the next seven cases summarized was any expert evidence called. ("NE")

In *Ottawa Carleton* Arbitrator Flaherty recognized the existence of the Omicron variant and that it was highly transmissible, but explicitly indicated that she did "not have scientific evidence about Omicron, or any basis to assess its risks relative to Delta or other variants" (para 81) .. (NE)

In *Maple Leaf Foods Inc* the award mentioned Omicron only in the context of its being more difficult to rule out with a single negative rapid antigen test. (NE)

In *Coca Cola Wright Decision* the award mentioned that Omicron was more contagious than the Delta subvariant and that rapid antigen tests are less sensitive to Omicron than to Delta. (NE)

In *BC Hydro and Power* the award recognized the advent of Omicron as the dominant strain in BC as of December 2021, and found that rapid antigen testing had proven to be unreliable in the time of Omicron but did not discuss the implications of vaccine effectiveness with respect to Omicron.(NE)

In *Elexicon* evidence was adduced regarding the existence of the Omicron subvariant, its dominance as of the end of 2021, its greater transmissibility, and the reduced effect of the primary series of vaccines reported in January and early February, 2022. Arbitrator Mitchell found that vaccinated individuals "can reduce their risk of acquiring COVID-19 by 60% compared to those are unvaccinated" (para 99), despite the advent of Omicron. (NE)

In *CKF Inc v. Teamsters* the Union submitted a single scientific journal article about the lack of effectiveness of the primary series of vaccination against the Omicron subvariant, and the Employer submitted several contemporaneous public health notices, that mentioned Omicron. (NE)

In *Coca Cola Noonan* the Union again submitted a single scientific journal article about the lack of effectiveness of the primary series of vaccination against the Omicron subvariant, and the Employer again relied upon public health notices. (NE)

In *Canada Post Corporation* both parties called expert witnesses. The experts' reports were written in November 2021, before the emergence of Omicron as the dominant strain of COVID19, but both experts testified (at some point no later than March 22, 2022) about the emerging scientific conclusions concerning Omicron, and the Employer expert provided a January 22, 2022 supplemental report concerning Omicron. The evidence was that Omicron was more transmissible, less virulent, and that vaccine effectiveness against Omicron was reduced, though the experts disagreed on the level of reduction.

In *Toronto District School Board* both parties called expert witnesses, who testified in early March 2022. They provided evidence that Omicron was highly transmissible, reduced the effectiveness of the primary series of vaccination and reduced the sensitivity of rapid antigen tests.

In *Alectra* the Employer retained an expert witness, Dr. N. Sutton, whose report indicated that Omicron had a higher "reproduction rate" than Delta, while the Union relied upon data released by the UK Health Security Agency from February 10, 2022, which the arbitrator found established that the effect of vaccinations waned over time and that the primary series of vaccinations were not "infallible" against Omicron, though the award does not specify the level of fallibility.

To the extent these pre-FCA decisions demonstrate a consensus, it is that the analyses in *KVP* and *Irving*, which require balancing the relevant interests, including the effectiveness of the challenged policy in advancing the Employer's stated goals, should be applied with a view to the early prevailing circumstances of the pandemic.

The evidence in this proceeding of the drastic and continuing reduction in effectiveness of the primary series of vaccinations far exceeds what is seen in these early cases, both in magnitude of reduction and in the number of sources that have continued to confirm the reduction. Therefore, the actual results of the balancing in these earlier decisions are of limited use.

ii. Post-FCA Decisions on Pre-FCA Facts

By the time of Arbitrator Nairn's decision in *FCA*, the circumstances of the Omicron-era pandemic were becoming better known and had been confirmed by numerous studies, as demonstrated in the evidence seen in the present case. *FCA* marked a watershed in which the evidence of the ineffectiveness of the primary sequence of the vaccines caused Arbitrator Nairn to reach a different result in the balancing of interests.

Purolator characterizes the *FCA* award as an outlier that arbitrators have since refused to follow. While the *FCA* decision is not without issues, which arbitrators have considered in subsequent awards, the cases cited by Purolator do not amount to a consensus rejecting Arbitrator Nairn's approach.

In fact, of the 10 cited arbitrations that were heard after the *FCA* award, four dealt with a time frame earlier in the pandemic than the circumstances in *FCA*:

a. *Central West Local Health Integration Network v Canadian Union of Public Employees, Local 966* dealt with employees in a healthcare environment who had been terminated as of November 2021;

b. In *Cameco Corporation, Port Hope Facility v United Steelworkers, Locals 8562 and 13173,* Arbitrator Chauvin was asked to determine the reasonableness of a policy that resulted in the termination of employees in December of 2021.

c. *Unifor 1999 v Reliance Comfort*, concerned employees who had been placed on unpaid leave, but the challenged policy had been rescinded by the employer on March 1, 2022;

d. *Lakeridge Health v CUPE, Local 6364*, dealt with healthcare employees who were terminated in November of 2021. In this case, though, the Union argued that the employees could have been kept on unpaid leave until June 2022. But Arbitrator Herman was unable to make any determinations about the June 2022 argument, because neither party led evidence of the extent of protection offered by the primary series vaccines in June of 2022 or of the risks of unvaccinated employees returning at that time.

In all of these cases the *FCA* decision had little relevance. It dealt with employees who continued to be on unpaid leave in late May 2022, and which declared the challenged vaccine policy to be of no force and effect as of June 25, 2022, and accordingly the arbitrators did not greatly engage with it.

iii. Truly Post-FCA Decisions

Wilfrid Laurier University v United Food and Commercial Workers Union was the first cited case to deal with the *FCA* decision that did not concern events from a much earlier point in the pandemic. In this case, the Union had challenged the university's vaccine mandate, which had run up until May 1, 2022. The parties entered their evidence through an agreed statement of facts and did not adduce any expert evidence or any evidence concerning vaccine effectiveness in the Omicron era.

When the *FCA* decision became available after the hearing, Arbitrator Wright allowed the University to make additional submissions concerning the award. The University sought to distinguish *FCA* by noting that its own mandate had ended on May 1, as opposed to the June 25 date determined by Nairn in *FCA*, and by suggesting that *FCA* had departed from earlier jurisprudence.

Arbitrator Wright determined that *FCA* was distinguishable noting that Arbitrator Nairn had before her the Federal government's announcement of June 14, 2022.

Toronto Professional Fire Fighters' Assn., I.A.A.F. Local 3888 v. Toronto (City) (Mandatory Vaccine Policy Grievance) ("Firefighters") and *Toronto (City) v Toronto Civic Employees' Union, CUPE, Local 416 ("Civic Employees")* were both being heard when the *FCA* decision was issued, and the parties in both cases made submissions on the effect of Arbitrator Nairn's award. Both of the Toronto cases involved expert evidence from the same two witnesses on behalf of the City, one of whom, Dr. Dubey, merely provided a will-say, and the other, Dr. Juni, provided a report on April 1, 2022 and then testified on May 12, 2022. In neither case did the Unions call their own expert witnesses to challenge the City's experts, and in neither case were the City's experts asked for their opinions concerning the conclusions reached by Arbitrator Nairn in *FCA*.

In both cases, the arbitrators determined that they were facing a different set of factual circumstances than those outlined in *FCA*, as the expert evidence before them indicated that the primary series of vaccinations retained effectiveness against Omicron.

In *Fire Fighters*, Arbitrator Rogers found on the basis of the unchallenged expert evidence that:

> On the evidence I received, a recruit or returning fire fighter vaccinated with two doses of a COVID-19 vaccine would be decidedly less likely to become infected than if he or she were unvaccinated. Furthermore, a fire fighter who received two doses before the Policy deadline is better protected than an unvaccinated individual. Simply put, there is nothing before me to support an argument that a person having received two doses of a two-dose regimen is not substantially better protected and less likely to present a risk to others than an unvaccinated colleague. (para 226).

Similarly, in Civic Employees, Arbitrator Herman distinguished *FCA*, holding that the context was different, in that in his opinion the argument in *FCA* had concerned transmission only and that:

> Further, the expert evidence in that case was different than that placed before me. Here the expert evidence established that a two-dose requirement is still effective, particularly against suffering serious health consequences if infected. (para 112).

In both cases, the arbitrators held that the policy was reasonable, though as Arbitrator Herman noted in *Civic Employees*, he did

> "not have before me any expert evidence, or other evidence, about the circumstances in play after May 12, 2022 that would enable me to determine whether the Policy remained reasonable after that date." (paragraph 118).

Coca-Cola Bottling Ltd. v. United Food and Commercial Workers Canada, Local 175 (Mandatory Vaccine Policy), (*"Coca Cola Herman Decision")* was heard both before and after the decision in *FCA*. In this case only one party, the Employer, retained an expert witness, Dr. Mark Loeb. Dr. Loeb's evidence was that there "is approximately a 36% total positive vaccination effect for combined susceptibility and transmission protection compared to not getting vaccinated" (para 20). Dr. Loeb also opined that Arbitrator Nairn had not correctly interpreted the scientific studies before her in *FCA*.

In *Coca-Cola Herman Decision*, Arbitrator Herman was faced with unchallenged expert evidence of the effectiveness of the primary series vaccinations against Omicron that differed materially from that in *FCA*, and differed materially from that in the present case.

The most recent cases cited by Purolator that deal with a time period contemporaneous or later than *FCA* are *Coast Mountain Bus Co. v. Unifor, ("Coast Mountain")* and *British Columbia Rapid Transit Co. v. Canadian Union of Public Employees, Local 7000, ("Rapid Transit").*

Coast Mountain was heard in August of 2022. In this arbitration, the Employer did not rely on the protective effect of vaccination with respect to transmission and infection but rather on the effects of vaccination in protecting against serious illness. The arbitrator agreed with the employer's opinion that vaccination was an "engineered control". Arbitrator De Aguayo ultimately held that:

> Accordingly, I find that whether or not a vaccinated or unvaccinated TO ["transit operator"] faces the same risks of infection, the vaccination requirement is justified on the basis that it significantly reduces serious health risks arising from infection. (para 96).

Rapid Transit was an expedited arbitration heard under s. 104 of the Labour Relations Code in September of 2022. Neither party called expert evidence. In his award, Arbitrator Noonan preferred the reasoning in *Coast Mountain* and distinguished *FCA* on that basis.

iv. Conclusions on the consensus

The post-*FCA* decisions cited above distinguish *FCA* for quite different reasons, largely dependent upon the differing circumstances put before each arbitrator. In *Wilfred Laurier*, the relatively early abandonment of the policy and the fact that the Federal Government had not yet announced the lifting of its mandate was considered relevant, whereas in the *Coca Cola* and *Toronto* cases, the unchallenged expert evidence led the arbitrators to take a different view of vaccine effectiveness than the evidence before Arbitrator Nairn did. And in *Coast Mountain*, despite the unchallenged expert evidence of lack of vaccine effectiveness in preventing transmission and infection, the arbitrator considered the specific circumstances of transit operators, and

evidence of the vaccine's effectiveness in protecting vaccinated employees from serious illness, to be sufficient to justify the employer's mandate.

These divergent reasons cannot be said to represent a consensus as to the general reasonableness of mandatory vaccination policies. The arbitral consensus, if one can be said to exist, concerns the method of determining whether such policies are reasonable, namely that it is necessary to engage in a balancing of interests based upon the prevailing circumstances in each individual case.

At points when these factors are relatively similar, similar decisions may issue, as in the early period of the pandemic before the advent of the Omicron subvariant. At other times, when new scientific consensuses emerge, or when governments or public health agencies alter their messaging, there is a wider diversity of decisions and the reasons behind those decisions.

In our submission this Board ought not rely upon perceived arbitral trends, but should instead engage in balancing the interests in this case based upon the evidence of relevant factors that is before us now.

[End of union submission on the vaccination mandate awards.]

318. I have highlighted a passage in the union's submission above because I consider it to be an accurate statement about the difference between most of the employer's cases (not just the early ones but most of the later ones) and the present one. This is the defining feature of this case which leads me to a different conclusion than most of those cases. It is also the reason why I align with the key conclusion in arbitrator Nairn's decision in *FCA*.

319. Employer counsel provided a summary of 24 relevant decisions claiming that they support the reasonableness of Purolator's Safer Workplace Policy. They are useful in providing the dates of the awards and some highlights of what was decided. I reproduce the summary here.

(a) In *United Food and Commercial Workers International Union, Local 333 v Paragon Protection Ltd*, dated November 9, 2021, arbitrator von Veh upheld a policy which subjected unvaccinated employees to additional health and safety precautions, and liable for disciplinary action up to and including dismissal. Arbitrator von Veh rejected the union's argument that a vaccination policy constituted forced vaccination.

(b) In *Bunge Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175*, dated January 4, 2022, Arbitrator Herman upheld a vaccination policy

which required an employee to attest to their vacation status, or be placed on unpaid leave. The decision of Arbitrator Herman stands for the following propositions: (i) COVID-19 represented a serious health and safety risk. (ii) In assessing the reasonableness of a policy, the context at the time of the implementation is critical. (iii) A policy requiring disclosure of vaccination status or proof vaccination does not constitute an unreasonable intrusion upon the privacy of an employee. (iv) An employer is justified in implanting a vaccination policy in compliance with third-party requirements. (v) An employer is not required to split its workforce where doing so would cause operational problems for the employer. (vi) An employer can rely on the precautionary principle to prevent the spread of COVID-19 in the workplace.

(c) In *Maple Leaf Sports and Entertainment v Teamsters, Local 847,* dated January 12, 2022, Arbitrator Jesin upheld a policy which placed unvaccinated employees on unpaid leave and might be subject to termination. The decision of Arbitrator Jesin stands for the following propositions:

(i) An employer is entitled to require disclosure of an employee's vaccine status to the extent necessary to administer its vaccination policy.

(ii) Being vaccinated against COVID-19 can be a necessary qualification for performance of work.

(d) In *Power Workers' Union v Elexicon Energy Inc.*, dated February 4, 2022, Arbitrator Mitchell upheld a vaccination policy which required an employee to attest to their vacation status, or be placed on unpaid leave and be subject to discipline up to and including termination. Arbitrator Mitchell held the policy was consistent with the employer obligations under the *Occupational Health and Safety Act* to take every reasonable precaution in the circumstances for the protection of a worker. Arbitrator Mitchell's decision stands for the following propositions:

(i) The nature of an employer's business is a crucial consideration in deciding whether a policy is reasonable. An employer who provides an essential service is entitled to enact policies to ensure a healthy workforce to be able to deliver such services.

(ii) The precautionary principle and the statutory codification thereof justifies the implementation of a vaccination policy.

(iii) In striking an appropriate balance between rights and interests of the employer, and rights and interests of employees, the basis upon which an employee objects to vaccination is important. An employee's interests can be less significant if there is a lack of objective reasonableness behind the objection.

(iv) An employer has an independent statutory obligation to take every *reasonable* step to protect the health and safety of its employees. An employer cannot defer to the government, and decline to act simply because the government has not required it to do so.

(v) The arrival of Omicron not only did not undermine the reasonableness of a vaccination policy but highlighted its importance.

(vi) What policies other employers may adopt is not relevant to an arbitrator's decision whether a particular policy is reasonable.

(e) In *Coca Cola Canada Bottling Inc v Teamsters, Local 213*, dated July 11, 2022, Arbitrator Noonan held a policy which led to the suspension without pay and termination of unvaccinated employees was reasonable. The decision of Arbitrator Noonan stands for the proposition that, in the absence of scientific certainty, the best evidence available to an employer is guidance from qualified public health officials.

(f) In *Toronto District School Board v CUPE, Local 4400*, dated March 22, 2022, Arbitrator Kaplan held a vaccination-or-unpaid leave policy was consistent with section 7 of the Canadian Charter of Rights and Freedoms, and a reasonable exercise of management rights. The decision of Arbitrator Kaplan stands for the following propositions:

(i) Section 7 of the *Canadian Charter of Rights and Freedoms* is not implicated in a mandatory vaccination policy.

(ii) The assessment whether a vaccination policy is reasonable must be done in accordance with expert opinion.

(iii) An employer may implement a vaccination policy pursuant to both its statutory obligations under the occupational health and safety legislation, as well as its management rights clause.

(g) In *BC Hydro and Power Authority v IBEW, Local 258*, dated March 31, 2022, Arbitrator Somjen held a vaccination-or-unpaid leave policy was reasonable. The decision of Arbitrator Somjen stands for the following propositions:

(i) A precautionary approach to the pandemic was justified. An employer was not required to wait until the negative consequences of COVID-19 were felt before acting.

(ii) An Arbitrator should rely on public health guidance in deciding whether the requirement of vaccination is reasonable.

(h) In *Extendicare Lynde Creek Retirement Residence v UFCW, Local 175,* dated April 1, 2022, Arbitrator Raymond held a vaccination policy which placed unvaccinated employees on an unpaid leave of absence and made them subject to further disciplinary action to be reasonable. The decision of Arbitrator Raymond stands for the proposition that an employer has an independent right to implement workplace vaccination policies, and loosening or removal of public health requirements does not render an otherwise reasonable policy unreasonable.

(i) In *Maple Leaf Foods Inc v UFCW, Local 175*, dated April 10, 2022, Arbitrator Chauvin held a vaccination-or-unpaid leave policy with option for termination was reasonable. The decision of Arbitrator Chauvin stands for the following propositions:

(i) The nature of the workplace is an important factor in deciding whether a vaccination policy is reasonable. (ii) The precautionary principle and its statutory recognition are of paramount importance.

(iii) A vaccination policy does not violate an employee's privacy rights or bodily autonomy.

(iv) The arrival of the Omicron variant does not render a policy unreasonable.

(v) Loosening or removal of public health restrictions does not make an otherwise reasonable policy unreasonable.

(j) In *Canada Post Corporation v Canadian Union of Postal Workers*, dated April 27, 2022, Arbitrator Jolliffe held a policy which required all employees to attest to their vaccination status, and placed those who were not fully vaccinated on an unpaid leave was reasonable. The decision of Arbitrator Jolliffe stands for the following propositions:

(i) In the case of differing expert opinion, the testimony of an expert with medical education, experience, and leadership should be preferred.

(ii) The arrival of the Omicron variant, far from removing the need of the vaccination policy, made such a policy all the more necessary.

(k) In *CKF Inc v Teamsters Local Union No 213, 10* dated May 25, 2022, Arbitrator Matacheskie held it was reasonable for the employer to remove unvaccinated employees from the workplace by placing them on an unpaid leave of absence. The decision of Arbitrator Matacheskie stands for the following propositions:

(i) The relevant question is not whether vaccination had reduced effectiveness, but whether there was evidence available to an employer that vaccination was not effective in preventing infection with Omicron. (ii) An employer is justified in considering public health guidance, including orders from British Columbia's Provincial; Officer of Health, which continued to state unvaccinated individuals are at a higher risk of transmitting COVID-19 to others.

(iii) The application of the precautionary principle supports the reasonableness of a vaccination policy.

(iv) The standard of decision making for an employer is not correctness, but reasonableness.

(l) In *Alectra Utilities Corporation v Power Workers' Union*, dated June 9, 2022, Arbitrator Stewart held a vaccination policy which contemplates disciplinary action for noncompliance was reasonable. The decision of Arbitrator Stewart stands for the following propositions:

(i) The emergence of the Omicron variant not only does not make a vacation policy unreasonable, but, to the contrary, makes it all the more necessary.

(ii) The loosening or removal of public health interventions does not make an otherwise reasonable policy unreasonable.

(m) In *Elementary Teachers' Federation of Ontario v Ottawa-Carleton District School Board,* dated June 21, 2022, Arbitrator Flaherty held the removal of unvaccinated and unexempted teachers from the workplace was a reasonable exercise of management rights. The decision of Arbitrator Flaherty stands for the following propositions:

(i) Whether other employers in the same industry have implemented a vaccination policy is an irrelevant consideration.

(ii) A policy is not unreasonable because it has exceeded what is required by the government.

(iii) The loosening or removal of public health interventions does not make an otherwise reasonable policy unreasonable.

(iv) Vaccines were safe and effective, and application of the precautionary principle supporting a vaccine policy.

(n) In *UNIFOR, Local 973 v Coca-Cola Canada Bottling Ltd, 13* dated March 17, 2022, Arbitrator Wright upheld a vaccination policy which put unvaccinated employees on an unpaid leave of absence. Arbitrator Wright's decision stands for the following propositions:

(i) The nature of a workplace, and the risk of transmission of COVID19 in that workplace, is a relevant consideration in deciding whether a vaccination policy is reasonable.

(ii) A vaccination policy can be reasonable even if its application would place an employee in a difficult decision.

(o) In *Wilfred Laurier University v United Food and Commercial Workers Union*, dated July 22, 2022, Arbitrator Wright held a policy pursuant to which to employees were placed on unpaid leave for failure to be fully vaccinated was reasonable. The decision of Arbitrator Wright stands for the following propositions:

(i) An employer is justified in relying on guidance from public health officials

(ii) The loosening or removal of public health interventions does not make an otherwise reasonable policy unreasonable.

(p) In *Toronto Professional Fire Fighters' Association, I.A.A.F. Local 3888 v Toronto (City)*, dated August 26, 2022, Arbitrator Rogers held a vaccination policy requiring fully vaccinated status as a condition precedent for a fire fighter's continuing to report for work was and continued to be reasonable. The decision of Arbitrator Rogers stands for the following propositions:

(i) The nature of the workplace is an important consideration. In a diverse and unpredictable environment, the hierarchy of controls and the precautionary principle justify a vaccination policy.

(ii) There is no doubt that vaccination is a significant contributor to an employer's ability to control workplace transmission of COVID-19.

(iii) An employee's reasons for declining vaccination are an important consideration in striking the appropriate balance.

(q) In *Coast Mountain Bus Company v Unifor, Local 111, 16* dated September 19, 2022, Arbitrator de Aguayo upheld a policy that placed unvaccinated employees on an unpaid leave. The decision of Arbitrator de Aguayo stands for the following propositions:

(i) An employer is entitled to rely on the effectiveness of vaccination against serious illness to justify a vaccination policy.

(ii) An employer is justified in relying on the precautionary principle.

(iii) An employer is justified in relying on public health guidance.

(r) In *Coca-Cola Canada Bottling Limited v United Food and Commercial Workers Union Canada, Local 175*, dated September 12, 2022, Arbitrator Herman upheld a policy that placed unvaccinated employees on unpaid leaves, even after Omicron became the prevalent variant.

(s) In *British Columbia Rapid Transit Company Ltd. v Canadian Union of Public Employees, Local 7000*, dated October 13, 2022, Arbitrator Noonan held removal of public health mandates did not render an otherwise reasonable policy unreasonable.

(t) In *Cameco Corporation, Port Hope Facility v United Steelworkers, Locals 8562 and 13173,* dated November 14, 2022, Arbitrator Chauvin held a policy that placed unvaccinated employees on an unpaid leave, and which terminated them after 6 weeks, was reasonable.

(u) In *Toronto (City) v Toronto Civic Employees' Union, CUPE, Local 416*, dated November 21, 2022, Arbitrator Herman held a policy which required employees to be fully vaccinated against COVID-19 was reasonable. The decision of Arbitrator Herman stands for the proposition an employer is not limited to prevention of transmission of COVID-19 in the workplace to justify a vaccination policy. Pursuant to its statutory obligations, an employer may consider the consequences of an infection on an employee in deciding whether to implement a vaccination policy.

(v) In *Unifor, Local 1999 v Reliance Comfort Limited Partnership*, dated January 2, 2023, Arbitrator Rogers upheld a policy according to which an employee who remained unvaccinated was liable to actions up to and including, but not limited to, restricting access to the workplace, placing the employee on an unpaid leave of absence, and/or modifying or terminating their contract of employment.

(w) In *Lakeridge Health v CUPE, Loal 6364*, dated April 26, 2023, Arbitrator Herman held an employer was justified in requiring employees to be vaccinated and that it was reasonable to place unvaccinated employees on an unpaid leave of absence. Importantly, Arbitrator Herman found that in certain circumstances, continued refusal to be vaccinated may treated as disciplinary misconduct and justify termination of employment.

(x) In *Central West Local Heath Integration Network v Canadian Union of Public Employees, Local 966,* dated June 29, 2023, Arbitrator Goodfellow held a vaccination policy which contemplated dismissal for non-compliance was reasonable.

[end of employer summary of vaccination cases]

320. Before leaving this summary, I note that in its submissions relating to the Owner/Operator grievances (discussed later) the employer was supportive of a number of awards which seem to place an obligation on employees to provide to their employer adequate reasons for choosing to remain unvaccinated. The lack of any, or any reasonable, explanation for that choice counts against them in the balancing of interests test.

321. Personal autonomy and bodily integrity are rights which are recognized in Canadian arbitral jurisprudence. They are a branch of rights broadly categorized as privacy rights. *Irving* is a direct authority on the point. The notion that upon taking a stand for those rights workers must disclose to their employer their particular personal reasons for doing so, and those reasons must be judged adequate, is anathema to the very rights themselves.

322. Workplace safety may override those rights and usually does. But to hold that failure to provide adequate personal reasons for asserting those rights should weigh unfavourably in the reasonableness balance is respectfully, an error.

323. At the end of the summary the employer referred to 2 decisions which it said did not support the reasonableness of a workplace vaccine mandate. These were *FCA* and *Electrical Safety Authority versus Power Workers Union* (Stout) 2022 CanLII 343.

324. I will turn now to comment on the *FCA* decision of arbitrator Nairn. The decision is dated June 17, 2022 and was heard on May 25, 2022. It concerned the reasonableness of a workplace vaccine mandate at two assembly plants, one at Windsor ("WAP"}and one at Brampton, Ontario. ("BAP"). The arbitrator describes these workplaces and in terms of proximity of employees and activities they are not much different from the warehouse conditions at Purolator.

325. The award then goes on to describe the general history of the pandemic including the different waves involving different variants of concern leading by July 2021 to the dominance of

the Delta variant which ushered in a fourth wave of the pandemic in Ontario. On September 16, 2021 the Moderna and Pfizer mRNA vaccines received full approval under federal *Food and Drug Regulations.* By December 2021 the Omicron variant ushered in the fifth wave of the pandemic in Ontario. By December 2021 "early surveillance data suggested a significant reduction in vaccine effectiveness against symptomatic infection for Omicron…".

326. The award also refers to the date of implementation of the employer's vaccine mandate policy, which was October 14, 2021. It refers to the dates of the lifting of vaccine mandates as well. These included the lifting by the Provincial Government of vaccine mandates in schools, hospitals and long-term care homes, on March 14, 2022. The award goes on to state: "as of April 4, 2022, most Ontario public service employees were no longer required to be mandated against COVID-19 or undergo regular COVID-19 rapid testing to go to work…"

327. The large number of employees, and the very high percentage of those being vaccinated was a significant fact which emerges from the award. The WAP employs approximately 3445 active full-time employees, 266 temporary part-time employees, and 822 employees are on leave, layoff, medical or other absences. The BAP employs approximately 2339 workers. In addition, there are 40 active full-time and 6 active part-time security officers employed at the WAP.

328. With a total of over 6000 active workers, as of the date of the hearing, the award states that 94.6% of these employees were reported as fully vaccinated. There were 262 employees who were unvaccinated. As a percentage of active employees this was about 5%. As a percentage of total employees this was about 4%. All of these employees were on unpaid leave of absence. There were no leave employee totals for the WAP.

329. The employer's policy referenced its statutory obligation under section 25(2)(h) of the *Ontario Occupational Health and Safety Act* to take "every precaution reasonable in the circumstances" to provide a safe environment for employees and visitors, including against COVID-19.

330. I will now reproduce some extracts from the award under the heading of SCIENTIFIC EVIDENCE:

> 51. The efficacy of COVID-19 vaccines likely wanes over time, though to varying degrees depending on the subject variant. Vaccines became less effective in preventing symptomatic infection and transmission in the face of the Delta variant, although they remained highly effective in preventing serious illness, hospitalization, and death.
>
> 52. As of early May, 2022, all new COVID-19 infections in Ontario were being caused by the Omicron variant. The effectiveness of vaccines has been compromised in the Omicron era. As the Omicron wave of the pandemic has surged, emerging evidence suggests that a two dose

course of an mRNA vaccine is significantly less protection against infection than with prior variants.

53. A pre-print study (a study not yet subjected to peer review) posted on December 14, 2021 led by Dr. N. Andrews, from the U.K. Health Security Agency reviewed vaccine effectiveness against the Omicron variant. It concluded that primary series immunization (2 doses) with either Pfizer or AstraZeneca provided limited or no protection against infection and mild disease. Boosting with the Pfizer vaccine was found to offer an increase in protection, but at the time that this study was conducted, the duration of that increased protection was not known.

54. A more recent briefing from the U.K. Health Security Agency, published April 28, 2022, concluded that, while vaccine effectiveness against Omicron from two doses of an mRNA vaccine dropped from 65-70% to about 15% by week 25, booster doses of an mRNA vaccine provided some renewed protection against symptomatic Omicron infections. Protection against hospitalization and death related to COVID-19 remained strong after a second dose but was more robust after a booster dose.

55. A Danish pre-print study published in December 2021 found that while three doses of an mRNA vaccine provided some protection against transmission of Omicron once infected, the comparative levels of transmission between an infected unvaccinated and infected two-dose vaccinated person was statistically insignificant.

56. A Swiss study published on April 8, 2022 looked at the levels of infectious viral load ("VL") as between vaccinated and unvaccinated individuals in the first five symptomatic days for different variants, including Omicron, and concluded: …For Omicron BA.1 breakthrough cases, reduced infectious VL was observed only in boosted but not in fully vaccinated individuals compared to unvaccinated individuals.

57. A study conducted by Dr. D. Fisman and other researchers from the University of Toronto's Epidemiology Division of the Dalla Lana School of Public Health, published in the Canadian Medical Association Journal on April 25, 2022, concluded that remaining unvaccinated increases the risk of infection among those who are vaccinated in a manner that is 2022 CanLII 52913 (ON LA) 14 disproportionate to the portion of unvaccinated people in the population. According to this study, unvaccinated populations heighten the risk for vaccinated populations, particularly when vaccines confer imperfect immunity. The study was not specific to the Omicron variant and did not consider waning immunity.

58. A small pre-print study from the U.S. recently found that while two-dose vaccinated individuals infected with the Delta variant had a significantly reduced viral load compared to unvaccinated individuals, this was not the case for those infected with the Omicron variant. For Omicron breakthrough cases (infection of those who have been vaccinated), a reduced infectious viral load was only observed in individuals with a booster shot but not when comparing fully vaccinated (two dose) individuals to the unvaccinated.

59. A recent nonrandomized clinical study conducted in Israel assessed the efficacy of a fourth dose of a COVID-19 mRNA vaccine administered three months after a third (booster) dose among health care workers. The data showed that a fourth dose produced an immune response, was safe, and was somewhat efficacious against symptomatic disease (31 to 43%) although not against infection itself. While most health care workers who became infected with the Omicron variant reported negligible symptoms, they nevertheless had relatively high viral loads. The authors concluded that those who were infected were also infectious, despite the number of vaccine doses received.

60. Sub-lineages of the Omicron variant have now also emerged, with a reduction in vaccine efficacy against symptomatic infection. However, Public Health Ontario continues to advise

> receiving a complete COVID-19 vaccine primary series and, for those eligible, the recommended booster dose(s), so as to provide optimal protection against severe outcomes.

331. Some of this evidence overlaps with evidence presented in this case and some is additional to it. The central point is that with regard to protection against infection and waning immunity the arbitrator was presented with sufficient evidence of mRNA vaccines' ineffectiveness against infection after a comparatively short time, to reach the conclusion she did. This was set out at paragraph 107 of the award which I will reproduce here:

> 107. Having regard to all of the above, I find that the Policy when introduced was reasonable and continued to be reasonable in its application. However, after careful review and not without considerable personal reservation, I hereby find that a COVID-19 vaccine mandate defined as requiring two doses (of a two-dose vaccine) is no longer reasonable based on the evidence supporting the waning efficacy of that vaccination status and the *failure to establish that there is any notable difference in the degree of risk of transmission of the virus as between the vaccinated* (as defined in the Policy) and the unvaccinated. Rather, *the evidence supports a conclusion that there is negligible difference in the risk of transmission in respect of Omicron as between a two dose vaccine regimen and remaining unvaccinated.* There is, under the definition in the Policy, no longer a basis for removing unvaccinated employees from the workplace. While the Union would argue that such a conclusion was available in December 2021, I disagree. More evidence was required of both the waning efficacy of the two-dose regimen against Omicron and the relative lack ofrisks of transmission before that conclusion could responsibly or reasonably be drawn, given the history of this virus. Where matters of health and safety are involved, it is not unreasonable to err on the side of caution.

332. Under the heading of REMEDY the award provides at paragraph 110 as follows:

> 110. Having regard to the finding in paragraph 107 above, I declare the Employer's Vaccination Policy, introduced on October 14, 2021, to be of no force or effect, effective June 25, 2022. I am prepared to provide the Employer with a short window to consider and address whatever flows from this decision before the Policy is vacated.

333. There has been some criticism of arbitrator Nairn's interpretation of the scientific evidence, by Dr. Loeb in *Coca Cola Herman,* which I will refer to as well as the arbitrator's comments on the *FCA* award result. Here is the arbitrator's summary of Dr. Loeb's evidence on this point:

> 19. Dr. Loeb was asked to comment upon the decision in FCA Canada Inc. and Unifor, Locals 195,444, 1285 ("FCA") (cited below), and he analyzed the science-based conclusions reached in that Award, and the underlying basis given for those conclusions. He concluded that the arbitrator incorrectly interpreted or applied a number of research studies. He noted that the data utilized in the Danish study, referred to in paragraph 55 of that Award, did demonstrate that there was a material difference, for Delta and Omicron variants, between vaccinated and unvaccinated persons for purposes of transmission, contrary to the conclusion of the arbitrator. As well, he stated, the arbitrator's statement in paragraph 57 of that Award, that the study conducted by researchers at the University of Toronto was not specific to the Omicron variant, was factually incorrect, as the study in question did provide a vaccine estimate for Omicron.
>
> 20. Dr. Loeb also disputed the finding in paragraph 107 of the Award that there is no longer any notable difference in risk of transmission between vaccinated (i.e. two doses) and unvaccinated individuals. In his opinion, this conclusion did not properly characterize the

> scientific evidence, and the evidence in fact demonstrates that there is approximately a 36 % total positive vaccination effect for combined susceptibility and transmission protection compared to not getting vaccinated. Dr. Loeb concludes that the arbitrator's decision in that paragraph is not supported by the most relevant evidence she cites nor by data external to the Award. His conclusion is that no other workplace intervention provides as effective protection as does being vaccinated.

334. I now quote the arbitrator's comments and conclusions with respect to Dr. Loeb's evidence including his criticisms of the *FCA* award:

> 46. Dr. Loeb is a recognized expert in the field, accepted as such by the Union, *his evidence was not challenged, and no contradictory scientific evidence was led.* His evidence demonstrates that by a significant and meaningful percentage, vaccines were and are the most effective means of protection for employees and the public, including the Omicron variant, and this is so even if only two doses are required, and they are the most effective means of protection with respect to susceptibility, the reduced chances of serious symptoms or effects of infection, and for limiting transmission. The Company correctly concluded that the best form of protection was to require that employees be vaccinated.
>
> 47. I agree with the two previous *Coca Cola* Awards that considered this same Policy, including their analysis and conclusions insofar as they considered the matters addressed herein, and their comments distinguishing previous decisions, which I need not repeat here.
>
> 48. With respect to the decision in FCA, the arbitrator in that case did not have before her the testimony or direct evidence of a scientific expert. The evidence of Dr. Loeb demonstrates that the arbitrator incorrectly interpreted some of the scientific information relied upon, and it is not apparent she would have reached the same conclusions had she not done so. It is also not apparent that she concluded that two doses do not still provide some material protection, as she stated in paragraph 104 of that Award that even with Omicron "it remains the case that a two-dose vaccine regimen continues to provide greater protection from serious outcomes for vaccinated individuals compared with no vaccine". In any event, Dr. Loeb's evidence convincingly demonstrates that a two dose policy remains prudent and advisable.
>
> 49. It was reasonable to place employees on unpaid leaves who had not received two doses of the vaccine, even after Omicron became the prevalent variant. That three doses provides greater protection than two doses does not mean that two doses does not still provide greater protection for employees, and others, than if employees were not vaccinated. On the evidence before me, it clearly does. There was sound reason for the Company to require two doses when the Policy was implemented, and this still remains true in the presence of and dominance of the Omicron variant.

335. It appears from the award summary of Dr. Loeb's evidence, that he noted arbitrator Nairn misinterpreted two studies out of the five which she relied on in reaching her conclusions. Arbitrator Herman says he is not convinced that she would have reached the same conclusion if she had not misinterpreted those two studies. However, there appears to have been no consideration on the part of Dr. Loeb of the three studies about which no mistakes were made.

336. Firstly, the Andrews study referred to in paragraph 53 of the *FCA* Award involved over a million participants. It was far and away the largest and most authoritative study undertaken on

the subject of vaccine effectiveness against infection. It found a percentage of effectiveness against infection to be an average of 9% as between the three major vaccines.

337. Next the UK Health Security Agency report referred to in paragraph 54 was derived from substantial samples, and the percentages of vaccine effectiveness for infection were not controversial in any way. This study placed effectiveness at 15% after 25 weeks.

338. Next, the studies referred to in paragraphs 56, 58 and 59, concerning which no mistakes were alleged to have been made, all addressed the infectiousness of vaccinated infected persons versus unvaccinated infected persons. In two of the studies there were found to be similar levels of infectiousness. In the Israel study vaccinated infected persons were described as "also infectious".

339. The Herman award does not specify how Dr. Loeb came up with a 36% vaccine effectiveness percentage combining susceptibility with transmissibility. Regardless of how he came up with it, it had to involve matching and combining solid irrefutable susceptibility figures in the range of 9% to 15% with figures derived from one or more infectiousness studies, all of which were known and still are known to be controversial and uncertain as best, with a widely disparate range of results. As a basis for reaching a conclusion about the reasonableness of a vaccine mandate this dubious combined percentage figure did not come close to achieving the kind of firm foundation required to do so.

340. To be fair to arbitrator Herman, he did not have the benefit of any expert evidence to challenge the observations and conclusions of Dr. Loeb. Given those unchallenged observations and conclusions he cannot be criticized for deciding as he did. However, reading that decision in the light of the data and expert evidence which I was presented with in this case brings to mind a rhetorical question. How many goals will a hockey team score against a team without a goaltender? The employer was pumping puck after puck into an empty net. Again, I do not criticize it for doing so. But this is a classic example underscoring the value of a well-executed adversarial system of justice as the best engine for arriving at the truth.

341. The lack of any counterbalancing expert testimony or advice meant that in arriving at his decision arbitrator Herman was not put in touch with the real world of early 2022, where in *highly vaccinated* populations and countries around the world the Omicron variant was spreading like wildfire, but instead inhabited an alternate universe in which either these things were not happening, or governments and the medical community were ignoring the implications and doing nothing.

342. Of course, governments both local, provincial and federal, and health care organizations were noticing, and were lifting restrictions and mandates everywhere in response to this universal fact, but it appears nobody brought this to the attention of arbitrator Herman. To be fair I agree with the employer's point that the lifting of restrictions and mandates by others does not automatically mean that the failure to do so establishes that a mandate is unreasonable. However, it certainly invites some comment or factual assertion to explain why the mandate continues to be reasonable in this employer's case, despite the ineffectiveness of the vaccine against infection. This of course was not going to happen in the Herman case because he was not made aware of the full extent of vaccine ineffectiveness against Omicron infection, nor of the Federal Government and other authorities' response to it.

343. There is one concern I have with the Nairn award, and that is the lack of reference at the conclusion stage to the issue of protection against serious illness, hospitalization and death. She acknowledged correctly that two-dose vaccine effectiveness against serious symptoms did not wane to nearly the same extent, but this fact did not appear to feature at all in the conclusion she reached about the reasonableness of the vaccine mandate as of June 2022.

344. One can only speculate as to why this was so. Perhaps the wording of the policy only referred to preventing infection (susceptibility). Perhaps the point was not argued by the employer. Perhaps she recognized, as the Federal Government clearly did, and as I do, that given the high percentage of vaccinated workforce, the dropping of the mandate at that stage would have a negligible effect on workplace safety. Perhaps she recognized that keeping unvaccinated employees away from the workplace did not reduce their risk of contracting serious illness in any way.

345. In any event there were no conclusions provided on this aspect of the case. This however takes nothing away from her conclusion which I consider to be correct, that vaccine effectiveness against infection was so minimal that it was wrong to continue to exclude unvaccinated employees from the workplace. I agree with the position of the union that this decision represents a watershed moment in the history of arbitral response to the evolution of the virus and the implications of the overwhelming data emerging in vaccine science. These developments were critical components in a new balance that needed to be struck in assessing the reasonableness of a workplace vaccine mandate.

346. I will now address three earlier decisions in which expert testimony was provided. The first of these was *Canada Post*. The following is an excerpt from the award:

> 23 In support of its position that the use of frequent, even daily, rapid antigen testing within the workplace, as a suitable workplace screening tool, was a viable alternative to mandatory vaccination, the Union called Dr. Colin Furness to provide expert evidence in the form of his November 21, 2021, report entered in evidence, and testifying in defence of his report on February 12, 2022. He also dealt with the report earlier provided to the Corporation by its expert witness, Dr. Michael Loeb.

347. Dr. Furness concentrated his report on extolling the merits of rapid antigen testing. However, at paragraph 29 of the award the following comment from his report is quoted. Recall that he was an expert witness called by the union.

> To the question of whether vaccination reduces workplace transmission, the answer is unequivocally yes, to a remarkable degree, when combined with other mitigation measures. It is useful to recall from above that 88% effectiveness of the Pfizer vaccine against the Delta variant means that unvaccinated people are nearly 10 times more likely to get sick from a given exposure than vaccinated people. Whether they are tested or not, at whatever frequency, unvaccinated employees are nearly 10 times more likely to contract COVID-19 than vaccinated employees with a similar exposure. Moreover, clear evidence indicates the transmission by unvaccinated people is 50% higher than by vaccinated people, a substantial difference.

348. At paragraph 34 of the award the arbitrator says:

> In his testifying in support of his expert report, Dr. Furness nevertheless acknowledged being a "big proponent of vaccination... an incredibly important tool to reduce the chance of being infected", as he put it, and undoubtably, in that respect, serving to reduce the chance of transmission to others as a general proven proposition as well as likely causing less serious illness where a breakthrough infection occurs.
>
> 37 Dr. Furness also conveyed in testimony his understanding that the currently developing data shows that two vaccine doses, long-term, is currently providing full protection against Omicron in only the 37% range, being a far lower efficacy than would be normally expected from vaccines, and for him making the vaccination process more problematic at this point as a screening tool.

349. At paragraph X of the award the arbitrator quoted from the evidence of Dr. Loeb.

> He described the currently approved COVID-19 vaccines as being effective as demonstrated in real-world studies, through large randomized controlled trials, including in Canada, citing Pfizer at 89% and Moderna at 92% in preventing symptomatic COVID-19 in individuals, dealing as he was during the fall of 2021 with the Delta strain as being dominant at that point.

350. At paragraph 41 the arbitrator went on to quote from the evidence of Dr. Loeb:

> Dr. Loeb went on to state in his report that the evidence taken from vaccine efficacy studies indicates that fully vaccinated persons are unquestionably less likely than unvaccinated to acquire COVID-19, "thus reducing the risk for transmission". Even where not fully protected, vaccinations cause a lower viral load in those infected and accordingly there results less likelihood of transmitting to others. By his assessment, it follows that if any symptomatic COVID-19 infection is prevented through vaccination, or reduced, transmission will be reduced.

47 Dr. Loeb for purposes of compiling his Supplemental Report, was asked to deal specifically with the emergence of the Omicron variant as it pertained to transmission and severity, effectiveness of vaccines, and the relevant strengths and weaknesses of a rapid antigen testing regime. He opined at paras. 14-16:

> 14. Compared to other variants, the Omicron variant has higher transmissibility. This would apply to both community and to workplace settings. The Omicron variant appears to be less virulent, that is, less likely in general to lead to severe disease than prior variants. As a prime example, a recent report from the Kaiser Permanente Southern California healthcare system, found that the risk of hospital admission with the Omicron variant, adjusted for age, comorbidity, receipt of vaccine, was approximately 50 percent compared to the Delta variant. The risk of ICU admission was reduced by about 75% with Omicron *while mortality risk was reduced by 90% compared to Delta.* Other studies have reported similar results, *with reduced risk of hospitalization ranging from 20 to 80%.*
>
> 15. Data on the effectiveness of vaccines against the Omicron variant are very limited at present. Data from the UK show that vaccine effectiveness after two Pfizer doses was 88% at two-9 weeks after the second dose, reduced to between 34% and 37% from 15 weeks post dose 2. From two weeks after Pfizer booster, vaccine efficiency increased to 76% for Pfizer 21 primary course recipients. These data support the fact the vaccines do remain effective against the Omicron variant. [emphasis added]

51 By Dr. Loeb's approach, the answer to Omicron at this point is to have booster vaccinations once the waning effect becomes significant, for better protection, not to have ever abandoned the vaccination approach altogether for some other less effective workplace alternative, such as rapid antigen testing.

351. At paragraph 88 the arbitrator summarized the prevailing medical opinion at the time of implementation of the policy:

> 88 There is no doubt that it was well understood at the time of implementation of this Mandatory Vaccination Practice *that one's being fully vaccinated hugely lowered the risk of becoming infected,* which unquestionably had become the principal way, other than completely isolating oneself, of limiting the transmission of the virus to another person, whether inside or outside workplace environments, and even when infected there was a reduced likelihood of there being a serious illness consequence, or passing the infection on to someone else who was vaccinated, or even to an unvaccinated person due to the lower viral load. Further it does not seem that herd immunity is currently an issue given the propensity for the Omicron variant to break through the vaccine protection, but even there causing less serious illness for those already vaccinated and reliance on a continuing lower viral load where vaccinated. That aspect would continue to have effect both for the vaccinated employee and possibly also others with whom they come into contact with, whether vaccinated or unvaccinated. The simple fact is that a low viral load is better than a high viral load.

352. I have extracted portions of the award that address susceptibility and transmission during the early stages of Omicron, but the bulk of the arguments, evidence and the award itself is concerned with the relative merits of rapid antigen testing versus a workplace vaccine mandate which is irrelevant to this case. There also is reference to the vaccination benefit of protection

from serious illness, hospitalization and death, although Dr. Loeb confirmed the mortality rate for Omicron had dropped by 90%.

353. Nevertheless, these extracts demonstrate very clearly prevailing medical opinion at the time of implementation of the *Canada Post* mandate, October 22, 2021, that vaccination was highly effective against infection and consequent transmission in the workplace or elsewhere. They reinforce my view on that subject, which I share with all the awards including the *Wilson* and *Morin* awards. The cases are of very little assistance to me in assessing the reasonableness of a vaccine mandate enforced continuously between January 10, 2022 and May 1, 2023.

354. The same can be said for two earlier awards with expert testimony which reflected a growing awareness of some of the immune evasiveness of Omicron and some of the waning effectiveness of vaccines to prevent infection. This testimony does not reflect the later shift in prevailing medical opinion recognizing the drastic extent of the reduction in effectiveness against infection, nor does it reflect the sheer volume of reliable authoritative data confirming this, which I have been presented with in the present case. These awards were *Toronto School Board* and *Alectra.* I find it unnecessary to review either of these awards in detail.

355. I will now turn to the other "truly post FCA decisions", starting with *Wilfred Laurier.* Arbitrator Wright addressed the *FCA* decision at paragraphs 28 and 29 of her award.

> 28. Finally, I agree with the University's submission that the award of Arbitrator Nairn in *FCA* is distinguishable from the present case for two reasons. First, the University paused the Policy effective May 1st, 2022. That was well before Arbitrator Nairn issued her award on June 17th , 2022, and well before the deadline of June 25th, 2022, that she gave the employer to amend its policy.
>
> The evidence upon which she relied in finding that the policy was no longer reasonable *included scientific articles from late April 2022, and other recent publications. She took notice of the federal government's announcement of June 14th, 2022, that lifted vaccine mandates for federal public servants and for federally regulated transportation workers effective June 20th, 2022.* She rejected Union counsel submission that she could conclude the policy was unreasonable as early as December of 2021.
>
> She indicated that more evidence was required before she could come to that conclusion. Certainly, by the time she wrote the award, June 17th , 2022, Arbitrator Nairn believed she had enough evidence to conclude that the policy was no longer a reasonable one. *There is nothing in the award to suggest she believed there was sufficient evidence for her to conclude that the policy was unreasonable from March 1st, 2022, to May 1st, 2022,* which is the relevant period in the present case.
>
> Second, the Arbitrator's reasoning in the *FCA* case was specific to a vaccine mandate requiring two doses of vaccine:
>
> "The evidence supports a conclusion that there is negligible difference in the risk of transmission in respect of Omicron as between a two-dose vaccine regimen and remaining unvaccinated."

> The University's Policy, by contrast, did not define "fully vaccinated" to mean two doses of vaccine. It rather tied the definition of "fully vaccinated" to on-going public health pronouncements.
>
> The Policy also incorporated periodic review in accordance with public health information and legislative requirements. Arbitrator Nairn noted that the policy under review in FCA did not incorporate "periodic review"; she suggested that incorporating periodic review into a vaccine policy "may be prudent."
>
> *The University's Policy is therefore clearly distinguishable from that considered by Arbitrator Nairn in FCA.*
>
> 29. In light of this conclusion, it is unnecessary for me to consider the extent to which Arbitrator Nairn's decision in *FCA* may be a departure from or inconsistent with the other arbitral decisions that have so far addressed the issue of the reasonableness of mandatory vaccination policies.

356. I see nothing in the above quoted passage to suggest that the *FCA* award was in any way incorrect and/or should not be followed. Arbitrator Wright properly notes that arbitrator Nairn had "scientific articles from late April 2022 and other recent publications". In particular she notes that arbitrator Nairn had notice of the lifting of the Federal workplace vaccine mandate announced on June 14, 2022. Arbitrator Wright clearly saw those two points as distinguishing features of the *FCA* award.

357. Next I refer to the *Firefighters* case and the *Civic Employees* case.

358. Two expert witnesses were called by the employer. In neither case did the unions call their own expert witnesses to challenge the city's experts. The arbitrator quoted and commented on the expert evidence of Dr. Juni:

> 78. Having noted that he had been asked to opine "on the value and benefits of a mandatory COVID-19 vaccination policy for employees of the City of Toronto" and "on the safety and effectiveness of COVID-19 vaccines currently available in Ontario", Dr. Juni's report (excluding a myriad of supporting references) included the following significant elements:
>
> > 4. My opinion is that vaccination is by far the best way to ensure the protection of City of Toronto employees and members of the public with whom they interact from contracting and/or transmitting SARS-CoV-2, the virus causing COVID-19, as well as preventing Long COVID, hospital admissions, ICU admissions and deaths from COVID-19 in City of Toronto employees.
> >
> > 8. My opinion is that the COVID-19 vaccines currently approved and in use in Canada are safe for use by all persons (other than the very small number who are contraindicated because of an allergy to one of the COVID-19 vaccine ingredients, or some other rare conditions), and that vaccines are the most effective way to reduce the risks of COVID-19.
> >
> > 12. Vaccine effectiveness was maintained for the Alpha variant that caused the third wave, and for the Delta variant that caused the fourth wave in Ontario. For all strains of the SARS-CoV-2 virus that were dominant in Ontario before December 2021 (the original SARS-CoV-2 virus, the Alpha and Delta variants),

a vaccinated person was therefore much less likely to transmit COVID-19 to others, including unvaccinated children and vulnerable persons.

13. At the end of November 2021, the Omicron variant was detected in Ontario, and quickly became the dominant variant in the province. Omicron is extremely transmissible and spreads much faster than the original strain and previous variants. Unfortunately, Omicron is also better at evading the immune system and therefore vaccine protection against infection with 2 doses of an mRNA vaccine has been reduced significantly with Omicron. Despite this, as of March 31, 2022, the estimated daily rate of reported cases per million amongst unvaccinated Ontarians was 252.3, whereas the estimated daily rate of reported cases per million amongst Ontarians vaccinated with at least two doses of a COVID-19 vaccine was 168.1. This represents a 33.4% reduction in risk of infection associated with vaccination with at least two doses.

18. At least 2 doses of a COVID-19 vaccine continue to be effective in reducing the risk of hospital admission, ICU admission and death also after Omicron became dominant in Ontario and globally. As of March 30, 2022, the estimated number of COVID-19 cases in hospital per million amongst unvaccinated Ontarians was 226.4, whereas the estimated number of COVID-19 cases in hospital per million amongst Ontarians vaccinated with at least two doses of a COVID-19 vaccine was 45.2. This represents a 80.0% reduction in risk of hospitalization associated with vaccination with at least two doses. The estimated number of COVID-19 cases in intensive care per million amongst unvaccinated Ontarians was 50.8, whereas the estimated number of COVID-19 cases in intensive care per million amongst Ontarians vaccinated with at least two doses of a COVID-19 vaccine was 8.5. This represents a 83.2% reduction in risk of ICU stay associated with vaccination with at least two doses. The reductions in the risks of hospitalization and ICU stay were even higher when the Delta variant was dominant in Ontario in August to November 2021: an average 96% reduction in the risk of hospitalization, and an average of 98% reduction in the risk of ICU stay. The reduction in the risk of hospital admission, ICU admission and death is high after two doses, and is even more pronounced after 3 doses of a COVID-19 vaccine. In a recent analysis from Kaiser Permanente Southern California, the protection against hospitalization with Omicron was 84.5% after 2 doses of a COVID-19 vaccine, and 99.2% after 3 doses. 20. There is an Omicron subvariant, BA.2, which has become the dominant subvariant in Denmark and is becoming dominant in Canada and globally. This subvariant shows increased transmissibility (spread more easily) than the original Omicron variant. According to a recent study performed in Danish households, increased transmissibility of BA.2, as compared with the original Omicron variant, was only seen in unvaccinated individuals, but not in individuals who had received 2 doses of a COVID-19 vaccine, nor in individuals who had received 3 doses of a COVID-19 vaccine. This suggests that COVID-19 vaccination will continue to be important for the control of BA.2 in Ontario, not only after 3 doses were received, but also after 2 doses were received.

359. The award goes on to quote from and comment on the expert evidence of Dr. Dubey.

56. In light of removing public health measures as we come out of the Omicron surge, vaccination remains the most important public health measure available to combat the pandemic and the illness caused by SARS-CoV-2. 57. TPH is recommending vaccination for the reasons outlined below. In short, the vaccines approved by Health Canada have been

conclusively shown to be highly effective at protecting against severe consequences of COVID-19 and have few contraindications and severe side effects. Data also demonstrates that vaccines may also assist in reducing virus transmission, even in the case of an Omicron infection (which is much more transmissible than previous variants).

58. The chief purpose of any vaccine, including COVID-19 vaccines, is to prevent or reduce serious illness, hospitalization and death. Vaccines approved by Health Canada are highly effective at achieving these goals. They have been shown to dramatically decrease the risk for severe illness, including hospitalization and death from a COVID-19 infection, across the variants that have appeared to date including Alpha, Delta and Omicron. Fully vaccinated individuals are much less likely to die from COVID-19 compared to someone of similar age who is unvaccinated.

59. Approved COVID-19 mRNA vaccines may also assist in addressing transmission.

74. In the context of the Omicron variant, vaccines remain the single most important measure to protect employees and residents of Toronto from the serious consequences of COVID-19 and, as outlined above, may also help limit transmission of the virus both in the workplace and in the community, thereby protecting vulnerable persons such as those who cannot be vaccinated and those with weakened immune systems.

The arbitrator continued:

The City relied strongly on the case of *Elexicon*, in which arbitrator Mitchell at paragraph 133 summarized his rationale for upholding the employer's policy requiring vaccination by its employees to be reasonable in the circumstances of the case:

> 6. To summarize, the first essential reason for my finding is that all employees have the right by law to a safe workplace and the Employer under the law has a duty to take every reasonable precaution in the circumstances to that end. *Here vaccinated employees are at less risk of becoming infected with the Omicron virus than are unvaccinated employees, and the more likely employees are to become infected, the more likely they are to transmit the disease to others.*

360. Arbitrator Rogers made note of the fact that the Association presented no evidence of its own to challenge or contradict the testimony of the City's experts.

173. Mr. Goldblatt emphasized that *the Association was not arguing about the background and science disclosed by the evidence of Drs. Juni and Dubey,* but Local 3888 did note that the doctors were not involved in the development of the Policy, did not address contextual information respecting the TFS, and were not competent to address labour relations circumstances. Neither of the doctors advocated for the consequences of non-compliance with the Policy.

361. This point was reinforced by the arbitrator's note of the City's reply on the subject:

202. The City responded to the Association's assertions concerning the inadequacy of the data presented to establish the need for the Policy's mandate noting that *Local 3888 had called no expert evidence to contest the bases upon which the City had introduced the Policy*. Counsel submitted that the Policy was supported fully by Dr. Juni's evidence and that his report was not shaken in the least on cross examination. In sum, it was the City's position that the data represented spoke convincingly to the reasonableness of the mandate it had introduced.

[emphasis added]

362. The arbitrator then goes on to comment on *FCA*.

> 221. Unlike the employees whose unpaid leaves of absence were to be brought to an end by the determination in *FCA Canada* that the employer's policy was no longer reasonable, fire fighters represented by Local 3888 have been and remain segregated into two cohorts: one, populated by the vast majority of fire fighters who established their compliance with the mandatory vaccination requirements or their entitlement to an exemption on medical or human rights grounds, and, another, comprising a small contingent of disciplinarily suspended fire fighters, *thirteen of whom were discharged in January 2022* for non-compliance with the Policy. None of the fire fighters of concern here were on an unpaid, non-disciplinary leave.
>
> 222. While the pandemic and the introduction of variants and new waves make the situation one of flux with the result that, as Arbitrator Mitchell stated in *Elexicon*, "what constitutes a reasonable mandatory vaccination policy in the course of a pandemic is contextual and highly dynamic" , *the issues here relate principally to the reasonableness or otherwise of the Policy introduced and enforced in the last months of 2021 reaching into 2022 to the point at which the City terminated the employment of non-compliant employees.* Any fire fighters who have joined TFS since the introduction of the Policy were required by its terms to meet the fully vaccinated criteria as a condition of their hiring. In the result, it should be the case that active fire fighters have met the requirements of the Policy as promulgated, such that it has no ongoing effect for them.
>
> 223. As matters stand, however, any fire fighter who might join — or rejoin — TFS would be obliged to comply with the Policy for as long as it remains in place.
>
> 224. *In that context, the circumstances here are quite different from those Arbitrator Nairn faced in FCA Canada*. While the expert evidence presented by the City admits or perhaps raises a significant question about the sufficiency of the Policy in that it does not require fire fighters who met its requirements in 2021 to have third or fourth "booster" vaccinations, Dr. Juni was clear in stating that it continues to be the case that a person receiving two doses of a recognized vaccine enjoys significantly greater protection against the virus than those who are unvaccinated.
>
> 225. *In light of the evidence I received*, it would be perverse and wrong to find here, as Arbitrator Nairn did, that "a COVID-19 vaccine mandate defined as requiring two doses (of a twodose vaccine) is no longer reasonable based on the evidence supporting the waning efficacy of that vaccine status and the failure to establish that there is any notable difference in the degree of risk of transmission of the virus as between the vaccinated . . . and the unvaccinated" or that "the evidence supports the conclusion that there is negligible difference in the risk of transmission in respect of Omicron as between a two-dose vaccine regimen and remaining unvaccinated".
>
> 226. *Those conclusions might well have been necessary and appropriate on the evidence Arbitrator Nairn had but are contradicted here by the unchallenged evidence of Dr. Juni and Dr. Dubey.* On the evidence I received, a recruit or returning fire fighter vaccinated with two doses of a COVID-19 vaccine would be decidedly less likely to become infected than if he or she were unvaccinated. Furthermore, a fire fighter who received two doses before the Policy deadline is better protected than an unvaccinated individual. Simply put, *there is nothing before me* to support an argument that a person having received two doses of a two-dose regimen is not substantially better protected and less likely to present a risk to others than an unvaccinated colleague. [emphasis added]

363. Two other short extracts from the award underscore the key difference between the evidence presented to arbitrator Rogers and the evidence presented to arbitrator Nairn in *FCA*.

> 233. Unlike other arbitrators I have neither been obliged to proceed without the benefit of expert testimony *nor confronted with divergent expert opinions*. I have set out the statements of Dr. Juni and Dr. Dubey at length as both express the case for the adoption of the mandate eloquently and convincingly.
>
> 249. The evidence is clear that the Policy protects employees against workplace infection to a high degree by having employees vaccinated……

364. Contrary to the position taken by the employer, the award in *Firefighters* is not inconsistent with and in no way undermines the award in *FCA.* It simply states that the expert evidence presented was very different from the data reviewed and considered by arbitrator Nairn. The expert evidence in *Firefighters* attracts the same metaphor I employed in describing the evidence in the *Coca-Cola Herman* case. The two experts in *Firefighters* were pumping puck after puck into an empty net.

365. Counsel for the Association in that case concentrated their advocacy skills and effort in arguing (successfully) that the punitive element of the policy in question was unreasonable. I note that this very significant finding by arbitrator Rogers is not included in the summary of the case provided by the employer quoted above.

366. With respect to the *Civic Employees* case*,* the same two experts were called with no experts called by the union to challenge or contradict their evidence, with the same predictable result. However, arbitrator Herman distinguished *FCA* on the additional ground that the parties in that case appeared to focus only on the alleged extra risk of infection of unvaccinated workers, with the consequence of transmitting the virus to others. (He expressed this confusingly as the risk of transmission, mixing up susceptibility with transmissibility, which was also considered separately in *FCA,* but this does not detract from his underlying reasoning). He acknowledged implicitly that, given the evidence before arbitrator Nairn that the risk of infection and consequent transmission was statistically insignificant, the conclusion was a valid one, but that was not the focus in the case before him.

> 112. In FCA Canada Inc. (above), the arbitrator concluded that a two-dose requirement was reasonable when it was initially introduced but was no longer reasonable as of the date when the decision issued. The arbitrator found that currently there was a negligible difference in risk of transmission of (*he means infection from and consequent possible transmission to*) the Omicron variant between those vaccinated and those unvaccinated. The arbitrator accordingly declared the two-dose vaccine policy of no force and effect as of a specific date. That context was different. The parties in that case appear to have focused only on the risks of transmission, (*he means infection from and consequent possible transmission to)*) while here, the Policy was motivated by attempts to address both transmission *(he means infection from and consequent possible transmission to)* risks and the risk of more severe symptoms if infected. Further, the expert evidence in that case was different than that placed before me. Here, the expert evidence

established that a two-dose requirement is still effective, particularly against suffering serious health consequences if infected.

367. He also said:

> 99. I am satisfied that Section 25(2)(h) of the Act requires that employers take every reasonable precaution to protect employees both against the risks of transmission (*he means infection and consequent possible transmission*) and against the more serious consequences a worker might suffer if s/he did become infected. Requiring employees to become vaccinated is by a considerable measure the most effective protection against transmission and/or the serious consequences of infection. The requirement to be vaccinated attempts to protect both the unvaccinated employee and those vaccinated employees working with unvaccinated employees.
>
> 100. Even if the Act itself did not require that the City take every reasonable precaution to protect employees from anything other than transmission, it was still reasonable for the City to attempt through the Policy to reduce the negative health ramifications for all workers should they become infected, and reasonable for it to take steps to minimize disruption to its ability to provide services to the public. At a minimum, the City has a valid interest in reducing the likelihood that its employees might die or be absent for lengthy periods while they are seriously ill and in the hospital.

368. Arbitrator Herman also noted the following time limitation on the effect of his award:

> 118. I do not have before me any expert evidence, or other evidence, about the circumstances in play after May 12, 2022 that would enable me to determine whether the Policy remained reasonable after that date, and *I therefore make no comment in respect of the continued reasonableness of the Policy or its application after that time.* [emphasis added]

369. Again, this award is not inconsistent with and does not undermine the award in *FCA*. The central point is that the expert evidence presented to arbitrator Herman was very different to the data reviewed and considered by arbitrator Nairn. As for the different focus of the parties in *FCA*, which was restricted to a similarity of risk of infection between vaccinated and unvaccinated workers, this was an important distinction.

370. The last two truly post *FCA* cases are *Coast Mountain* and *Rapid Transit.* I have discussed these in detail at paragraphs 298-312 above in the section of the award addressing protection against serious illness, hospitalization and death. Just to recap, they both found a nexus between workplace safety and two-dose vaccinated protection from serious illness, but in *Coast Mountain* it was found that the bus drivers' work environment exposed them to greater hazard than everyday living both for risk of infection and risk of serious illness. *Rapid Transit* followed this factual conclusion but took a more expanded view of the *Coast Mountain* rationale for the mandate. I rejected that broad based rationale for reasons found in that section of the award referenced above.

Assessment of the relevance and persuasive value of the 24 vaccination arbitration awards relied on by the employer.

371. I disagree with the proposition of the employer at paragraph 882 of its submission that there is an arbitral consensus concerning the reasonableness of mandatory vaccination policies and that this consensus has "survived the arrival of the Omicron variant".

372. Exhaustive review of these cases establishes that arbitrators can and should deal only with the evidence presented to them in support of or contradicting any given proposition put forward by the parties to advance their case. The evidence in this proceeding of the drastic and continuing reduction in effectiveness of the primary series of vaccinations far exceeds what has been presented in the cases relied on by the employer, both in magnitude of reduction and in the number of reliable authoritative sources that have continued to confirm that drastic reduction.

373. In several of the cases expert testimony was provided supporting the employer's side of the case with no experts being called by the union to challenge or contradict it. I consider it inappropriate and unsafe to accord arbitral deference to these awards, considering the vast quantities of aggregated data presented to me, virtually none of which was reviewed or commented upon by those experts.

374. My closing comment on this aspect of the case is to refer again to the big picture painted in the introduction to the Andrews study referred to several times above. Soon after the arrival of the Omicron variant it was noticed that in highly vaccinated countries and populations Omicron was spreading like wildfire. Vaccination appeared to be having little or no effect on the spread of this variant of the virus. It was this phenomenon that began to attract searching enquiry and the aggregation of massive amounts of data to ascertain exactly what was going on. At around the time when much of this data was being accumulated, digested, and incompletely published or publicized, which occurred roughly during the winter and into the spring of 2022, most of these vaccination cases were heard and decided. To be fair to the arbitrators and experts attempting to make sense of the data, it was incomplete and open to differing interpretations. Even arbitrator Nairn stated that she reached her conclusion "with considerable personal reservations" when deciding that the vaccine mandate in *FCA* graduated to being unreasonable by June 2022 because of the evolution of the virus, and revised vaccine science.

375. However, by the time this case came on for hearing, the mass of data above described had been duly digested and analysed, leaving no doubt whatsoever that the mRNA vaccines provided statistically insignificant protection against infection. The evidence in most of these cases, whether because of timing or because of selective presentation, did not reflect this reality in unambiguous

terms. The removal of that uncertainty also removed the rationale for relying on the precautionary principle relied on in many of the cases.

376. There are other considerations to be addressed including infectiousness after being infected, and protection against serious illness, hospitalization and death. These have been dealt with elsewhere in the award and to some extent in commentary on the cases. These considerations are also important, but by far the most significant development was the disappearance of meaningful protection against infection and consequent transmission.

377. This development was recognized in *FCA* and I am in agreement with the result in that case. Though not the only finding, it is the most important finding dictating the disposition of the hourly paid grievances.

XV The Owner /Operator Grievances

Facts and background

378. The facts in relation to these grievances are not substantially in dispute. In November 2021 Purolator began to receive enquiries from owner operators asking whether the drivers had to be vaccinated and whether unvaccinated owner operators could use vaccinated relief drivers to cover their routes.

379. The uncontested testimony of Mr. Hayashi was that Purolator conveyed the message that relief drivers did have to be vaccinated, and owner operators could not use vaccinated relief drivers to operate their routes if the unvaccinated owner operator was out of the workplace having been placed on a Leave of Absence pursuant to the Policy.

380. There was a Policy update dated December 7, 2021, the headline of which provided:

> Covid 19 Safer Workplaces Policy Update
>
> Company provided rapid antigen testing ends January 7, 2022, and employees not vaccinated by January 10, 2022 placed on unpaid leave of absence.

381. All unvaccinated owner operators were informed in December 2021 that they would not be permitted "under the Policy" to have vaccinated relief drivers cover the routes after January 10, 2022 unless they themselves were vaccinated. This included owner operators who were off work with injuries and who would not in any event have a reason to attend Purolator or customer's facilities. Mr. Hubbard, Mr. Moes and Mr. Simmons were among those who were off work with injuries.

382. The following three letters are representative samples of correspondence sent out to owner operators by the employer at this time.

December 10, 2021 Chad Crowe c/o Purolator Inc. Nanaimo Depot

Chad: This letter is to remind you of the requirement under our Covid-19 Safer Workplaces Policy for all Owner Operators to be fully vaccinated by December 31, 2021. Our records indicate that you currently do not meet the requirements under our policy.

Having a relief driver who is fully vaccinated to replace you on your route is not acceptable under the Policy. Failure to become fully vaccinated, and attest to such, by January 10, 2022, will be considered a failure to meet your contractual obligations.

This will be our final reminder to you of our policy requirement. On January 10, 2022, you will be found in violation of our policy requirement and your contract will be suspended.

If you have any questions in relation to this matter, please raise them immediately or refer to the Safer Workplaces Policy. cc. Owner Operator File

January 12, 2022 Chad Crowe 2181 Dick Ave Nanaimo BC V9X 1R6

Chad: A requirement under Purolator lnc.'s Covid-19 Safer Workplaces Policy is for all Owner Operators to be fully vaccinated by December 31, 2021. You were advised in December 2021 that failure to become fully vaccinated, and attest to such, by January 10, 2022 would be considered a failure to meet your contractual obligations to Purolator Inc. and your contract would be suspended.

As of January 10, 2022 you were not compliant with our requirements and as such, your contract has been suspended. Again, be advised that it is a requirement to become fully vaccinated in order to complete your contractual service obligations to Purolator Inc. Although you were not compliant with this requirement as of January 10th, we will afford you one last opportunity.

In order to maintain your contract with Purolator Inc., you are required to obtain a vaccination by January 19, 2022 and provide Purolator Inc. proof that such has occurred. Failure to do so will result in the termination of your contract at Purolator Inc. A secondary vaccination must also by obtained by February 11, 2022 along with your corresponding ability to return to service at Purolator Inc. within provincial health guidelines from the date of your second vaccination.

Proof that you have scheduled a secondary vaccination prior to the outlined February 11th date is also required. Notwithstanding the requirement to obtain an initial vaccination by January 19, 2022, failure to comply with the terms in this paragraph will likewise result in the termination of your contract at Purolator Inc. If you have any questions, please raise them immediately or refer to the Safer Workplaces Policy.

Regards District Manager cc. Owner Operator File

January 24, 2022 Chad Crowe 2181 Dick Ave Nanaimo BC V9X 1R6

Chad: A requirement under Purolator lnc.'s Covid-19 Safer Workplaces Policy is for all Owner Operators to be fully vaccinated by December 31, 2021. You were advised in December 2021 that failure to become fully vaccinated, and attest to such, by January 10, 2022 would be

considered a failure to meet your contractual obligations to Purolator Inc. and your contract would be suspended.

As of January 10, 2022 you were not compliant with our requirements and your contract with Purolator Inc. was suspended. Subsequent to January 10, you were again advised of this requirement but were afforded one last opportunity to maintain your contract with Purolator Inc. by obtaining an initial vaccination by January 19, 2022 and provide Purolator Inc. proof that such has occurred. You were advised that failure to do so would result in the termination of your contract at Purolator Inc.

Although January 19, 2022 has passed and you have not advised Purolator Inc. to having obtain a vaccination, we will not be terminating your contract at Purolator Inc. but rather will be placing you on an indefinite suspension. As a result, the route you had been contracted by Purolator Inc. to service will now be posted. Should your vaccination status become compatible with Purolator lnc.'s Safer Workplaces Policy in future and you wish to resume contractual service for Purolator Inc., the Company will consider such application based on the current Owner Operator route vacancies at the terminal.

Regards

Bruce Merner, Unit Manager cc. Owner Operator File; Human Resources; Teamsters

383. All the owner operators who remained unvaccinated, together with the hourly paid employees who were unvaccinated, were placed on leaves of absence. They had their routes suspended and they filed grievances. Some did not actually ask to be allowed to use a relief driver once the relief driver policy had been announced, but that I find is not a barrier to entitlement under any grievance.

Discussion

384. In the first instance, success or failure of these grievances is independent of the result of the individual hourly paid grievances and the group grievance. Even if the vaccine mandate was found to be reasonable throughout its duration, these grievances could succeed. The union's position is that the employer applied the vaccine mandate policy to them in an unreasonable way contrary to the principles in *KVP*. It exercised its management rights under the collective agreement in an arbitrary and discriminatory way in violation of the collective agreement. A finding in its favour on these grounds does not depend on a finding that the vaccine mandate itself was unreasonable. In the second instance, if the grievances do not succeed on these grounds they can still be successful in terms of obtaining a partial remedy because as of June 30, 2022 they should have been permitted to drive unvaccinated.

385. The employer offered a number of justifications for its treatment of unvaccinated owner operators which I set out further on in the award.

386. There are other issues arising in connection with these grievances, but the main point of dispute concerned the correct interpretation of Appendix M, Section 7, Letter of Understanding No. 4, Section C, Provision 2.0, General Provisions, subsection a), of the collective agreement at page 341 and 342, which provides as follows:

> 2.0 General Provisions
>
> a) Retaining Services
>
> i) The Owner Operator shall personally and exclusively operate the equipment supplied pursuant to his Owner Operator contract with the Company except that such equipment shall be operated by an employee of the Owner Operator in instances where the Owner Operator is absent because of vacation, illness, accident or *on leave of absence for reasons acceptable to the Company.* On written request from the Union or Company, the Owner Operator will produce proof of ownership of his equipment or the equipment lease agreement.
>
> [emphasis added]

The Union Position

387. The position of the union is as follows. It starts with the observation that the SWP did not impose or even suggest a disciplinary consequence for failing to get vaccinated, so disciplinary measures would be a contravention of the policy. I quote from some of the union's written submission:

> "Local 31 submits that the collective agreement language provides for use of relief drivers in the present circumstances, and that refusal to permit use of relief drivers is both unreasonable and a violation of the collective agreement. Put simply, Purolator has required that these owner operators be placed on leaves of absence, and therefore the provision does not permit Purolator to claim that the reason for leave of absence is unacceptable. Purolator's view that failure to vaccinate is "not acceptable" reveals its fundamentally disciplinary approach to the whole vaccination issue. An employer with a non-disciplinary approach would say that an employee's choice not to vaccinate is acceptable -- however, it is trumped by the need for a safe workplace. A minimally intrusive response could then (assuming the mandate otherwise passes the tests in KVP and Irving) lead to temporary removal of the unvaccinated employee from the workplace without further penalty.
>
> 57. A careful reading of the provision reveals that the word "acceptable" in Article 2.04(a)(i), applies to the reasons for the leave of absence and hence to the LOA itself. For example, if an owner operator wishes to take six months off to visit family in Asia,

the Employer, theoretically at least, could deny the leave of absence (though there is no evidence this has ever happened, or even that owner operators normally bother to ask permission). However, if the LOA is permitted, then the owner operator is required by the mandatory language of the collective agreement to provide a relief driver.

58. In other words, Local 31 says the logical intent of the phrase "on leave of absence for reasons acceptable to the Company" is to make clear that owner operators do not necessarily have carte blanche to take as much LOA as they want, whenever they want. The parties apparently contemplated that if the reasons for an LOA were not acceptable to Purolator, then there would be no LOA. The purpose of Article 2.01 is to ensure that "equipment shall be operated by an employee of the Owner Operator in instances where the Owner Operator is absent...". The purpose of the phrase "for reasons acceptable to the Company" in Article 2.04 is to confirm that leaves should be authorized, not to prevent owner operators from employing relief drivers when they actually are on leave."

MOVING GOALPOSTS

59. Purolator apparently crafted its Safer Workplaces Policy with a view to protecting the Policy from interference by arbitrators and courts. It ostensibly included a minimally intrusive approach, i.e., a leave of absence for anyone unvaccinated, rather than termination or other discipline, in accord with Irving and most other arbitration decisions which have permitted mandates. The Policy was apparently motivated to some extent by the Federal government's encouragement that federally regulated employers develop policies similar to those enacted by Ottawa, which included a non-disciplinary leave of absence for unvaccinated employees. (In fact, Federal government employees who were placed on leave absence have by now been back at work for over a year.)

60. However, Purolator's treatment of unvaccinated owner operators reveals a very different approach. This can be seen most clearly in the examples of correspondence to unvaccinated owner operators. This correspondence was through mostly identical form letters. A typical example is found *(as quoted above),* respecting Chad Crowe.

61. As noted above, the letter of December 10, 2021, advised that unvaccinated owner operators would not be permitted to use relief drivers. It went on to state that "On January 10, 2022, you will be in violation of our policy requirement and your contract will be suspended". Purolator's language has changed from "leave of absence" and loss of "access to the workplace" to "violation" and "contract will be suspended." Leave of absence applies to an individual owner operator, who -- while absent -- continues to have the right and responsibility to ensure provision of service under the owner operator contract. Suspension of the owner operator contract itself seems to eliminate all rights and obligations.

62. The collective agreement refers to both leave of absence and suspension. Leave of absence is used in Article 2.04 (a) described above. The concept of suspension is disciplinary, e.g., in the management rights provision at Article 3.01(b): "To demote, discharge, reprimand, suspend and discipline with just cause." Moreover, although the word "suspension" was used to characterize owner operators' loss of employment, the description of owner operators' status in the final letters of January, 2022, is actually that of termination. Owner operators were being told their routes were being posted and that return to work, if it ever occurred, would only be possible by applying for vacancies. This is the same as being told their contracts are terminated and they may apply for a vacancy at some time in the future. (there is a departure from the standard language in one individual circumstance, i.e., the James Adams' correspondence...)

63. The process used by Purolator respecting unvaccinated owner operators was entirely disingenuous. Owner operators were put out of work on January 10, 2022. At this point they had been told they were on leave of absence. A few days later, on January 12, they received a further letter which is unmistakably disciplinary. This letter referred to a "...failure to meet your contractual obligation to Purolator Inc.," and threatened "termination of your contract" if the recipient were not vaccinated within the coming month.

64. On January 24, 2022, another letter was sent out telling unvaccinated owner operators that, contrary to the letter of January 12, their contracts would not be terminated, but instead the owner operators would be placed on "indefinite suspension." The stated content of the so-called "suspension" was that owner

operators' routes had been posted, and that they would be "considered" for vacancies should their vaccination status become compatible with Purolator's Policy. According to the letter, an owner operator's "violation" of the Policy, and "failure to meet your contractual obligations" resulted in loss of their jobs, their routes, and seniority rights to return to those positions even if they subsequently became vaccinated.

65. Purolator purported to act under its Safer Workplaces Policy throughout, according to the letters to owner operators in December, 2021, and January, 2022. However, neither the restriction against using relief drivers ("not acceptable under the policy") nor the penalties in the January 12th and 24th letters are mentioned in the Policy itself.

66. In cross examination Mr. Hayashi acknowledged that unvaccinated owner operators were treated differently than owner operators off work on an extended WCB claim. Owner operators off work on WCB were allowed to assign relief drivers to cover their route; however, an unvaccinated owner operator was not permitted to do so.

67. It was put to Mr. Hayashi that the injured owner operator and the unvaccinated owner operator both want to return to work and keep their route. His reply was, "Respectfully, no owner operator chooses to get injured."

68. Asked if they were treated differently because they chose not to get vaccinated, Mr. Hayashi answered, "Yes, if they chose."

69. The cross examination continued in this vein, and Mr. Hayashi was asked questions about Gord Hubbard, who had a back injury and for years his relief driver had been doing his route exclusively for long periods.

Q. Even though he was injured and using his relief driver all the time, he also had his route suspended.?

A. Yes.

70. It was put to Mr. Hayashi that even if unvaccinated owner operators Dan Moes, Gord Hubbard and Phil Simmons, were on WCB injury and always used relief drivers, they would still have their contracts suspended. His answer was:

A. If they didn't comply with the policy, then yes.

71. Mr. Hayashi agreed that the purpose of the treatment they received was not merely to exclude them from the workplace, because these individuals were injured and not working. He was quite candid throughout that an unvaccinated owner operator had his contract "suspended" because "He chose not to be vaccinated and we asked him to."

[End of union position]

There is an additional portion of the union's submission addressing the somewhat separate grievance of Dan Moes. I will quote from that later in this section.

The Employer Position

388. I will now quote from the written submission of the employer on this issue. It commences with a review of the evidence.

"Purolator was entitled to refuse to permit a non-vaccinated Owner/Operator to use a vaccinated relief driver

789. On April 13, 2023, in direct examination, Mr. Hayashi testified that in November 2021, Purolator began to receive inquiries from Owner/Operators asking whether: (a) Relief drivers had to be vaccinated. (b) Unvaccinated Owner/Operators could use vaccinated relief drivers to complete the routes.

790. Mr. Hayashi testified Purolator communicated that relief drivers did have to be vaccinated, and that Owner/Operators could not use vaccinated relief drivers to operate their routes while the unvaccinated Owner/Operator was out of the workplace due to failing to comply with the SWP. Purolator clearly communicated this in letters to Owner/Operators that were sent out in December 2021.

791. Mr. Hayashi testified that the basis for this decision was that in almost all his discussions with various Teamsters locals in his career, they had taken the position – that he agreed with – that Owner/Operators should be operating the route they own regularly and the majority of the time. If they were not, unions took the position it was a subcontractor or a form of subcontracting.

792. At paragraph 71 of its written submissions, the Union refers to Mr. Hayashi's testimony in cross examination on May 2, 2023. The Union asserts Mr. Hayashi agreed

the reason unvaccinated Owner/Operators were not permitted to use relief drivers was not to exclude them from the workplace. - 176 –

793. The Union is mischaracterizing the evidence. Union counsel put to Mr. Hayashi that there may be cases that an Owner/Operator was unable to operate their route due to illness or a workplace injury, but that in those cases the Owner/Operator was permitted to use a relief driver for their route at that time. Mr. Hayashi acknowledged that was the case in some circumstances, but in those circumstances the Owner/Operators were unable to operate their routes due to circumstances beyond their control, whereas in this case the Owner/Operators were choosing not to comply with the SWP.

794. In fact, in his testimony Mr. Hayashi referred to the urgency created by the Pandemic. It is this type of urgency that is absent from the case of an Owner/Operators who is away from work due to an injury.

795. If the Union's position were correct, that is, if Purolator were required to permit an Owner/Operator who was in contravention of the SWP to use a vaccinated relief driver, that would mean an unvaccinated Owner/Operator would be on a potentially indefinite leave of absence. As Purolator will argue below, that could not be what the parties intended.

796. Mr. Hayashi's testimony in this connection is confirmed by the Union's own evidence.

797. On October 4, 2022, in direct examination, Mr. Hubbard testified he was aware that under the Collective Agreement, use of a relief driver more than 30 days required Union approval.

798. On October 4, 2022, Mr. Raines also testified he was aware of a number of Owner/Operators who did not actually drive, but rather relied on relief drivers. Mr. Raines referred to these as "absentee" drivers. However, Mr. Raines did not offer any testimony regarding the particular circumstances of these Owner/Operators. Without this detail, you should give little weight to Mr. Raines' evidence.

799. On October 7, 2023, Mr. Coleman testified in direct examination that the Union has traditionally been opposed to "absentee" Owner/Operators. Mr. Coleman - 177 -

testified that is because the Union is in the business of representing workers, and not business owners.

800. On October 4, 2022, in cross-examination, Mr. Fieldhouse testified regarding various articles in the Collective Agreement applying to Owner/Operators.

801. In cross-examination, Mr. Fieldhouse was taken to various provisions in the Master Collective Agreement.

802. Mr. Fieldhouse was taken to section (c) of Appendix M, which contains terms and conditions of employment applicable to Owner/Operators in British Columbia. which contains the following language:

The employer here repeats section 2.04 a) i) of the collective agreement.

803. Mr. Fieldhouse was taken to page 187, which contains provisions applicable to Owner/Operators in the Province of Manitoba. Mr. Fieldhouse conceded that this provision was different from the British Columbia provision. The Manitoba provisions do not limit an Owner/Operator's ability to subcontract to periods of absence, nor do they give Purolator the sole discretion whether to approve such a request.

804. Mr. Fieldhouse was also taken to Appendix "O", which contain provisions specific to the province of Alberta. At page 409:

> The Owner/Operator shall personally and exclusively operate the equipment supplied pursuant to this Owner/Operator Contract with the Company, except that such equipment shall be operated by an employee of the Owner/Operator, in instances where the Owner/Operator is absent because of vacation, illness, accident or on leave of absence for reasons acceptable to the Company and the Union.
>
> The Company will not unreasonably reject employee(s) of the Owner/Operator from being able to perform work for Purolator…

805. Mr. Fieldhouse agreed that these provisions are different from those applying to British Columbia.

806. Mr. Fieldhouse's testimony confirms that the Collective Agreement language applying to Owner/Operators in British Columbia is different from the language applying to Owner/Operators in other provinces. As will be argued below, this supports the conclusion that Purolator was entitled to decline to permit a vaccinated relief driver to relieve an unvaccinated Owner/Operator in British Columbia.

807. You also heard evidence from Mr. Moes and Mr. Crowe.

808. On October 4, 2022, Mr. Crowe testified that in November 2021, Mr. Moes asked Mr. Crowe to become Mr. Moes' relief driver. Mr. Crowe testified to accomplish this, he was required to secure a relief driver for himself.

809. Mr. Crowe testified he was able to identify a relief driver for himself, and while Purolator initially approved his relief driver, it subsequently rescinded this approval, because Mr. Crowe was not vaccinated.

810. Mr. Moes' testimony proves he was dismissed for failure to cover his route, as required by his Owner/Operator Agreement with Purolator, and not because of the SWP.

811. On September 12, 2022, Mr. Moes testified he required relief drivers. Mr. Moes also testified between November 22, 2021, and December 3, 2021, he had trouble covering his route, and this had nothing to do with the SWP. Rather, this was because his route was very challenging, and it was difficult to find a relief driver for that route. Furthermore, Mr. Moes testified Port Alberni is a very small town, there was a limited pool of relief drivers, and no one was willing to work because of COVID-19. 812. Mr. Moes testified between December 14, 2021, and December 30, 2021, he was unable to cover his route.

813. Mr. Moes was referred to letter from Purolator dated December 30, 2021, terminating his contract as an Owner/Operator (Exhibit 2, Tab 7). Mr. Moes conceded that this letter did not refer to the SWP at all, but was based on his inability to cover his route.

814. The testimony of Mr. Moes makes two things clear: (a) Mr. Moes was terminated not because of the operation of the SWP, but rather because of his inability to cover his route as required under his contract. Mr. Moes' attempt to rely on Mr. Crowe's situation is not successful. Mr. Crowe was not able to become Mr. Moes' relief driver because Mr. Crowe himself was not in compliance with the SWP. It would have made little sense for Purolator to approve Mr. Crowe becoming Mr. Moes' relief driver, knowing that Mr. Crowe himself was not in compliance with the SWP, and may need to go on a leave of absence in accordance with the SWP. (b) Furthermore, and in the

alternative, even if the reason Mr. Moes could not fulfil his contract was because of Purolator's decision regarding Mr. Crowe's relief driver, Mr. Moes has no right to complain about that. It is Mr. Crowe whose rights under the collective agreement to a relief driver is implicated by Purolator's decision.

389. The employer's submission goes on at paragraphs 1173 to 1225 to present a series of arguments to justify its treatment of the owner operators as consistent with the rules in *KVP* and within the bounds of the collective agreement.

Owner/Operators were not Entitled to Use of Relief Drivers

1173. In its written submissions, the Union argues the collective agreement entitled an Owner/Operator to the use of a relief driver in the circumstances of this case.

1174. However, a close reading of the Collective Agreement indicates an Owner/Operator in British Columbia is not entitled to utilize a relief driver in the circumstances of this case. An Owner/Operator is entitled to a relief driver where they are unable to fulfill their contractual obligations in specified circumstances.

1175. Appendix "M" of the Collective Agreement (Exhibit 7, page 325) contains provisions applying specifically to British Columbia, and includes provisions regarding Owner/Operators

1176. Appendix "M" defines an Owner/Operator as follows

> 1.0 Definition of an Owner/Operator An Owner/Operator is a person, including a privately held corporation, who caried on a pickup and delivery business and who has entered into a fee for services contract (hereinafter referred to as the "Owner/Operator Contract") with the Company for the provision of pick-up and delivery services. The Owner/Operator is, therefore, a business man who provides his equipment, realizes his revenue from his customer, the Company and pays his expenses, including statutory deductions. Such an Owner/Operator is the owner and/or purchaser and except as permitted herein, the excusive operator of equipment utilized for the Company's services…. The Owner/Operator shall not subcontract, or hire other individuals to perform his work, performed for Purolator Inc. except for during periods of absence.
>
> 2.0 General Provisions a) Retaining Services i) The Owner/Operator shall personally and exclusively operate the equipment supplied pursuant to his Owner/Operator contract with the Company except that such equipment shall be operated by an employee of the Owner/Operator in instances where the Owner/Operator is absent because of vacation, illness, accident or on leave of absence for reasons acceptable to the Company. [emphasis added]

1177. We highlight the following important points about these provisions:

(1) The Collective Agreement defines an Owner/Operator as a business person who works for Purolator but provides his own equipment. However, an Owner/Operator is still subject to the same requirements as Purolator's hourly employees.

(2) The Collective Agreement explicitly prohibits an Owner/Operator from subcontracting work, except during periods of absence.

(3) The types of "absence" that would exempt an Owner/Operator from the prohibitions against subcontracting are "in instances where the Owner/Operator is absent because of vacation, illness, accident or on leave of absence for reasons acceptable to the Company."

Therefore, the Collective Agreement does not give an Owner/Operator a blank check to use a relief driver for any reason at all. Rather, an Owner/Operator may use a relief only if the Owner/Operator is absent because of (1) vacation, (2) illness, (3) accident, or (4) on leave of absence for reasons acceptable to the Company. Equally importantly, an Owner/Operator is not entitled to use a relief driver whenever he is on an approved leave of absence. Rather, the Collective Agreement specifies that the reasons for that leave of absence must be acceptable to Purolator.

1178. At paragraphs 57 and 58 of its submissions, the Union asserts the provisions above refer to the reasons for the granting of the leave of absence, and not to the permissibility of the use of relief drivers during a leave of absence. The Union asserts "The purpose of the phrase "for reasons acceptable to the Company" in Article 2.04 is to confirm that leaves should be authorized, not to prevent owner operators from employing relief drivers when they actually are on leave."

1179. This interpretation is contrary to the plain language of the provision, and the context in which it appears.

1180. First, the language the Union relies on does not appear in a part of the collective agreement concerning leaves of absence. It appears in a section titles "Retaining Services." If this was a provision regarding the entitlement of an Owner/Operator to leaves of absence, it would appear in a section titled accordingly.

1181. Indeed, the title the parties used for this section reinforces Purolator's position, namely that the purpose of this section is to identify circumstances in which an Owner/Operator may be permitted the use of a relief driver and the retention of his services with Purolator.

1182. More importantly, the parties clearly turned their attention to the circumstances under which an employee may use a leave of absence. Under Article 20.05 a) to c), the parties clearly contemplated the circumstances under which an Owner/Operator is entitled to a leave of absence. Section 8.2 of Appendix M incorporates Article 20.05 a) to c) into the Owner/Operator provisions of the Collective Agreement.

1183. Therefore, if the Union is correct that the purpose of Article 2.0 a) i) is to state that leave should be granted, it would be entirely redundant and superfluous.

1184. Second, it is an accepted principle of collective agreement interpretation that the words used by the parties must be read in the context of the entire collective agreement, and where the parties use different words, they must mean different things.

1185. If the purpose of Article 2.0 a) i), and the use of the phrase "for reasons acceptable to the Company" was "to confirm that leaves should be authorized," as the Union alleges, one would expect the parties to use words clarifying an Owner/Operator's entitlement to a leave of absence, or conditions under which leave must to be granted. However, the Article does not contain any language to this effect.

1186. Purolator also notes that the Collective Agreement contains a strong management rights clause, which recognizes Purolator's "exclusive right…to operate its establishment…subject only to the restrictions imposed by law or by the provisions of the present Collective Agreement."

1187. If the Union was correct in its assertion that "The purpose of the phrase "for reasons acceptable to the Company…is to confirm that leaves should be authorized," then this provision would be entirely redundant. An employer is always required to act reasonably in the administration of the collective agreement. The parties do not need a provision (and a vague one at that) to affirm that.

1188. On a contextual reading, Articles 1.0 and 2.0 a) i) identify the circumstances under which an Owner/Operator may use a relief driver for the purposes of retaining

their service. The more appropriate interpretation of this language is that and Owner/Operator may not use a relief driver when they are on a leave of absence for reasons not acceptable to Purolator.

1189. This interpretation of the limited entitlement to the use of a relief driver is confirmed by Letter of Understanding No. 2 which states:

> The parties agree that employees performing the Relief function will be used to perform work in any classification for temporary fluctuations in volume, absenteeism, temporary vacancies or emergencies. Relief employees have no regularly scheduled daily hours of work or start times.

1190. This interpretation of the limited entitlement to the use of a relief driver is also confirmed by Letter of Understanding No. 3. Under this Letter of Understanding, if an Owner/Operator is unable to meet their contractual obligations to Purolator due to illness, injury, or unavoidable circumstances, Purolator will assist the Owner/Operator in finding a replacement relief driver for a maximum of five days. This affirms the time-limited nature of a relief driver.

1191. Purolator acted reasonably in exercising its management right to not permit an unvaccinated Owner/Operator utilize a vaccinated relief driver to evade the requirements of the SWP. As will be argued below, this approach was consistent with the purpose of the SWP.

1192. Furthermore, the Owner/Operator provisions under British Columbia's Appendix "M" are different from provisions governing Owner/Operators in other provinces. It is an acceptable principle of collective agreement interpretation that each word in a collective agreement must be given meaning, and when parties use different words, they must have intended those words to have different meaning.

1193. Appendix "E" contains provisions regarding Owner/Operators in Manitoba. At page 186, the Collective Agreement states:

In the event an Owner/Operator will not be operating his own equipment for reasons other than loss of license, sick or injury, or a leave of absence that is acceptable to both the Union and the Company…the Company shall post such Owner/Operator run for bids.

Section 2.2 – Retaining Services

(a) The Owner/Operator shall personally and exclusively operate the equipment supplied pursuant to this Owner/Operator Contract with the Company, except that such equipment shall be operated by an employee of the Owner/Operator, in instances where the Owner/Operator is absent because of vacation, illness, accident or on leave of absence for reasons acceptable to the Company and the Union.

(b) The Company will not reasonably reject employee(s) of the Owner/Operator from being able to perform work for Purolator as outlined in 2.2 a) above.

1194. Similar language appears under Appendix "O," which govern Owner/Operators in the Province of Alberta (Appendix 7, page 409).

1195. Two things are important to note. 1196. First, Appendix "E" explicitly contemplates an Owner/Operator being on a leave of absence for reasons other than those acceptable to the Company.

1197. Second, Section 2.2 b) explicitly prohibits Purolator from unreasonably rejecting an employee of an Owner/Operator from working for the Owner/Operator in the circumstances of section 2.2 a).

1198. The same point applies to the language appearing under Appendix "O."

1199. These provisions are absent from Appendix "M." A meaning must be assigned to this difference. The parties clearly intended an Owner/Operator in Manitoba and Alberta to have better entitlements in terms of utilization of relief drivers than an Owner Operator in British Columbia.

Past practice and Union's Views

1200. Past practice and the Union's express position regarding relief drivers confirm this interpretation.

1201. You heard evidence from Mr. Raines, who testified that the Union has historically been opposed to what he called "absentee" Owner/Operators, that is, an Owner/Operator who does not deliver the services personally as required by the Collective Agreement, but who instead hires relief drivers to perform this work.

1202. Mr. Raines' testimony was confirmed by Mr. Fieldhouse.

1203. The testimony of Mr. Raines and Mr. Fieldhouse confirms that the Collective Agreement requires an Owner/Operator to perform the services personally.

1204. This is consistent with the evidence provided by Mr. Hayashi on May 1, 2023, who confirmed that in almost all his discussions with various Teamsters locals during the course of his career, the various locals had taken the position that Owner/Operators should be operating the route they own regularly and for the majority of the time.

1205. You also heard testimony that there are a number of Owner/Operators who consistently use relief drivers. However, the Union's witnesses did not offer a detailed testimony concerning the circumstances of these Owner/Operators.

1206. It may well be acceptable for someone who is injured or under chronic disability to use a relief driver to fill their contractual obligations as a relief driver. However, the case of someone who made a conscious choice not to comply with a valid health and safety policy, and this without any compelling basis (and, for that matter, any basis at all) is very different. Such an Owner/Operator made a decision to make themselves unavailable for work. The Collective Agreement does not entitle such a person to a relief driver, so that they can continue to disregard a critical health and safety policy.

The Purpose of the SWP

1207. Permitting an Owner/Operator who was not in compliance with the SWP to utilize a relief driver would have defeated the very purpose of the SWP, namely to protect the health and safety of Purolator's employees, and to ensure its employees are both safe and working.

1208. As noted earlier, in implementing the SWP, Purolator was motivated by compliance with its obligations under the *Canada Labour Code*, as well as the protection of the health and safety of its employees.

1209. If Purolator had permitted a certain group of its employees to evade this requirement by going on a leave of absence and utilizing other vaccinated employees to do their work, this would have not achieved the objectives of the SWP. In particular,

it would have disincentivized compliance with the SWP, thereby reducing the rate of vaccination in Purolator's workforce.

1210. In light of the clear public health guidance and medical evidence available, achieving a high rate of vaccination was the key requirement for protecting the health and safety of employees.

1211. Furthermore, one purpose of the SWP was to ensure all were both safe and working. Granting an Owner/Operator who chose not to comply with the SWP the right to use a relief driver would simply have condoned that failure. That was not something Purolator was required to do.

1212. In *Central West Local Health Integration Network,* Arbitrator Goodfellow held an employee who does not comply with an otherwise reasonable vaccination policy is not entitled to an indefinite leave of absence. Arbitrator Goodfellow stated:

> I disagree that the Employers were required to place any or all of the 22 non-compliant employees on some form of non-disciplinary unpaid leave for some indeterminate period of time pending some future unknown event or possible employee change of heart. In my view, there is reason to question whether any such possibility forms part of a KVP analysis. *KVP* requires an employer to demonstrate whether a rule or requirement relied on as a basis for discipline – in this case, to be vaccinated in order to work – was reasonable. As part of that analysis, *Irving* requires that any "less intrusive" means of accomplishing the goals of the requirement be considered. Neither *KVP* nor *Irving* address the consequences of a failure to comply: both assume disciplinary consequences. Indeed, the policy in *Irving* called for termination for any refusals to test. As noted above, the "less intrusive" analysis applied to the requirement not, separately, to the consequences. Nor, in my view, can it reasonably be suggested that placing employees on indefinite unpaid leaves of absence is, in any way, an alternative means of accomplishing the goals and objectives of the policy. The goal of the policy is to keep employees safe and working; it is not, as the Employers highlighted here, to keep employees safe and not working. The object of the policy is to get the work done, safely, with as much of the existing employee complement as possible. It is not to get the work done with temporary replacements – employees who, if they could be found on such contingent terms, would then need to be oriented and/or trained and who would then, presumably, be subject to termination should circumstances, including the state of mind of the non-compliant, change – all while the Employers were attempting to cope with the greatest public health crisis ever faced. That, in my view, is not a less intrusive means of accomplishing the objectives of the policy; it is a less effective means of enforcing it. The disciplinary aspect of the policy was coercive and it was meant to be. The goal was to achieve compliance.

1213. It is important to emphasize that in this case, Purolator did not terminate anyone for failure to be vaccinated. The hourly employees were and remained on a leave of

absence. The Owner/Operators' contracts were suspended. All were called back effective May 1, 2023, and their respective seniority dates were respected.

1214. Arbitrator Goodfellow's analysis is nevertheless on point and applicable. If the Union's position was correct, that is, if Purolator was required to permit an Owner/Operator who chose not to be vaccinated to use a relief driver to cover his absence as a result of his decision not to be vaccinated, that would have been tantamount to permitting that Owner/Operator to be on an indefinite leave of absence. Arbitrator Rogers [*Goodfellow*] is clear that an employer is not required to do so.

1215. Starting at paragraph 66 of its written submissions, the Union asserts an Owner/Operator who chose not to be vaccinated in accordance with the SWP was treated differently than an Owner/Operator who was on an extended workers' compensation leave.

1216. Arbitrator Goodfellow's analysis reveals the answer to the Union's challenge. The purpose of a leave for an employee who is on a workers' compensation leave is to permit that employee to recuperate and rehabilitate. Permitting the use of a relief driver would have been perfectly consistent with that objective. By contrast, the purpose of the SWP was to ensure a healthy and working workforce. Permitting an Owner/Operator who chose not to comply with the SWP to use a relief driver would have been contrary to this objective.

Operational Issues

1217. Permitting an unvaccinated Owner/Operator to go off on an indefinite leave of absence imposes serious operational constraints on Purolator.

1218. As submitted previously, an Owner/Operator is still subject to the same requirements as all others.

1219. An Owner/Operator role varies significantly from that of an hourly employee. Unlike an hourly employee, upon engagement an Owner/Operator is required to complete all of the following:

(a) Undergo training.

(b) Successfully pass a criminal background check.

(c) Obtain a truck.

(d) Have a qualifying drivers license.

1220. These requirements were noted by Mr. Hayashi at various points in evidence and summarized in the context of requirements to hire a relief driver.

1221. In some cases, depending on the experience of the driver, this process can take two (2) weeks.

1222. Purolator would be unlikely to find Owner/Operator replacements to cover such contract(s) and undergo strenuous search requirements only to find that they may suddenly be replaced shortly thereafter by an Owner/Operator who suddenly elects to become compliant with the SWP and return to work.

1223. For these reasons, Purolator was reasonable in not permitting an Owner/Operator who had chosen not to comply with the SWP to utilize a relief driver.

1224. Furthermore, it is important to recall you heard testimony from four Owner/Operators:

(a) Chad Crowe: Mr. Crowe testified he intended to become a relief driver for Mr. Moes. Mr. Crowe testified he was able to find a relief driver for himself, but Purolator did not permit him (Mr. Crowe) to become Mr. Moes' relief, because Mr. Crowe was not vaccinated. Mr. Crowe also testified he was not vaccinated, and did not intend to comply with SWP. However, he did not offer any reason, let alone a compelling reason, for his decision not to comply with the SWP. We note the absence of any evidence suggesting Mr. Crowe at any point sought an exemption under the SWP.

(b) Dan Moes: Mr. Moes received a letter dated December 30, 2021, indicating his contract was terminated. However, the letter made no mention of the SWP. Rather, the letter identified Mr. Moes' inability to cover his route as the reason. Mr. Moes argued the reason he was not able to cover his route was because of Purolator's decision not to approve Mr. Crowe's relief driver, which meant Mr. Crowe could not become Mr. Moes' relief driver. It is important to note since Mr. Crowe was himself not in compliance with the SWP, he could not have become Mr. Moes' relief driver. Mr. Moes also testified he was not vaccinated, and did not intend to comply with the SWP.

However, he did not offer any reason, let alone a compelling reason, for his decision not to comply with the SWP.

(c) Gord Hubbard: Mr. Hubbard testified he received a letter from Purolator indicating having a vaccinated relief driver for an unvaccinated Owner/Operator was not acceptable under the SWP. However, Mr. Hubbard did not testify to Purolator having rejected any of his relief drivers. Mr. Hubbard also testified he was not vaccinated, and did not intend to comply with the SWP. However, he did not offer any reason, let alone a compelling reason, for his decision not to comply with the SWP.

(d) Doug Raines: Mr. Raines is an Owner/Operator and a chief steward. He testified that he is aware of a number of Owner/Operators who do not actually drive, but rather rely on relief drivers. However, he did not offer any testimony regarding the particular circumstances of these Owner/Operators.

1225. The following points require emphasis:

(a) Mr. Moes was terminated not because of the operation of the SWP, but rather because of his inability to cover his route as required under his contract. Mr. Moes' attempt to rely on Mr. Crowe's situation is not successful. Mr. Crowe was not able to become Mr. Moes' relief driver because Mr. Crowe himself was not in compliance with the SWP. It would have made little sense for Purolator to approve Mr. Crowe becoming Mr. Moes' relief driver, knowing that Mr. Crowe himself was not in compliance with the SWP, and may need to go on a leave of absence in accordance with the SWP. Furthermore, even if the reason Mr. Moes could not fulfil his contract was because of Purolator's decision regarding Mr. Crowe's relief driver, Mr. Moes has no right to complain about that. It is Mr. Crowe whose rights under the collective agreement to a relief driver is implicated by Purolator's decision.

(b) Neither Mr. Hubbard nor Mr. Raines offered any testimony regarding their relief driver nominations having been rejected by Purolator because of the SWP.

(c) Mr. Crowe offered testimony regarding his relief driver being initially approved, but that this approval was subsequently withdrawn because he (Mr. Crowe) was not vaccinated. However, it is important to keep the context in mind. The reason Mr. Crowe applied for a relief driver was not because he himself had a legitimate reason

for being absent from work. Rather, he intended to cover Mr. Moes' route. Mr. Crowe himself was not in compliance with the SWP. It would have made little sense for Purolator to permit Mr. Crowe to cover Mr. Moes' route, where it was possible that Mr. Crowe himself would end up being on a leave of absence as a result of his non-compliance with the SWP.

[End of employer written submission re Owner Operators]

390. In oral submissions on the final day of the hearing counsel for the employer made some additional points. He also repeated some points covered in the written submissions which I will not refer to here.

391. He stated that I should recognize three categories of LOA:

1. A leave of absence granted (or not prevented) because of absence owing to WCB approved inability to work;
2. A leave of absence granted (or not prevented) because of injury at work whether WCB approved or not;
3. A leave of absence imposed by the employer as a consequence of exclusion from the workplace under the SWP.

392. He stated that under the third category of leave of absence an owner operator should not be able to evade the consequences of non-compliance with the SWP by hiring a relief driver.

393. Employer counsel referred me to *Maple Leaf Sports*, a case decided in January 20, 2022 and referred me to paragraph 21.

> 21. I do not agree with the Union's contention that the seniority rights accorded in Article 13 are being denied. Rather, the Employer has established that being vaccinated for Covid 19 is a necessary qualification for the performance of work within the bargaining unit. Such a determination is reasonable given the pandemic that presently exists. More fundamentally, it is a reasonable and appropriate approach to fulfilling its duties under OHSA for the protection of all workers in its employ. Furthermore, the Employer in this case has taken appropriate steps to protect the confidentiality of any information that is disclosed under its policy.

394. Counsel referred me to Article 20.05 a) and b) of the collective agreement which provides as follows:

> 20.05 Leaves of Absence
>
> a) When the requirements of the company's services will permit, any employee hereunder, and a written application to the company with a copy of said application to the union me, if approved by the company, be granted a leave of absence for a maximum of thirty (30) calendar days.

b) Such leave may be extended for additional periods of 30 (30) calendar days when approved by both the company and the union, in writing and seniority may accrue during such extensions.

395. It was argued that this demonstrates the temporary nature of leaves of absence and that it is contrary to the collective agreement for leaves of absence to be granted or tolerated in the absence of the approvals or consents set out in 20.05 a) or b). The implication was that owner operators should not be permitted to stay absent from work pursuant to an LOA continuing beyond the periods set out. Allowing them to use relief drivers would enable them to remain on an LOA indefinitely, which would be contrary to the collective agreement.

396. The union, by arguing against this proposition, is asking me to rewrite the collective agreement.

[End of description of the employer position]

Analysis

397. The Chad Crowe letters reveal confusion in the employer's response to unvaccinated owner operators. The core goal and purpose of the Safer Workplaces Policy when implemented was to reduce the risk of infection and consequent illness in the workplace by excluding unvaccinated workers from it. This was based upon a belief, reasonable at the time, that allowing unvaccinated workers into the workplace endangered others already there because they were more likely to be infected and pass it on.

398. This, at the time of implementation, was a reasonable workplace safety precaution. Those who elected not to be vaccinated were not treated as insubordinate and were not to be punished for their decision. The SWP at paragraph 5.3 stated that the consequence for those not getting vaccinated would be that they would be unable to work and would be placed on an unpaid leave of absence.

399. This should be contrasted with the specific consequence of progressive discipline for failing to undergo Rapid Antigen testing, and possible termination for a failure to attest also referred to in paragraph 5.3.

400. However, this fundamental aspect of the policy appears to have been forgotten or ignored by the employer in its treatment of unvaccinated owner operators. They were treated as insubordinate, branded as non-compliant, and had their contracts with the employer suspended, effectively terminating the employer's contractual obligations to them.

401. The employer's treatment of these owner operators was declared to be a consequence of "non-compliance with the Policy", which could only mean choosing not to get vaccinated. This choice did not attract discipline under the Policy. The Policy simply provided that if you chose not to be vaccinated you would be excluded from the workplace and placed on a leave of absence.

402. This leave of absence status was not just sanctioned by the employer, it was imposed by the employer.

403. These owner operators continued to have contractual obligations to the employer to service their appointed routes, quite independently of their choice not to be vaccinated and placement on an LOA.

404. But as part of the imposition of inappropriate treatment, the employer took the step of refusing to allow them to use vaccinated relief drivers which would have enabled them to fulfil their contractual obligations to the employer and service their routes.

405. The obligation to service their routes pursuant to their contractual relationship with the employer did not start or stop depending on their presence or absence at work. Article 2.0 of Appendix M makes this very clear. In the event of vacation, illness, accident or LOA "for reasons acceptable to the Company", the article states that the equipment *shall be operated* by an employee of the owner operator.

406. Following the complex interpretive pathway laid out by the employer between paragraphs 1177 and 1190 of its submission the employer appears to be saying "We don't like it that you chose not to be vaccinated. We don't like it that we had to exclude you from the workplace and place you on a leave of absence. So never mind that your LOA is sanctioned, approved and imposed by us, it came into existence for reasons not approved by us. We do not find acceptable or approve of the reasons why we sanctioned and approved the leaves of absence. So we can reasonably invoke Article 2.0. and deny your use of relief drivers". This is a sophistry too far. I reject it.

407. The SWP was designed and created by the employer and provided specifically for the consequence of failing to be vaccinated. This was the placement of unvaccinated employees on a leave of absence. It is unpersuasive to suggest that such an absence is "for reasons not approved by the employer" on the footing that these words refer to some preliminary examination or vetting of the employer's underlying enthusiasm or motivation for granting the leave of absence. The absence, which is what triggers the use of relief drivers, is for reasons specifically set out,

sanctioned and approved by the employer. Lack of enthusiasm or lack of "acceptability" for the reasons why the LOA was granted or imposed in the first place does not engage Article 2.0.

408. Referring to paragraph 1188 of the employer's submission, it is stated:

> The more appropriate interpretation of this language is that an Owner/Operator may not use a relief driver when they are on a leave of absence for reasons not acceptable to Purolator.

409. The provision in question is quite easily construed and understandable given the fact asserted by the union, admittedly without specific evidence, but completely unchallenged by the employer, that owner operators were in the habit of taking an LOA and using a relief driver without asking for express permission from the employer. The caveat in 2.0 is reasonably construed as addressing the possibility that an owner operator might try to take an LOA not specifically approved, which was discovered to be for an unacceptable reason, in which case there will be no LOA. This interpretation is I find much more persuasive than the interpretation advanced by the employer, which claims that the LOA in question is a legitimate and approved LOA (as here imposed by the SWP) but is rendered "unacceptable" because the employer doesn't like the underlying reasons it had for approving it.

410. The employer refers to Letter of Understanding No 2 as supporting its interpretation of limited entitlement to the use of relief drivers. This states:

> The parties agree that employees performing the relief function will be used to perform work in any classification for temporary fluctuations in volume, absenteeism, temporary vacancies or emergencies. Relief employees have no regularly scheduled daily hours work or start times.

411. It is not entirely clear what point the employer is making by referring to this LOU. If it is to underscore that the relief function is to fill in for temporary fluctuations rather than permanent adjustments, this is not in any way inconsistent with the use of relief drivers during indefinite leaves of absence. The word temporary is used to distinguish these fluctuations and other temporary needs, from permanent adjustments to manpower needs. The duration of the temporary situation is not restricted in any way by this LOU.

412. The employer next refers to Letter of Understanding No 3, which it says affirms the time-limited nature of a relief driver. However, the extract referenced by the employer leaves out an important portion of the LOU.

413. This is found at paragraph 2 of the LOU, at page 361 of the relevant collective agreement:

> It shall remain the responsibility of the Owner/Operator to locate and train, (subject to management agreement) a suitable replacement relief contractor to perform the services under contract between the company and the owner operator *for the duration of all absences*.

414. It is only after this general statement of obligation to locate and train a relief driver to perform services under contract, *for the duration of all absences*, that there is a qualification noted in certain circumstances:

> However, in the case of absences due to illness or injury, or due to unavoidable circumstances, and if the duration of the absences is five days or less and at the request of the owner operator, then the company will assist the owner operator in finding a replacement relief person for the duration of the absence, up to the maximum of five days where appropriate…

415. It is only this second portion of the LOU which the employer quoted from to support its contention that use of a relief driver is very time limited. It is apparent from looking at the immediately preceding paragraph that LOU No 3 is not supportive of this at all.

416. In paragraphs 1192 to 1199 the employer suggests that different relief driver wording in the collective agreement appendices E and O applicable to Manitoba and Alberta respectively mean that an owner operator in those two provinces have "better entitlements in terms of utilization of relief drivers than an owner operator in British Columbia". I quote:

> 1193. Appendix "E" contains provisions regarding Owner/Operators in Manitoba. At page 186, the Collective Agreement states:
>
> > In the event an Owner/Operator will not be operating his own equipment for reasons other than loss of license, sick or injury, or a leave of absence that is acceptable to both the Union and the Company…the Company shall post such Owner/Operator run for bids.
> >
> > Section 2.2 – Retaining Services
> >
> > (a) The Owner/Operator shall personally and exclusively operate the equipment supplied pursuant to this Owner/Operator Contract with the Company, except that such equipment shall be operated by an employee of the Owner/Operator, in instances where the Owner/Operator is absent because of vacation, illness, accident or on leave of absence for reasons acceptable to the Company and the Union.
> >
> > (b) The Company will not unreasonably reject employee(s) of the Owner/Operator from being able to perform work for Purolator as outlined in 2.2 a) above.
>
> 1194. Similar language appears under Appendix "O," which govern Owner/Operators in the Province of Alberta (Appendix 7, page 409).
>
> 1195. Two things are important to note.
>
> 1196. First, Appendix "E" explicitly contemplates an Owner/Operator being on a leave of absence for reasons other than those acceptable to the Company.

1197. Second, Section 2.2 b) explicitly prohibits Purolator from unreasonably rejecting an employee of an Owner/Operator from working for the Owner/Operator in the circumstances of section 2.2 a).

1198. The same point applies to the language appearing under Appendix "O." 1199. These provisions are absent from Appendix "M." A meaning must be assigned to this difference. The parties clearly intended an Owner/Operator in Manitoba and - 289 - Alberta to have better entitlements in terms of utilization of relief drivers than an Owner/Operator in British Columbia.

417. With regard to paragraph 1196, the same may be said for Appendix M in British Columbia. The phrase "for reasons acceptable to the Company" clearly implies that there may be reasons for a leave of absence which are not acceptable to the company. This of course does not mean that the reasons for the owner operators' leaves of absence in BC, being specifically approved by the Company, could legitimately be described as "reasons not acceptable to the Company".

418. As for paragraph 1197, the unreasonable rejection of a relief driver proposed by an owner operator has been explicitly prohibited. However, with great respect to the negotiators in Manitoba and Alberta, this provision is redundant. In no case where discretion resides with the employer, either under its management rights or under any other provision of the collective agreement allowing for the exercise of discretion, is the employer entitled to exercise those rights unreasonably. Even less so is the employer entitled to exercise those rights in a manner which is arbitrary, discriminatory, or in bad faith, all of which are encompassed in the employer's treatment of its unvaccinated owner operators in British Columbia.

419. This disposes of Article 2.0 as it does not provide any plausible mechanism or justification for banning the employment of vaccinated relief drivers by unvaccinated owner operators on leaves of absence.

420. What other justifications were put forward by the employer?

421. The first of these is referred to in paragraph 791 in which Mr. Hayashi's testimony was recalled. He stated that the basis for the decision to refuse vaccinated relief drivers is because the union had consistently declared their opinion that relief drivers were not to be used as the equivalent of subcontractors. Thus, permitting the use of relief drivers for an extended period during an indefinite leave of absence was contrary to the union's wishes. This rationale is untenable. In the context of the pandemic and the imposition of the employer's workplace vaccine mandate, including leaves of absence for the duration of the mandate, the union was not going to

complain about the owner operators employing vaccinated relief drivers for the duration of the mandate thus allowing them to service their routes and fulfil their obligations under their contracts.

422. The next argument was to be found at paragraph 795 in which the employer argued that allowing these owner operators to employ vaccinated relief drivers would effectively enable them to be on a potentially indefinite leave of absence, and this could not be what the parties intended. In support of this the employer cites the award of arbitrator Goodfellow in *Central West Health*. The passage cited simply supports a finding that it was reasonable to impose discipline for non-compliance because by imposing the discipline of termination the employer could thereby avoid the operational difficulties associated with having a portion of the work force on indefinite leaves of absence. However, in that case the employer did not have a vaccine mandate policy which specifically contemplated and sanctioned indefinite leaves of absence, while in the present case the employer did.

423. The argument about indefinite leaves of absence is not persuasive. The employer chose to place them on potentially indefinite leaves of absence, so facilitating the continuance of those leaves of absence by allowing vaccinated relief drivers would only be facilitating something the employer had already decreed.

424. The next argument was somewhat related to the previous one. The employer argued that the parties could not have intended to permit potentially indefinite leaves of absence because this would be contrary to the restrictions in the collective agreement on the length of leaves of absence.

425. The employer referred to Gordon Hubbard's testimony agreeing that such restrictions were contained in the collective agreement. Further detail was provided in the course of employer counsel's oral argument on the last day of hearing as set out above. For ease of reference these provisions in the collective agreement are repeated here:

> 20.05 Leaves of Absence
>
> a) When the requirements of the company's services will permit, any employee hereunder, on a written application to the company with a copy of said application to the union may, if approved by the company, be granted a leave of absence for a maximum of thirty (30) calendar days.
>
> b) Such leave may be extended for additional periods of thirty (30) calendar days when approved by both the company and the union in writing, and seniority may accrue during such extensions.

426. The employer's position is untenable. First of all, no evidence that this procedure was ever followed was presented by the employer. It is true that the evidence of union witnesses about lack

of actual compliance with these provisions was not detailed. However, if the employer wished to rely on consistent compliance with this practice as grounds for invalidating the owner operators' lengthy leaves of absence, and/or for refusing the use of relief drivers, it was up to them to bring forward that evidence. Secondly, even if the practice were established this would not have invalidated the owner operators' potentially indefinite leaves of absence. The practice would have required the employer, not the union or the owner operator, to approve an initial 30-day absence, which at the very least was implicitly approved by the implementation of the SWP and the placement of the owner operators on an LOA. The next 30-day absence required the mutual agreement of the union and the employer to additional periods of 30 days, with no limit expressed as to the number of additional periods. The union would have been only too happy to withhold its consent to any additional periods of 30 days, given its opposition to the whole leave of absence program set up under the SWP. The fact that they didn't is confirmation that the process was obviously not followed in the first place.

427. To cap it all, it bears repeating that these potentially indefinite leaves of absence were all sanctioned and imposed by the SWP which was designed and implemented by the employer.

428. In addition, Purolator took its lead from the Federal government when introducing its mandate. The Federal mandate provided for a non-disciplinary response to the unvaccinated. It chose to simply exclude them from the workplace on the grounds that they posed a danger to others, being more likely to be infected and pass it on. Purolator followed the lead of the Federal government in crafting a non-disciplinary response to the choice not to get vaccinated and then proceeded to depart from that lead in the case of the unvaccinated owner operators. This was an unreasonable reaction, and an example of arbitrary and discriminatory treatment. The employer breached the rules in *KVP* by discriminating against one class or category of unvaccinated bargaining unit members.

429. The employer also claimed that its management rights were somehow appropriately engaged in prohibiting the use of relief drivers. I find that they exercised those management rights in a manner which was arbitrary, discriminatory, and in bad faith. This is apparent from the following facts:

a) The prohibition was contrary to the collective agreement, Appendix M Article 2.0 for the reasons I have set out.

b) The prohibition did nothing substantial to advance the objectives of the SWP.

c) The prohibition was an abuse of the employer's discretion (if they had a discretion) to declare the owner operators' absences to be "for reasons unacceptable to the Company", when the absences were because the employer chose to place them on an LOA.

d) The prohibition was a punitive response, contrary to the SWP, to the choice not to be vaccinated.

430. Next, paragraph 1216 of the employer's submission is not persuasive. It asserts that permitting the use of relief drivers would have enabled them to undermine the objective of the Policy. It implies that remaining unvaccinated was a culpable violation of the Policy. The actual wording of the Policy is that remaining unvaccinated was "a contravention of the policy". This is less negative phrasing, consistent with the approach that the employees' rights of personal autonomy and bodily integrity were respected but were overridden by safety considerations.

431. It underscores the mistaken attitude of the employer to the unvaccinated owner operators. It displays again a punitive mindset based on the perception that their conduct was insubordinate and a culpable violation of the policy. The SWP did not provide this punitive response. Prohibiting the use of relief drivers was a measure which contributed little or nothing towards achieving the goals and objectives of the Policy.

432. The employer also claimed that enabling unvaccinated owner operators to go on an indefinite leave of absence, by allowing use of relief drivers, would have caused it to suffer operational inefficiencies and difficulties, including hiring, and training replacement owner operators who would have to be let go once the indefinite leaves of absence came to an end.

433. This assertion is without merit. The employer designed and implemented the SWP, which included imposing indefinite leaves of absence as a consequence of electing to remain unvaccinated. These leaves of absence were to remain in place, for as long as the owner operators chose to remain unvaccinated, or alternatively, for the duration of the SWP. The employer may well have experienced operational difficulties as a result of imposing these leaves of absence. But it was their decision to impose them not the owner operators' decision. It should not go unnoticed that the employer would have avoided all these operational difficulties by adhering to the collective agreement, and the *KVP* rules by allowing vaccinated relief drivers.

<u>The employer's underlying reasons.</u>

434. I have already set out my reasons for rejecting the employer's complicated interpretation of Article 2.0. The key conclusion of this complicated interpretation was that the phrase "for reasons

acceptable to the Company" referred somehow to finding "unacceptable" the underlying reasons or motivations resulting in the LOA.

435. The fact is, however, even if I was persuaded to adopt this interpretation, I do not find reasonable or otherwise valid the employer's underlying reasons. The rationale of the employer for declaring these "underlying reasons" to be "reasons not acceptable to the Company" under Article 2.0. was itself totally unreasonable.

436. I will now review and recap what those reasons were. There may have been other undisclosed reasons, but the evidence at the hearing disclosed the following.

437. The first of these was disclosed through the evidence of Mr. Hayashi. When pressed in cross examination about why the use of vaccinated relief drivers was denied, even though this would have been in compliance with the safety demands of the policy, he said it was because "…we told them to get vaccinated and they didn't do it".

438. This was a clear allegation of insubordination, and a disciplinary response to it.

439. The allegation was unreasonable. The owner operators were told that if they chose not to get vaccinated, they would be denied access to the workplace and be placed on an unpaid LOA. They did what they were told. They stayed away from the workplace and went on LOA. According to the terms of the SWP they were not insubordinate.

440. The second underlying reason which the employer found "unacceptable" was their perception that the owner operators were in culpable violation of the policy. This was demonstrated in a number of ways.

441. The first of these was the language in the letters from the employer to the owner operators, who chose not to be vaccinated, which have been quoted from above.

442. Turning to the letter of December 10, 2021 to Chad Crowe, it included the following:

> Failure to become fully vaccinated, and attest to such, by January 10, 2022, will be considered a failure to meet your contractual obligations.
>
> This will be our final reminder to you of our policy requirement. *On January 10, 2022, you will be found in violation of our policy requirement* and your contract will be suspended. [emphasis added]

443. The next two letters contained variations on the consequences of remaining unvaccinated, but the underlying false message that Mr. Crowe was "in violation of the Policy" remained in place.

444. The next example demonstrating that this was the employer's view, is found in the language of employer counsel's written submissions at the close of the hearing.

445. At paragraph 1191 it is stated that Purolator acted reasonably in exercising its management right "not to permit an unvaccinated owner operator *to utilize a vaccinated relief driver to evade the requirements of the SWP."*

446. At paragraph 1206 the same mistaken theme is repeated. After stating it might be acceptable to use a relief driver when injured or disabled, employer counsel goes on:

> However the case of someone who made a *conscious choice not to comply* with a valid health and safety policy, and this without any compelling basis (and, for that matter, any basis at all) is very different. Such an Owner /Operator made a decision to make themselves unavailable to work. The Collective Agreement does not entitle such a person to a relief driver, *so they can continue to disregard a critical health and safety policy.*

447. Again the misconception is by implication repeated, that to be unvaccinated is a culpable violation of the policy, so using a vaccinated relief driver is somehow escaping the consequences of that violation, or *evading* the requirement, to be vaccinated, which is "unacceptable".

448. At paragraph 1211 there is a further example. There it is stated:

> Furthermore, one purpose of the SWP was to ensure all were both safe and working. Granting an owner operator *who chose not to comply with the SWP the right to use a relief driver would simply have condoned that failure.* There was not something Purolator was required to do.
>
> [emphasis added]

449. In fact, permitting the use of a vaccinated relief driver would have enabled the unvaccinated owner operator to achieve two things. He would have fulfilled the safety objective of the Policy, and he would have been able to fulfil his contractual commitments to his employer. If only the employer could have got past focusing on what it mistakenly perceived as insubordination and culpable violation of the Policy, it could have enjoyed a win-win situation with routes maintained and safety achieved.

450. The rest of the "underlying reasons" I find are in practice inseparable from what I would describe as the primary reasons offered by the employer for prohibiting relief drivers. I have already reviewed them and found them wanting.

XVI Conclusion re Owner/Operator Grievances

451. All these grievances including Dan Moes' are upheld. The Dan Moes grievance is somewhat different and will be addressed below. The rest of the grievances are upheld for the following reasons.

1. Insofar as the prohibition of relief drivers was part of the implementation of the SWP, I find that the policy was applied unreasonably, contrary to the rules in *KVP*.
2. The purported use of Appendix M Article 2.0 to prohibit the use of relief drivers was a breach of the collective agreement. The employer wrongfully attempted to exercise its discretion under that provision to deny the use of vaccinated relief drivers. There were no reasonable grounds for declaring the reasons for their absences not to be "reasons acceptable to the Company".
3. Insofar as the employer exercised any discretion it might have had pursuant to its management rights, to prohibit the use of relief drivers, it did so in a manner which was arbitrary, discriminatory and in bad faith.
4. All the owner operator grievors are entitled to be made whole. They are entitled to be put back into the position they would have been in if the use of vaccinated relief drivers had not been prohibited at the commencement of the SWP and in one case prior to commencement of the SWP.

XVII Grievance of Dan Moes

452. I will now address the grievance of Dan Moes which falls into a slightly different category.

Facts

453. The facts surrounding this grievance are as follows.

454. Dan Moes was terminated on December 30, 2021 for failing to service his route in Port Alberni on Vancouver Island. Mr. Moes, an owner operator with 18 years of seniority, had been injured at work in early September 2021 when he was hit in the head by a door at the Purolator warehouse and suffered a concussion. Since his injury he had been covering his route by employing a relief driver. After his relief driver left in the latter half of November 2021, he struggled to find a replacement.

455. At that time Purolator arranged for Chad Crowe, an unvaccinated owner operator in Nanaimo, to cover his route, consistent with Letter of Understanding No. 4 of the collective agreement.

456. Mr. Crowe covered the route from November 23 until the end of the following week. During that period Mr. Moes found a temporary relief driver named Josh Taylor to cover the week of December 6 to 10, 2021 and made plans with Chad Crowe for coverage beyond December 10.

457. Messrs. Moes and Crowe agreed that Crowe would hire a relief driver to service his own route and then operate as a relief driver full-time for Moes.

458. On December 6, Mr. Crowe submitted a fully vaccinated candidate for relief driver, Mark Nesbitt, to Bruce Merner, the manager of Purolator's Nanaimo depot, for approval. Purolator's approval process was to submit proposed drivers to a criminal record check. On December 7, Merner advised Crowe that Nesbitt had been cleared and gave his permission for Crowe to bring him into the workplace on the following day.

459. Mr. Crowe proceeded to train Mr. Nesbitt on the job for a few days starting on December 8. On or about December 9 or 10, Mr. Crowe had a conversation with Bruce Merner. During this conversation, Mr. Merner asked him why he needed a relief driver. Mr. Crowe advised him that he intended to have Nesbitt cover his own route so that Crowe could act as a relief driver for Dan Moes.

460. Mr. Merner subsequently told him that he was not allowed to use Mr. Nesbitt as a relief driver because Crowe was unvaccinated. Merner explained that since Crowe was not vaccinated and the January 10, 2022 deadline was coming up, it was futile to use a relief driver and it wouldn't matter after the deadline passed. As a result of Mr. Merner's decision, Mr. Crowe was unable to act as a relief driver on Mr. Moes' route because he did not have a relief driver for his own route.

461. Purolator then assigned Mr. Crowe to cover Mr. Moes' route from December 14 onwards but continued to treat Mr. Moes as not having fulfilled his obligations to service his route.

462. On December 28, Mr. Moes advised his supervisor that he had secured a vaccinated driver, Josh Taylor, to be his relief driver commence the following week.

463. On December 30, after having directed Mr. Crowe to cover the route they had prevented him from working on as a relief driver, Purolator terminated Mr. Moes for failing to provide service on his route.

<u>Union Position</u>

464. The union's position was articulated at paragraphs 88 and 89 of its submission.

> 88. Local 31 submits that this termination would not have occurred but for Purolator's decision to reverse its approval of Mr. Crowe's relief driver in early December because they suspected that Mr. Crowe would not comply with the Safer Workplaces Policy, even though the vaccination deadline was at that time a month away.

89. Purolator's actions in this matter represent a serious departure from the stated policy. Purolator discriminated against Mr. Crowe by refusing to allow him to use a previously approved relief driver in the period before the policy's January 10 deadline, in the full knowledge that this would also prevent Mr. Moes from obtaining the coverage he needed for his own route. If Mr. Crowe's treatment had been consistent with that of other owner-operators under the policy, he would have been able to cover for Mr. Moes until January 10, at which point both he and Mr. Moes would have been suspended. Mr. Moes would then have been in the same position as other unvaccinated owner/operators who were denied the use of vaccinated relief drivers and were suspended. He would then have had the benefit of any favourable ruling in this case available to other owner/operators. This discriminatory and punitive treatment cannot be considered a reasonable exercise of management rights under the *KVP* principles and as such, the termination flowing from it is without justification.

The Employer Position

465. The employer's position can be found in some portions of paragraphs 1224 and 1225 of its submission.

> Mr. Crowe testified he intended to become a relief driver for Mr. Moes. Mr. Crowe testified he was able to find a relief driver for himself, but Purolator did not permit him (Mr. Crowe) to become Mr. Moes' relief, because Mr. Crowe was not vaccinated.
>
> Mr. Crowe also testified he was not vaccinated and did not intend to comply with SWP. However, he did not offer any reason, let alone a compelling reason, for his decision not to comply with the SWP…
>
> Mr. Moes received a letter dated December 30, 2021, indicating his contract was terminated. However, the letter made no mention of the SWP. Rather, the letter identified Mr. Moes' inability to cover his route as the reason.
>
> Mr. Moes argued the reason he was not able to cover his route was because of Purolator's decision not to approve Mr. Crowe's relief driver, which meant Mr. Crowe could not become Mr. Moes' relief driver.

It is important to note since Mr. Crowe was himself not in compliance with the SWP, he could not have become Mr. Moes' relief driver.

Mr. Moes also testified he was not vaccinated, and did not intend to comply with the SWP. However, he did not offer any reason, let alone a compelling reason, for his decision not to comply with the SWP.

The following points require emphasis: (a) Mr. Moes was terminated not because of the operation of the SWP, but rather because of his inability to cover his route as required under his contract. Mr. Moes' attempt to rely on Mr. Crowe's situation is not successful. Mr. Crowe was not able to become Mr. Moes' relief driver because Mr. Crowe himself was not in compliance with the SWP. It would have made little sense for Purolator to approve Mr. Crowe becoming Mr. Moes' relief driver, knowing that Mr. Crowe himself was not in compliance with the SWP, and may need to go on a leave of absence in accordance with the SWP.

Furthermore, even if the reason Mr. Moes could not fulfil his contract was because of Purolator's decision regarding Mr. Crowe's relief driver, Mr. Moes has no right to complain about that. It is Mr. Crowe whose rights under the collective agreement to a relief driver is implicated by Purolator's decision.

Mr. Crowe offered testimony regarding his relief driver being initially approved, but that this approval was subsequently withdrawn because he (Mr. Crowe) was not vaccinated.

However, it is important to keep the context in mind. The reason Mr. Crowe applied for a relief driver was not because he himself had a legitimate reason for being absent from work. Rather, he intended to cover Mr. Moes' route. Mr. Crowe himself was not in compliance with the SWP. It would have made little sense for Purolator to permit Mr. Crowe to cover Mr. Moes' route, where it was possible that Mr. Crowe himself would end up being on a leave of absence as a result of his non-compliance with the SWP.

Analysis

466. I have already concluded that the employer's prohibition against the use of vaccinated relief drivers was unreasonable, wrongful and a breach of the collective agreement. The employer in its submission admits that after Mr. Crowe's relief driver was approved, it was withdrawn because Mr. Crowe was unvaccinated. Even within the confines of the employer's SWP based prohibition, this withdrawal was unjustified as the January 10 deadline had not arrived.

467. But more significantly the whole problem confronting Mr. Moes arose directly or indirectly (it doesn't matter which) because of the prohibition against vaccinated relief drivers which was unjustified.

XVIII Conclusion re Dan Moes Termination

468. The termination of Mr. Moes for failing to cover his routes was unjustified. It was not a reasonable application of the SWP. It was arbitrary and discriminatory. Insofar as it was disciplinary for refusing to be vaccinated, it was also not for just cause. His grievance is upheld.

XIX Non Attestation Terminations

469. There is nothing to add to what was stated in the summary section of this award at paragraphs 51 to 54. Insofar as the group grievance covers these terminations this aspect of the group grievance is upheld. Insofar as the individual grievances filed in November 2022 cover these terminations, they are upheld.

XX *Res Judicata*

Background

470. In September 2021 Purolator introduced its Safer Workplaces Policy ("SWP") in response to the COVID-19 pandemic. It required all employees, as a condition of access to the workplace, to be vaccinated by December 25, 2021. It was an integral part of the SWP that those who elected not to be vaccinated, and accordingly could not access their workplace, would be placed on unpaid leaves of absence. The policy came into full force and effect on January 10, 2022.

471. A number of employees at different locations of the employer in Canada elected not to be vaccinated, and as a consequence they were denied access to their workplace pursuant to the SWP and placed on unpaid leave of absence. This led to the filing of a number of grievances.

Arbitrations

472. There have so far been three arbitrations arising from grievances which have been filed against the SWP. These are *Wilson, Morin* and the present arbitration.

473. The chronology for these three arbitrations is of some significance and I will provide it here. The first arbitration was heard by arbitrator Wilson by videoconference on Saturday, January 29, 2022. No witnesses were called and the evidence for his decision was based entirely on an agreed statement of facts filed on or before January 29, 2022. Arbitrator Wilson reserved his decision and published it on March 15, 2022.

474. The second arbitration was heard by arbitrator Morin, also by videoconference. Some limited oral testimony was provided on January 20 and February 24, 2022. The bulk of the facts put before arbitrator Morin were contained in a lengthy series of admissions signed by the union and the employer but not by separate counsel for the grievors. Arbitrator Morin relied heavily on these admissions in his award. These admissions were dated and filed with arbitrator Morin on January 20, 20022.

475. Arbitrator Morin reserved his decision, but before completing his deliberations, the *Wilson* award was released, and published on March 15, 2022. Employer counsel's response to this development was to send a letter to arbitrator Morin advising that the employer wished to file a preliminary objection to the rendering of a decision on the merits of the case, on the grounds of res judicata, based on the decision of arbitrator Wilson having determined exactly the same issue as the issue before arbitrator Morin.

476. Arbitrator Morin acceded to this request and a hearing on the preliminary objection was scheduled and occurred on April 12, 2022. A decision was rendered by arbitrator Morin on April 27, 2022, in which he upheld the preliminary objection of the employer and declared *res judicata*, or its equivalent in Québec, to be applicable.

477. The third arbitration is this one British Columbia. In December 2021 bargaining unit members who had elected not to be vaccinated began to file individual grievances against the SWP for being denied access to the workplace and being placed on unpaid leaves of absence.

478. On January 10, 2022, prior to the commencement of the hearings that led to the *Wilson* and *Morin* awards, the union filed a policy/group grievance on behalf of all vaccinated and/or partly vaccinated members who had been put on leaves of absence or terminated by Purolator.

479. On March 30, 2022, Purolator advised the union that they would be taking the position that *res judicata* applied as against Local 31's grievances. After I was appointed as arbitrator, Purolator

applied to me on May 31, 2022 to bifurcate the proceedings, asking that the parties argue the preliminary objection of *res judicata* prior to the hearing of evidence on the merits of the grievances. On June 24, 2022, I denied the bifurcation application. This decision was appealed by the employer without success, and accordingly the matter proceeded to a hearing which would include the merits of the case as well as the preliminary objection, with no stipulation as to the sequence for consideration of the two branches of the case.

Owner/Operators Exception.

480. Before embarking on analyzing the merits of the positions of the parties with respect to *res judicata* I should say that the owner operator grievances need not be considered in a direct sense in terms of *res judicata*. Nothing like these grievances was advanced before arbitrators Wilson or Morin. I have addressed them independently in this award and have upheld them. This result is in no way dependent on a finding with regard to reasonableness of the SWP for the period in issue. I have detected no serious opposition from the employer to this approach. The only connection between the owner operators and a determination on the reasonableness issue is if another court or tribunal found my decision with regard to the owner operators to be incorrect, but my decision regarding the reasonableness issue to be correct. In such circumstances the owner operators' grievances would still succeed, but have a remedy as of June 30 2022, on the same basis as the hourly paid grievors, rather than a remedy as of the date when they were denied the use of vaccinated relief drivers.

The Three Identities.

481. It is common ground that, for the application of *res judicata*, three identities must be present. They must be the same parties, the same subject matter of cause or dispute, and the same issue. In the present case there is no serious dispute about the first two identities. The union had some things to say about different Locals and expectations about how grievances are processed through different Locals, but these were not sufficient to persuade me that we are dealing with different parties. They are all under one Federal Certification across Canada. The subject matter was clearly the reasonableness of the employer's SWP. However, the parties take different positions about the third identity, which is usually referred to as "identity of issue".

Arbitral Approach to Identity of Issue

482. Arbitrators have long endorsed the principle that deference should be given to previous arbitral awards when the issues in the previous awards are the same as those currently before them.

This approach to deference was articulated by arbitrator Laskin, as he then was, in the oft-cited *Brewer's Warehousing* award:

> It is not good policy for one Board of Arbitration to refuse to follow the award of another Board in a similar dispute between the same parties arising out of the same Agreement where the dispute involves the interpretation of Agreement.
>
> *Re Brewer's Warehousing Co. Ltd*, [1954] O.L.A.A. at para 6. 2 6.

483. This policy has been adapted by arbitrators over the years and has come to be merged to a certain extent with the language and principles of the common law doctrines of *res judicata*. What has remained constant, however, is the requirement that the party seeking to use a prior award to dismiss a subsequent proceeding without a hearing on the merits must demonstrate that the two awards deal with the same issue or question.

484. The burden of a motion to dismiss a grievance other than on its merits rests on the party raising the objection and it is high. It has been characterized as follows:

> It must be clearly shown that to proceed further would be to thwart or frustrate the statutory policy that the awards of grievance arbitrators shall be "final and conclusive". Where such a clear showing is not made i.e. where the scale is evenly balanced – a preference should be given to proceeding in the ordinary way. *British Columbia Hydro & Power Authority*, (1986) 25 L.A.C. (3d) 112 (Munroe) at paras 121-2.

485. The question of issue identity has been dealt with in a number of awards that set out the general approach taken by arbitrators when faced with motions to dismiss based on the effect of prior awards. Union counsel provided a convenient summary which I here adopt.

486. In *Canadian Airlines International Ltd. and C.U.P.E., Re*, [1993] C.L.A.D. No. 1205, the union grieved a snack allowance not being paid to flight attendants on a certain flight route. The employer claimed that the matter had already been disposed of in an earlier arbitration in front of arbitrator Ready and moved that the new grievance be dismissed as being *res judicata*.

487. At paragraph 25, reviewing the jurisprudence concerning prior awards, arbitrator Brown highlighted the necessity of determining that the issue is the same in both proceedings:

> Prior arbitration awards between the same parties dealing with the same collective agreement are accorded persuasive authority in determining subsequent disputes and are generally followed unless the arbitrator is convinced that prior award was wrongly decided. Where, however, the same or identical issue dealt with in an award has been brought forward in another grievance to another arbitration board which is requested to make a determination on the same or identical issue the principle of res judicata has been applied to estop the grievor from proceeding with that claim. In arriving at such a conclusion, three criteria must be met so that if the issue is not precisely the same or identical or there are different parties and agreement

> the reason to apply the principle may not exist; none the less the prior award may be relevant and persuasive with regard to a determination of the merits of the grievance in the second case.

488. At paragraph 35 he characterized the arbitral approach as follows:

> [I]n appropriate circumstances the application of res judicata and issue estoppel has and can be maintained as adapted by arbitrators in relation to the requirement by statutes and adherence to industrial relation principles that an arbitrator's award is final and binding on the parties to the collective agreement. While parties are entitled to fair hearings of their disputes, they are not entitled to unnecessary relitigation of claims and issues which have been settled or determined at arbitration. The application of finality to dispute resolution in the circumstances of a continuing contractual relationship is of utmost importance. None the less, where the criteria for the application of these principles have not been met where the issue is not precisely the same in form or substance, then, in the interests of a fair hearing, the subsequent grievance may be heard on the merits.

489. Ultimately, despite the fact that the two grievances engaged the same article of the collective agreement and both dealt with meal allowances, arbitrator Brown held that "there is some doubt that the identical issue in form or substance contained in the Ready award is raised by the present grievance" and therefore declined to apply the doctrines of res judicata and ordered the hearing to proceed on the merits of the grievance (at paragraphs 39 and 44).

490. In *SGS Canada Inc. and International Longshore and Warehouse Union, Local 518*, [1999] B.C.C.A.A.A. No. 215, the union grieved a number of employer decisions that assigned work outside of the bargaining unit. The employer moved to have the union's grievances dismissed on the basis of *res judicata*, citing two previous awards by arbitrator Greyell interpreting the bargaining unit's scope of work.

491. The union opposed this, arguing that arbitrator Greyell's decisions had dealt explicitly with circumstances in BC's Lower Mainland and not with locations outside of that area, whereas in the subsequent proceedings the work assignments were in Kitimat and locations on Vancouver Island.

492. After summarizing the jurisprudence on prior arbitral awards and *res judicata*, arbitrator Dorsey at paragraph 43 proceeded to establish precisely what had been decided in the prior awards in order to identify which aspects of the union's case might involve deference to the earlier four awards, taking care to ensure he "exercised caution not to reach beyond the evidence or to give arbitrator Greyell's awards broader scope than they clearly state".

493. Having reviewed the prior awards, arbitrator Dorsey determined that they did not include any consideration of port areas outside of the Lower Mainland, such as at Kitimat and on Vancouver Island and there was thus no reason to defer to the awards in relation to grievances dealing with those areas (*SGS* at paragraphs 48-52 and 53-56).

494. In *Winnipeg Health Authority v. Manitoba Government and General Employees' Union,* [2006] M.G.A.D. No. 39, a group of nutritionists filed a reclassification grievance. After the filing of the grievance, but before the arbitration, the parties had also engaged in a separate interest arbitration during collective bargaining.

495. In the interest arbitration the union had argued unsuccessfully that the nutritionists' wages should be benchmarked to those of a higher-paid classification.

496. The employer moved to dismiss the reclassification grievance as being *res judicata*, arguing that it was simply an attempt to relitigate the failed benchmarking from the interest arbitration.

497. In his decision, at paragraphs 33, 36 and 37 arbitrator Peltz proceeded to determine "what precisely arbitrator Werier decided" and indicated that the union's case might be barred "if it was shown that arbitrator Werier decided a factual question which is necessarily part of the pending grievance dispute" and that it was "a material fact or conclusion which was necessarily decided in the earlier case and was fundamental to the earlier decision".

498. Arbitrator Peltz dismissed the employer's application, notwithstanding the similar remedies sought in each arbitration and the overlap in evidence between the two arbitrations, holding that the two proceedings were not dealing with the same question:

> 5 The question which the Union wishes to litigate in the present case is whether or not the Nutritionists have been performing the central or core functions of the higher rated HS4 classification on a regular and recurring basis. Nothing in the interest arbitration award answers these questions directly". (*WRHA* at paragraph 39)

<u>The Common Law Doctrines of *Res Judicata.*</u>

499. Before turning to the specific aspects of *res judicata* which are engaged in the present case, it should be acknowledged that there are two different categories of *res judicata*: cause of action estoppel and issue estoppel. The employer's submissions claim that the same rule applies to both categories and the union says that rule only applies to cause of action estoppel.

500. According to the union a key consequence of identifying issue estoppel as opposed to cause of action estoppel is that, unlike the consequence in cause of action estoppel, any evidence or argument not before the previous court or tribunal may be presented to defeat the conclusion on the issue previously reached even if it could with reasonable diligence have been acquired or thought of at the time of the previous hearing. For the previous conclusion to dictate the result in the second case, it must be able to survive these new facts or arguments. If it does, issue estoppel

will apply. But otherwise not. The employer disagrees and says that this limitation applies to both categories of estoppel.

501. The following excerpts from leading authorities help to explain the difference between cause of action estoppel and issue estoppel.

502. In *Winnipeg Regional Health Authority v Manitoba Government and General Employees Union* 156 (LAC 4th) 142 at paragraphs 37-38, arbitrator Peltz referred to *Danyluk v Ainsworth Technologies* (2001), 201 DLR (4th) 193 at paragraphs 23-25:

> 37. In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on the application of issue estoppel and the relevance of the rule against collateral attack.
>
> Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, *though for a different cause of action.* The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.
> >
> > This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, supra, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", Farwell, supra, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, supra, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.
>
> The preconditions to the operation of issue estoppel were set out by Dickson J. in Angle, supra, at p. 254:
>
> > (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

> 38 This discussion is helpful in the present case. When arbitral and court authorities speak of "the same question" for purposes of an issue estoppel, *they mean a material fact or conclusion which was necessarily decided in the earlier case and was fundamental to the earlier decision.* As stated in *Leisureworld,* supra, (at p. 57-58), "the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action ... is conclusive ..." Issue estoppel applies *if the precise point was determined with certainty in the earlier decision.* [emphasis added]

503. In *Doering v. Grandview (Town),* [1976] 2 S.C.R. 621 the respondent sued the appellant municipality in 1969 for damages to his land and crops resulting from flooding in the years 1967 and 1968 and alleged to be due to a dam earlier built by the municipality but altered by it in 1967. The action was dismissed on May 24, 1973.

504. Some nine months later, the respondent commenced a new action, claiming damage to his crops from water in 1969, 1970, 1971 and 1972 as a result of the municipality having maintained the river waters at an artificially high level behind the same dam, causing the water of the river to enter an aquifer consisting of sandy soil about four feet below the surface of the respondent's lands and thus to saturate the soil with water.

505. A motion was brought by the municipality seeking to have the second action stayed or set aside. The trial judge granted the motion and stayed the action. On appeal, the judgment of the trial judge was reversed by a majority of the Court of Appeal and from that decision the municipality appealed to the Supreme Court.

506. Held: (Laskin C.J. and Spence, Pigeon and Beetz JJ. dissenting): The appeal should be allowed and the order staying the action restored.

507. The headnote summary of the majority judgement reads:

> Per Martland, Judson, Ritchie, Dickson and de Grandpré JJ. The principle of res judicata applied in this case. The issue of whether the river was caused to overflow its banks and damage the respondent's lands because the town had wrongfully impounded the waters behind the dam was thoroughly explored in the first action. The same question was raised in the present action. Although the years when the damage was alleged to have occurred in the second action were different from the first, all other conditions were exactly the same except that since judgment was rendered in the earlier action, the respondent had taken advice leading him to the conclusion that the water which damaged his crops, although coming from the same source, reached his land by saturation through an aquifer rather than by "flooding".
>
> It was not alleged by the respondent that he could not by reasonable diligence have put himself in a position to advance the theory of soil saturation through the aquifer at the time of the first action, nor could it be said that his failure to raise that particular point did not arise "through negligence, inadvertence or even accident". A burden lay upon the respondent to at least allege that the new fact could not have been ascertained by reasonable diligence at the time when the first action was commenced before he could invoke it so as to expose the appellant a second time to litigation arising out of the same conduct.

508. The judgment of Martland, Judson, Ritchie, Dickson and de Grandpré JJ. was delivered by J. Ritchie.

RITCHIE J.:-- I have had the advantage of reading the reasons for judgment of my brother Pigeon in which he has recited many of the facts giving rise to this appeal as well as relevant portions of the pleadings and of the judgments in the Manitoba Courts.

This is the second of two actions brought by the respondent against the Town of Grandview; both actions are founded in nuisance and both assert claims for damage by water to the respondent's land and the crops thereon, allegedly caused by the conduct of the Town of Grandview in the construction and operation of a "make-shift" dam whereby the waters of the Valley River where it runs through the respondent's land, were so "impounded" as to have adversely affected his soil and crops.

The first action was brought in April 1969, claiming that by repairing and replacing a dam previously existing, the town had "impounded a large volume of water and caused to be built up a large unnatural and above normal head of water ... and raised the water levels in the said River ... and it is further alleged that "the said dam obstructed the natural flow of water and caused the waters therein to overflow the banks ... flooded, inundated, cut away and eroded the plaintiffs' said land."

The first case which related to damage to the plaintiffs lands and crops in the years 1967 and 1968, and is herein referred to as the 1969 action, was apparently not called for trial until September 1972, at which time the hearing was adjourned until May 1973, when Chief Justice Tritschler rendered his decision, the opening words of which indicate that both parties had ample time to consider all phases of the matter before and during the trial; in this regard, the Chief Justice observed:

This case has been before the courts for many years, and this is our second hearing. Chief Justice Tritschler's reasons for judgment are conveniently recited in the reasons of my brother Pigeon and I only find it necessary for the purpose of these reasons to abstract the following two quotations:

(i) The very simple issue here is whether the frequent flooding of Mr. Doering's land, which no one disputes, is attributable to the maintenance by the town of Grandview of its dam.

Unfortunately, Mr. Doering has convinced himself that the dam has been the cause of his flooding troubles. That is not so. Not only has he failed to satisfy the onus of proving that the flooding of his land was caused by the defendant's dam, but his own evidence establishes the very contrary of that; namely that the flooding would have taken place if the dam had not been in existence.

(ii) It is clear from the evidence that plaintiffs land is going to be flooded to some extent nearly every year because it will flood whenever the flow exceeds 750 cubic feet per second, and the mean flood is 879 cubic feet per second. You are going to have flooding there every year except in a dry year like the present.

The evidence fully satisfies the Court that the flooding, *which is the subject matter of this action,* was not caused and was not contributed to by the defendant's dam.

Within nine months of this judgment being rendered, *a new action was commenced* by the same Mr. Doering claiming damage to his crops from water in 1969, 1970, 1971 and 1972 as

a result of the Town of Grandview having maintained the waters of the Valley River at an artificially high level behind the same dam. The conduct alleged against the town as *the foundation for both actions* was the same, namely, the impounding of the waters of the river at an artificial height due to the dam, but in the second action it was alleged that the damage was occasioned by the "impounding" causing the water of the river to overflow and enter an "aquifer" consisting of sandy soil about four feet below the surface of Doering's lands and thus to saturate the soil with water.

The reason for *bringing the second action* is frankly explained in the affidavit filed herein by Mr. Doering where he says:

3. I consulted Walter Carman Newman about taking an appeal from that judgment which held that the damage to my land and crops that I suffered in 1967 and 1968 was not caused by surface flooding by waters impounded by the dam in question.

4. I was advised by Walter C. Newman that the damage to my land and crops which continued in 1968, 1969, 1970, 1971 and 1972, was probably not due to surface flooding at all but caused by the impounded water flowing through an aquifer layer underneath the topsoil of the plaintiff's land and saturating the ground above during the relevant periods. He further advised me that since these issues were not dealt with in the 1969 action, an appeal would be ineffectual in such a case and that I had to start another action.

5. Acting upon the suggestion of Walter C. Newman I consulted Professor Andrew Baracos, a recognized soils expert, who conducted tests on the said land and confirmed the suggestion of Walter. C. Newman.

6. Prior to 1973 I had no knowledge of an aquifer lying close beneath the topsoil of my land or the effect that such an aquifer would have when waters are impounded at an artificial height in a river to which the aquifer extends, I believing only that the saturation of my soil could only be due to surface flooding. The question of the aquifer was therefore not raised in the 1969 action and the action in any event could not deal with the damage caused to my land and crops in the years 1969 to 1972 both inclusive.

This affidavit was filed on a motion brought by the defendant before Chief Justice Dewar *seeking to have the action stayed or set aside*. Excerpts from the decision on that motion are once again conveniently recited in the reasons for judgment of my brother Pigeon. I only find it necessary to advert to the following paragraph which he quoted.

None of the facts alleged re the conduct of the defendant *in the pending action* are new, in the sense that they did not exist *when the prior action went to trial* in September 1972. There is no suggestion the aquifer, now alleged to serve as a conductor of water from the forebay to plaintiffs lands, did not exist in the years 1967 through 1972. All of the facts now alleged as to tortious conduct (which is the essence of this type of actionable nuisance) were available and *could have been brought forward in the prior action.* If they were not, whether by inadvertence, failure to exercise reasonable diligence, or accident, the plaintiff is not now entitled to pursue what is substantially the same claim, but for damage alleged to have been sustained in subsequent years.

[emphasis added]. Later in his judgment, Chief Justice Dewar cited the cases of Henderson v. Henderson [(1843), 3 Hare 100.] and Ord v. Ord [[1923] 2 K.B. 432.] and quoted the following passage from Vice-Chancellor Wigram's reasons for judgment in the former case at p. 115:

> ... I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

In reversing the judgment of Chief Justice Dewar, Matas J.A., speaking for himself and Freedman C.J.M., (Guy J.A. dissenting) in the Court of Appeal of Manitoba, referred to the last-quoted excerpt from the case of Henderson v. Henderson, but adopted the interpretation placed upon that case by Johnson J.A., with whom Ford C.J.A. agreed in the Court of Appeal of Alberta in Hall v. Hall and Hall's Feed and Grain Ltd. [(1958), 15 D.L.R. (2d) 638.], where he characterizes the proposition stated by Vice-Chancellor Wigram as "the wider principle of res judicata" and goes on the say:

> *It was apparently the wider principle of res judicata that was applied in the present case. This doctrine has not so wide an application as the broadness of the language might lead one to infer. It is limited to such matters as arise within one cause of action. It is, I think, clear that if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct.*
>
> In that case the first action had been brought for an accounting between husband and wife, where the second action involved the allegation that a business partnership had existed between them which had been converted into a limited company and the wife sought compensation for her interest in the partnership. *There were thus clearly two separate causes of action, but with the greatest respect, I cannot agree that the causes of action in the two cases here under consideration are separate and distinct.* [emphasis added]

As Chief Justice Dewar points out, all the facts which are alleged to constitute tortious conduct by the town in the present case existed *when the prior action went to trial* and it was there found that these facts did not support the present respondent's action for damage to his crops by water. The only new issue raised in the present case is the contention that the same conduct for which the town was exonerated from blame in respect of damage to crops in 1967 and 1968 is blameworthy in respect of the damage done in 1969, 1970, 1971 and 1972 because, although the water came from the same source, it reached the respondent's land by a different route. The aquifer was on the respondent's land before 1967 and he states in his affidavit that damage to his land and crops complained of in the first action was probably caused by it according to the information which he received from the expert whom he consulted after the trial. Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory. Such an expert could probably have been consulted before the first action, and if he had been then the matter would no doubt have been put in issue at that time, but in

my view the circumstances here are to be considered in the light of the principles established in Phosphate Sewage Co. v. Molleson [(1879), 4 App. Cas. 801.], where Lord Cairns said, at pp. 814-5:

> As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that *a party who has been unsuccessful in a litigation* can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it *ought now to be allowed to be the foundation of a new litigation,* and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words res noviter veniens in notitiam, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to. [emphasis added]

509. It is apparent from the reasons of the Supreme Court that it agreed with Chief Justice Dewar, the litigation was essentially an attempt at re-litigation of the same cause of action.

510. The plaintiff was alleging the same harm, the same source of harm, but assisted by a different expert, was saying that the excess water causing the harm percolated through undefined subterranean channels, as opposed to arriving by flooding on the surface. There was, one might say, a different chain of causation being alleged, but it was essentially the same action involving the same parties.

511. It was this conclusion which dictated the result in the Supreme Court decision. However, it is implicit in that judgement that had the two claims not been identified as essentially the same cause of action, the presentation of new evidence and argument would not have been foreclosed. Ritchie J referred to the citation by Matas JA of the dictum in *Hall v Hall* limiting the restrictions on new evidence and argument to cases where there was a single cause of action. He did not disagree or disapprove of the statement quoted but went on to conclude that in the case at bar there was only one cause of action, so the limitations applied.

512. This being so the court, by necessary implication endorsed the point made in *Hall v Hall*. Accordingly, *Doering* is therefore good authority for the proposition that limitations on new evidence and argument are applicable only to cause of action estoppel, and not to issue estoppel.

513. In *Erschenbaumer v Wallster* 2013 BCCA 76, it was stated:

12 The general principles of the doctrine of res judicata were reviewed by this Court relatively recently in *Cliffs Over Maple Bay*.

The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

13 In *Cliffs Over Maple Bay,* Madam Justice Newbury set out the *requirements of issue estoppel* at para. 31(from *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* (No. 2), [1967] 1 A.C. 853 at 935, as quoted with approval in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254):

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. ...

In the present case, it is not asserted that the issues the defendant wishes to raise as defences were questions decided in the first proceeding. *Accordingly, it is not necessary to give further consideration to issue estoppel.*

14 *With respect to cause of action estoppel*, Newbury J.A. quoted, at para. 13, from the seminal case of *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 at 319 (Ch.):

> In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

She noted, at para. 14, that this language has been somewhat narrowed by the decision in Hoque v. Montreal Trust Co. of Canada, 1997 NSCA 153, 162 N.S.R. (2d) 321, where Mr. Justice Cromwell stated that the doctrine should apply to "issues which the parties had the opportunity to raise and, in all the circumstances, should have raised" (para. 37).

15 Madam Justice Newbury set out *the requirements of cause of action estoppel* at para. 28 (from *Grandview v. Doering*, [1976] 2 S.C.R. 621, as summarized in *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, aff'd (1987), 45 D.L.R. (4th) 766 (Man. C.A.)):

> 1.There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
>
> 2.The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
>
> *3.The cause of action in the prior action must not be separate and distinct;* and
>
> 4.The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

16 Although it is *referred to as cause of action estoppel*, the principle applies to defences as well as claims. This is explained in Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham, Ontario: LexisNexis, 2010) at 137-38:

> While the plaintiff may not split a cause of action or pursue litigation by instalments, the defendant may not split the defence by turning around and, as the plaintiff in a subsequent action, sue on an issue which, if successful, would challenge the integrity of the previous judgment. This is what was attempted in *Henderson*.
>
> ….In other words, a cause of action in a second action which could have been a defence in the first action, but was not raised, is barred ... The cloak of cause of action estoppel is woven the same for both the plaintiff and the defendant in subsequent proceedings. [emphasis added]

514. It is apparent from the above extracts that in the case of cause of action estoppel a previous judgement may not be undermined or attacked on the basis of new arguments or facts which could with reasonable diligence have been brought forward when that cause of action was being litigated. However, it appears that the rule is not applicable when issue estoppel is being advanced. The highlighted passage in *Hall v Hall* underscores this.

515. The term “cause of action” is not used in labour arbitration, so some translation for the purpose of explaining cause of action estoppel is necessary. A reasonable equivalent in labour arbitration would be where there were grievances submitted to two different arbitrators involving identical issues, and the question submitted to the first arbitrator and decided by him/her was the same question submitted to a second arbitrator.

516. The *Morin* decision is a perfect example of cause of action estoppel as applied in a labour arbitration setting. The exact same question was asked of both arbitrators. It covered a very similar time period.

517. The question asked of me is by no means the same question. I am asked to adjudicate the reasonableness of the SWP between January 10, 2022 and May 1, 2023, which requires me to take

into account facts and circumstances which by definition could not possibly have been before those two arbitrators.

518. Cause of action estoppel is accordingly inapplicable. If the statement of the law in *Hall v Hall* quoted above is correct there is therefore no bar in this case to advancing facts and arguments which could with due diligence have been acquired or thought of in earlier arbitrations. The employer maintains that the limitation is applicable in this case. Most of the cases it cites in support engage cause of action estoppel not issue estoppel. These include *Erschenbaumer, Grandview*, as well as *Hill v Hill*, 2016 ABCA 49.

519. The employer also cited *Apotex Inc v. Merck & Co* 2002 FCA 210 in support of its position. The Court in that case did assert the point referred to by the employer. However, I have read the decision and it appears to mix up the limitations on new arguments and facts applicable to cause of action estoppel and assumes they apply to issue estoppel as well.

520. The *Apotex* decision also cites *Merck & Co v Apotex*, 1999 FCJ No 2022, a decision of the Federal Court of Appeal, as supporting this view. However, that case is one which applies the limitations to cause of action estoppel not issue estoppel. I quote from the decision at para 12:

> 12 The policy of the law strongly favours the finality of court orders, not only so as to ensure the certainty of transactions but also the integrity of the judicial process. In a passage from a decision of the Supreme Court of Nova Scotia en banc that was quoted with apparent approval by the Supreme Court of Canada, it was stated:
>
> > The doctrine of res judicata is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgement between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising. It is clear that the plaintiff must go forward in the first suit with his evidence; he will not be permitted in the event of failure to proceed with a second suit on the ground that he has additional evidence. In order to be at liberty to proceed with a second suit he must be prepared to say: "I will shew you this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been ascertained by me before."
>
> 13 This policy is of long-standing and has been consistently upheld and applied by the highest authorities both in England and in Canada for at least a century and a half. It was first enunciated in 1843 by Vice-Chancellor Wigram, as follows:
>
> > In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in

> respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

More recently, there was a passage quoted with apparent approval by the Supreme Court of Canada, where Lord Denning M.R. stated:

> The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, *there is a strict rule of law that he cannot bring another action against the same party for the same cause*. Transit in rem judicatam ... But *within one cause of action, there may be several issues raised which are necessary for the determination of the whole case.* The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceeding except in special circumstances. ... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self- same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances... [emphasis added]

521. These passages identify the limitations in question as applicable only to cause of action estoppel.

522. Other decisions which have been cited in Lange 5th Edition as supportive of the employer's position include *Minott v O'Shanter Development Co* 1999 42 OR (3d) 321 (CA).

523. In *Minott* at paragraph 331 the court decided that in the first case no evidentiary findings had been made on a key issue and then went on to say:

> "had any evidentiary findings being made, the parties might have been precluded from relitigating those findings in the subsequent wrongful dismissal action if the other requirements of issue estoppel had been satisfied. Those findings would not have disposed of the wrongful dismissal action, but they may have narrowed it"

524. This is not a strong statement supporting the employer position. First of all the comment is that the parties "*might* have been precluded from relitigating those findings" without actually deciding the point. Secondly, the comment is *obiter* because having concluded that there were no

such evidentiary findings, it was not necessary to explore possible limitations on the right of a party to raise new arguments or facts in the second action distinguishing their issue from the issue decided in the first action.

525. In *Moody v Ashton*, 2004 SKQB 488, 248 DLR (4th) 690 the court cited *Minott* with approval, as if it provided clear authority on the point, without further discussion.

526. In *Moody v Ashton* the central issue was whether a consent dismissal amounted to a final judgment on the merits. The comment about the consequences of issue estoppel is indirect and incidental to the decision. It is *obiter.*

> 8 It is well established in jurisprudence that for the doctrine of res judicata to apply, three elements are required to be present: firstly, the subsequent proceeding must involve the same parties; secondly, the matters in dispute in the second action are identical to those in the first action; thirdly, the judgment in the first action must have been on the merits of the case. While the first two requirements appear to have been met, it is clear that there has been no disposition on the merits of the case by a court of competent jurisdiction. *Had the matter before this court been determined on the merits by a court of competent jurisdiction, then the two-armed doctrine of res judicata would apply; the cause of action estoppel, where a second action is brought for the same cause of action and has been the subject of a first action; and issue estoppel where a point or issue of fact in a second action has already been decided in a first action, although the cause of action may be different.*
>
> 9 It must be decided in this case whether the consent to the dismissal of an action is a final judgment on the merits, thereby barring a commencement of a second action pursuant to the doctrine of res judicata. [emphasis added]

527. There is thus a reference to the "two armed" doctrine of *res judicata*, on the assumption that both cause of action and issue estoppel are engaged, but there is no explanation or analysis as to why both arms are engaged. This is understandable because in that particular case it did not matter which branch or arm would have been applicable, but this does not amount to a strong authority from which to conclude that both arms would have been engaged in that case, because the ruling was that *res judicata* did not apply for other reasons. The comment as I have said, was *obiter*.

528. *Price v Shediac (Town)* [1992] N.B.J. No. 108 is an authority which could be read as contrary to the union's position on this point. The decision cites with approval *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd et al. (1988) 47 D.L.R (4th) 431*, where Chief Justice McEachern, of the BC Supreme Court, stated at page 438:

> ... no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing.

> The exceptions to the foregoing include fraud or other misconduct in the earlier proceedings or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence ...

529. This passage appears to apply the reasonable diligence test to both cause of action estoppel and issue estoppel. It is therefore inconsistent with the distinction implicitly recognized and approved in *Doering*, which is a decision of a higher court.

530. It can be seen from this review that the point is not without controversy. I consider the correct view is as stated in the quote from *Hall v Hall* set out above and as implicitly approved in *Doering.*

531. That conclusion is, however, likely not required for a decision in this case. Assume for the sake of argument that the employer is right, and the union in defending the issue estoppel objection is subject to the limitation that in the earlier proceedings before *Wilson* or *Morin* it was obliged to bring up all data and arguments then available by the exercise of reasonable diligence. The exercise of reasonable diligence could not possibly have enabled the union to bring up all the medical and vaccine science data as well as other facts which emerged later, after the final date on which evidence on those facts and data was presented in the *Wilson* and *Morin* cases, which were respectively January 20 and January 29, 2022 (excluding the personal evidence given in the *Morin* case on February 24, 2022).

532. These later facts which could not possibly have been foretold or unearthed in January 2022 included the lifting of the Federal mandate in June 2014, and the disappearance of evidence for third party requirements by the same date at the latest.

533. My overview of the history and chronology set out in Section II above describes the developing awareness in the medical community of the total ineffectiveness, to the point of statistical insignificance, of the vaccines to protect against infection after 25 weeks. This developing awareness became a certainty, no longer justifying the application of the precautionary principle, sometime in the late spring of 2022, and no longer justifying a vaccine mandate. It is contrary to logic and common sense, as well as contrary to the foundational principles of *res judicata* to eliminate or foreclose at this stage all that evidence received in a full hearing on the merits because of what two arbitration awards decided well before this growing awareness became a certainty and other significant facts emerged.

<u>Issue Identity in Issue Estoppel and Abuse of Process by Re-Litigation.</u>

534. The leading case is *Angle v Minister of National Revenue* (1974) 47 DLR (3d) 544 (SCC).

535. At page 4, the majority reasons state that the test for issue identity, when it is claimed that res judicata prevents the subsequent case being heard on the merits, is:

> "…whether the determination on which it is sought to found the estoppel is "so fundamental" to the substantive decision that the latter cannot stand without the former. Nothing less than this will do."

536. The reverse of that coin is that if the substantive decision in the subsequent case can stand or happily co-exist with the former decided issue incorporated into it, there is no issue estoppel. *Res judicata* has no application.

537. The following thus summarizes the issue estoppel test. It requires:

1. Precise identification of the issue that has been decided in the first case.
2. The decision on the issue in question must have been central or pivotal in that case.
3. The claim in the second case cannot prevail if the same conclusion on that decided issue is a necessary ingredient for its success.

538. The same stringent requirement of issue identity also applies to the doctrine of abuse of process by relitigation. See *Petrelli v. Beach Holiday Resort Ltd,* 2011 BCCA 367 at paragraphs 70-72; *Lougheed Estate v. Wilson,* 2012 BCSC 169 at paragraphs 87-88.

539. The application of this test to the employer's preliminary objection is fatal to it. My decision on the merits peacefully co-exists with the decisions in *Morin* and *Wilson*. By way of further explanation, the only issue in this case (barring the owner operators' grievances which do not realistically engage res judicata) is articulated by the employer at paragraph 9 of its submission on the merits:

> Purolator submits the SWP was a reasonable exercise of Purolator's management rights under the National Collective Agreement from the time it was implemented to when it was suspended effective May 1, 2023.

540. This description of the issue should perhaps be expanded to include the assertion that the SWP as a unilaterally imposed management rule passes the *KVP* and *Irving* tests. It was reasonable between January 10, 2022 to May 1, 2023.

541. I agree with the employer that this is the central issue in this case. This means that if the union is able to satisfy me there was a period of time when the SWP was not reasonable, then the grievances are upheld, the only issue then being quantum. If that period of time is a different period of time than was considered and assessed in the *Wilson* and *Morin* decisions (which it is), this substantive decision can stand comfortably alongside them and accords them due deference.

It is not inconsistent with them. Those decisions in no way invalidate or undermine my decision. My decision in no way undermines or contradicts those decisions. I should point out in passing that I agree with arbitrator Morin's invocation of the doctrine of *res judicata*. The facts and circumstances he was addressing were indistinguishable from those addressed by arbitrator Wilson and, as I have said elsewhere, were a perfect example of cause of action estoppel applied in a labour law context.

542. A quick review of my decision on the merits will confirm that I am in agreement with the result in both those awards. I have found that the SWP was reasonable between January 10, 2022 and June 30, 2022. The evidence, agreed statements of fact, and admissions considered in those two awards were presented in the case of arbitrator Wilson, on January 29, 2022, and in the case of arbitrator Morin, on January 20 and February 24, 2022. They could only make decisions about reasonableness covering the period of time they reviewed and received evidence about. (Arbitrator Morin purported to ban all future grievances against the SWP but I believe with great respect that he was wrong in that.) These arbitrators do not and did not have a crystal ball. This award on the merits is not only consistent with those awards but expands the scope of their applicability to June 30, 2022.

543. It will thus be apparent that identity of issue is absent as between this award on the merits and the *Wilson* and *Morin* awards.

544. There is a fundamental error in the employer's approach to issue identity in this case. It persists for the most part in treating arbitral assessment of the reasonableness of the SWP as a static one-time assessment, akin to a termination, where the facts and circumstances are ascertained and fixed, and on the basis of those fixed facts and circumstances a ruling on just cause is given. The vast majority of *res judicata* authorities are immersed in that kind of fact pattern. This is not surprising because if the *rem* previously adjudicated is fluid and constantly changing the next *judicatam* is unlikely to be same *rem*.

545. The employer demonstrated throughout its submissions a repeated failure to acknowledge the fundamental difference between submission of that static type of subject matter to the adjudicative process and the process involved in adjudicating evolving and fluid subject matter. Here the adjudicative process involves a continuing assessment of the reasonableness of the employer's performance in striking a balance as required in *KVP* and *Irving* and continuing to respond appropriately and reasonably to the evolution of the virus, developing vaccine science and high levels of vaccination in the workplace and the population as a whole.

546. That being so, it is not appropriate to invite me to abdicate my adjudicative responsibility and invoke the doctrine of *res judicata* because of two decisions which considered circumstances in January and February of 2022, and which could not possibly have anticipated the circumstances prevailing in late June 2022.

547. The fact that the situation was fluid and evolving is supported by the arbitral jurisprudence on vaccine mandates. Arbitrators addressing vaccine mandates across Canada have acknowledged that COVID-19 created a dynamic and evolving situation. It has been repeatedly recognized that this fluidity affects the analysis of the reasonableness of policies put in place to respond to it. Examples include the following:

> a. It must also be noted that the circumstances at play may not always be static. The one thing we have all learned about this pandemic is that the situation is fluid and continuing to evolve. What may have been unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa.
>
> *Electrical Safety Authority v. Power Workers' Union (COVID19 Vaccination Policy Grievance),* [2022] O.L.A.A. No. 22 at para 73.
>
> b. As is clear from our experience of the COVID-19 pandemic over the last two years, circumstances change quickly, and it is difficult to anticipate what may occur next. The evidence in this case demonstrated that well: in March 2020, at the beginning of the pandemic, the Employer changed its Immunization Program; in June 2021 it introduced a new COVID-19 Vaccination policy; and by late August 2021 it introduced the September 2021 Mandatory Vaccination policy in response to concerns about the Delta strain of the COVID-19 virus. We are now dealing with the Omicron variant, and it is impossible to know what comes next. Similarly, the Ontario government and public health authorities have been changing their policies as each new wave of infection occurs or virus strain emerges. New versions of vaccines and medications are being released on an ongoing basis to assist with curbing or treating COVID infections. It is safe to say that the COVID-19 situation is fluid.
>
> *Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Mandatory Vaccination Policy Grievance),* [2022] O.L.A.A. No. 53 at paras 230-231.
>
> c. The first arbitration case in Ontario to be decided in this COVID-19 context was ESA where the mandatory vaccination policy was found to be unreasonable. In setting out the basic framework for analysis Arbitrator Stout explained that the reasonableness of a 19 policy was a highly contextual matter involving the balancing of interests that will vary from workplace to workplace, and will be fluid, potentially changing as circumstances change. … I cannot predict the future, but I fully agree with Arbitrator Stout that the situation is extremely dynamic and what is reasonable is the circumstances can easily change such that what is reasonable today may be unreasonable in the future, and the converse also applies. Such is the reality of the pandemic and arbitrators can only deal with the facts before them and must be wary of prognosticating into the future without the expertise to do so.
>
> *Power Workers' Union and Elexicon Energy Inc.,* 2022 CanLII 7228 (ON LA) at paras 84 & 113.
>
> d. Changes to the progress of the pandemic and responses to it are dynamic and arbitral decisions are responding to those changes, as appropriate.

BC Hydro and Power Authority and Powertech Labs Inc. v. Moveup (Canadian Office & Professional Employees' Union Local 378) (Vaccine Mandate Policy Grievance), [2022] B.C.C.A.A.A. No. 77 at para 27.

> e. There are now a considerable number of arbitration decisions dealing with the implementation and maintenance of employer policies requiring employees to be vaccinated against COVID-19 in order to remain actively working. There is no real dispute here as to the generally applicable legal principles set out in those decisions. The factors set out at paragraph 34 of *KVP*, infra, must be assessed. The fundamental factor in dispute in this case is the reasonableness of the Policy in the circumstances of the Employer's workplaces in the context of the changing nature of the COVID-19 pandemic.

FCA Canada Inc. v. Unifor, Local 195 (COVID-19 Vaccine Mandate Grievance), [2022] O.L.A.A. No. 187 at para 3

548. These observations underscore the need to recognize the difference between a static set of facts and circumstances and evolving facts and circumstances when looking for possible identity of issue.

549. The following is a partial list of facts and circumstances which differed between what was presented to arbitrator Wilson in the agreed statement of facts ("ASF") and the facts and circumstances presented in the present case.

550. There was no evidence in the ASF concerning the waning of vaccine effectiveness over time with respect to Delta or Omicron. There was no reference to the reduced severity of the Omicron variant.

551. It did not become clear until late March or April, that two-dose vaccination after 25 weeks provided statistically insignificant protection against infection. This of course was missing from the ASF presented to arbitrator Wilson because this development in awareness and understanding of the full impact of the immune evasiveness of Omicron and the extreme degree of ineffectiveness of the vaccines had not yet occurred.

552. The lifting of the Federal vaccine mandate on June 20, 2022 was not mentioned in the ASF. Of course, it could not possibly be mentioned because it had not occurred as of January 29, 2022.

553. Evidence of current third-party requirements had existed and was presented in January 2022 but I have concluded that meaningful evidence of it had disappeared, or was not presented as current, by June 2022.

554. I could go on, but this perhaps is sufficient to make the point that the facts and circumstances in the ASF filed on January 20, 2022, addressed by arbitrator Wilson were very different than the facts and circumstances I have been presented with in this arbitration.

555. Likewise, the admissions provided to arbitrator Morin made no specific mention of the Omicron variant. The admissions contained no reference to the primary series vaccines drastically

reduced effectiveness against infection from Omicron. Again, it is obvious that a whole range of factors influencing my decision in this case were not included in the admissions before arbitrator Morin and could not reasonably be expected to have been included because many of them were developments that had not occurred when the admissions was signed and delivered on January 20, 2022, or when some grievors testified and evidence was concluded, on February 24, 2022.

556. The mass of data and everything driving my conclusion which fixes a time after which the SWP was no longer reasonable all negate the application of issue estoppel by recognizing the existence of a different set of circumstances existing as between the *Wilson* and *Morin* awards and my award, in which the continuing reasonableness of the SWP had to be assessed. The necessary ingredient of issue identity is absent.

Discretion and fairness in the doctrines of res judicata

557. The employer and the union disagree in their interpretations of the authorities on the subject. There is merit in both their positions. I am not inclined to enter that debate because *res judicata* is so clearly inapplicable to this case that the discretion and fairness arguments are academic.

XXI Conclusion with respect to the employer's *Res Judicata* Preliminary Objection

558. The objection is dismissed for all the reasons set out above.

XXII Detailed Summary of Result in Hourly Paid Grievances and Group Grievance

559. Matters addressed in paragraphs 1 to 377 of this award have led me to the conclusion that the SWP ceased to be reasonable as of June 30, 2022.

560. I will recap the four reasons advanced by Purolator for why it was reasonable to maintain the SWP from January 10, 2022 until May 1, 2023.

561. The primary reason was the danger to others in the workplace caused by introducing unvaccinated workers who were more likely to get infected and pass it on. That danger dissipated during the early part of 2022 and was eliminated in terms of any statistical significance by the late spring of 2022.

562. The second reason was operational necessity. Customer and third-party requirements dictated that Purolator employees should be vaccinated to service these parties effectively. In order for this reason to continue to qualify as an ingredient of the reasonableness of the mandate the onus was on the employer to prove, at least as of the date of management discussions about lifting

the mandate in June 2022, that the third-party requirements remained in place, in sufficient numbers to affect significantly the efficient operation of the business. Purolator utterly failed to do this. There is no need to review further the facts on this aspect of the case.

563. The third reason offered by the employer at the hearing was protection provided by the vaccines against serious illness, hospitalization, and death. The argument was that keeping unvaccinated workers away from the workplace would contribute in some significant way towards workplace safety. I rejected that argument in the first place by finding that the contribution to workplace safety was so minimal or small that it did not reasonably justify depriving the unvaccinated workers of their livelihood. In the second place I found that vaccination for the purposes of protecting against serious illness was a sensible precaution and furthered a commendable public health goal, but allowing unvaccinated workers into the workplace had no adverse impact whatsoever on their workplace safety or the safety of others there. It was not a reasonable workplace safety precaution in any way and thus did not qualify as reasonable grounds for maintaining the mandate.

564. Lastly, there was the argument that unvaccinated workers once infected were more infectious than vaccinated workers once infected so they should be kept away from the workplace. I address this at paragraphs 169 and 189-215, under the section entitled Expert Evidence. I found the evidence on this subject, after reviewing a series of reports and the expert evidence of both sides, to be inconclusive. It did not amount to a valid reason for the mandate.

565. All these considerations were given a very full airing together with the other issues in the case, during the 24 days of hearing, with 560 pages of written submissions, including two days of oral argument at the end.

566. However, looking back at the totality of the evidence, a critical fork in the road was reached with the management discussion in June 2022, which led to a decision to keep the mandate in place. I have reviewed that discussion and the considerations of management in reaching its decision to keep the mandate. Some of the considerations listed as favourable to the continuance of the mandate had nothing to do with enhanced workplace safety but addressed concerns such as possible employee resentment and possibly being seen to acknowledge they were wrong to impose a mandate in the first place. Continuing third party vaccination requirements which continued to be treated as a serious factor were totally unsubstantiated. As well, management had the Federal Government's lead to consider. On June 14, 2022 the government announced the lifting of their workplace vaccine mandate and published sensible reasons for doing so. It was a critical time,

when a confidential brief to management containing a thoughtful *KVP/Irving* balancing analysis, measuring the ongoing adverse impact to the unvaccinated of loss of livelihood, against the ongoing workplace safety benefit of excluding them from the workplace, might have yielded a better decision.

567. Unfortunately, lacking that kind of timely guidance, a poor decision was made, from which bargaining unit members suffered, and they are entitled to be compensated.

568. The grievances are upheld. The grievors are to be made whole on the footing that they should not have been on unpaid LOAs commencing July 1, 2022.

XXIII Summary of All Conclusions

569. The hourly paid grievances are upheld. The group grievance is upheld. The grievors are entitled to be compensated for their losses which will include any lost wages and benefits, between July 1, 2022 and their first day of work following May 1, 2023.

570. The owner operators' grievances are upheld. They are entitled to be compensated for their losses commencing the first date that they lost revenue from being denied the use of a vaccinated relief driver. There is no common end date for their losses at this point. The losses are yet to be determined.

571. Dan Moes' grievance is upheld with full compensation from the first day of his dismissal, or first loss of revenue from being denied use of a relief driver, whichever came first.

572. The administrative non-attestation termination grievances, either individually or as part of the group grievance, are upheld. These grievors are entitled to the same level of compensation as the other grievors in their category.

573. The *res judicata* preliminary objection is dismissed.

574. I reserve jurisdiction to determine quantum with respect to all grievances.

575. I reserve jurisdiction on any other matters arising, including interpretation, or implementation with respect to this award.

IT IS SO AWARDED.

Nicholas Glass

Nicholas Glass, Arbitrator, December 14, 2023

APPENDIX

Gender-Specific Language

Unless the context clearly indicates otherwise, wherever the masculine or feminine is used all of the same is intended, and shall be understood and interpreted to include all individuals, of any gender, or those who do not identify with any gender.