IN THE MATTER OF AN ARBITRATION

BETWEEN:

**CANADA POST CORPORATION**

(The Corporation)

-and-

**CANADIAN POSTMASTERS AND ASSISTANTS' ASSOCIATION**

(The Union)

**Mandatory Vaccination Challenge**
**(Consultation and Time Extension)**
(Grievance No. NPG NA-21-004)

# AWARD

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| BEFORE: | Thomas Jolliffe, K.C. |
| FOR THE CORPORATION: | Christopher Pigott, Lawyer for Canada Post Corporation<br>Lennie Lejasisaks, Lawyer for Canada Post Corporation<br>Grace Skowronski, Senior Legal Counsel<br>Alexandra Hunt, Senior Officer Contract Interpretation,Labour Relations<br>Jeewan Sachdev, Director, Labour Relations<br>Leah Lewis, Director, Health and Safety<br>Briana Richard, Senior Labour Relations Officer, RSMC |
| FOR THE UNION: | Sean McGee, Counsel for the CPAA<br>Alison McEwen, Counsel for the CPAA<br>Brenda McAuley, National President, CPAA<br>Dwayne Jones, National Vice-President, CPAA<br>Steve McCuaig, National Labour Relations Officer, CPAA |
| HEARING DATES: | July 26 and 27, 2022 (via Zoom) |
| ADDITIONAL REPLY ARGUMENT RECEIVED: | September 2, 2022 (Corporation)<br>September 16, 2022 (CPAA) |

**DATE AWARD ISSUED:**
**September 29, 2022**

My File: 53,632

1. Canada Post Corporation, in October 2021, announced its operations-wide mandatory vaccination policy to be included in the overall scope of its preventative actions aimed at combatting the COVID-19 pandemic. The Canadian Postmasters and Assistants Association filed its grievance on November 9, 2021 alleging that management had acted improperly in refusing to allow extension of the time for its members to obtain a COVID-19 vaccination, either generally or in individual cases, and also by choosing not to have allowed the rapid testing alternative to be continued before placing those employees on leave without pay, which is to say moving away from the existing "vaccination or test" model.

2. The Corporation responded in its grievance reply that the mandatory vaccination policy was reasonable and necessary to ensure that the health and safety of all employees, customers and agents of the Corporation was protected, widespread vaccination known to be effective in reducing transmission of COVID-19 and protecting individuals from severe illness as a consequence of the virus. It cited the Government of Canada's August 13, 2021 announcement that all Crown corporations and other federal sector employers were expected to develop a vaccination policy that mirrored its own mandatory policy. It further asserted that the timelines provided were sufficient under the circumstances, and that there was "no violation of the collective agreement or any other law".

3. It also bears observing at outset that the Corporation continues to adopt the same summary of its position on the validity of the policy known as the "Mandatory Vaccination Practice", as stated in the earlier arbitration hearing relative to the CUPW grievance. It had resulted in an initial interim award by Arbitrator Burkett denying a cease-and-desist application on November 30, 2021 and followed by my award on the merits, issued on April 27, 2022 dismissing the grievance. At para. 71 of the Jolliffe Award the Corporation's summary position was stated covering its having implemented the policy across its operations, which would include the CPAA membership:

> Canada Post's basis for implementing the Vaccination Policy was simple: the Government of Canada sent a clear message that the federal public service and Crown Corporations should have a vaccinated workforce because vaccination is by far the best mitigation measure to reduce transmission of COVID-19. Canada Post decided to adopt the Vaccination Practice in order to keep Canada Post employees, contractors, customers, visitors and their families safe, and fulfil its *Canada Labour Code* obligation to take every reasonable precaution for the protection of the health and safety of employees.

> Vaccination is the most effective tool Canada Post has to protect employees from COVID-19. Vaccines are safe and effective against not only reducing transmission by reducing the severity of symptoms in individuals who become infected. Fully vaccinated individuals have much better outcomes than unvaccinated individuals if they become infected with COVID-19. The overwhelming majority of individuals who have been hospitalized or died from COVID-19 since January 1, 2021 are unvaccinated. The risk to Canada Post employees and the public of an unvaccinated workforce is far too high. It is in the public interest for Canada Post, a Crown corporation, relied upon by Canadians, to have a workforce that is safe and healthy.

4. It bears observing at outset of this Award that the policy giving rise to the Association's grievance is no longer in force, having been suspended by the Corporation in July 2022. In presenting the Association's case at hearing, Association counsel advised that it is not currently seeking to altogether invalidate the mandatory vaccination policy and accepts that the Corporation would have had the right, eventually, to impose a policy covering an employee vaccination requirement with its described consequences for noncompliance. Its case at this point centres on the manner in which the Corporation went about establishing the policy, said not to have provided sufficient scientific and/or medical information for the Association's review and assessment, and not allowing any delay while that kind of information could have been reasonably evaluated and consulted on by the Association and its membership. In seeking declaratory relief to reflect the alleged actionable wrongdoing it also seeks a ruling that the Corporation should compensate any affected members for all losses incurred resulting from its proceeding in the manner it did. This includes assessing an appropriate monetary payment for noncompliant employees who may have chosen to comply were there to have been an extension of the announced time requirement and better consultative communication with the Association prior to implementation. It holds to the view that there may well have been some employees who delayed their cooperation due to the Corporation not presenting sufficient investigative information. It contends that there should have been more informative consultation and sharing of all developed scientific and medical information which the Corporation would have used in reaching its decision to enforce a vaccination requirement.

5. The Association having placed the consultation process front and centre, Mr. McGee in his opening remarks asserted that the evidence would show that despite the Association's repeated requests, in the context of their being some interactions between the parties, the Corporation failed to provide any, or any sufficient, justification for imposing what was viewed as the "vaccination or leave policy" when it did. The Association particularly relies on Article 10 referencing the joint

consultation principle, and the joint committee process in dealing with matters of mutual interest. The guiding principle is set out at Article 10.01:

10.01 **Principles**

(a) The Corporation and the Association subscribe to the principle of joint consultation, and agree to establish joint Association/Management consultation committees in accordance with Clause 10.04 for the purpose of meaningful consultation on matters of mutual interest. However, nothing in this Article precludes meetings outside the framework of the joint consultation process, as necessary between representatives of the Association and Management to discuss matters of immediate concern or problems of human relations.

(i) The above principle shall encompass the exchange of information, the seeking and considering of the advice and views of each party with appropriate opportunity provided to discuss and comment in a genuine manner.

(ii) The above principle does not imply unanimous or majority agreement; nor does it interfere with Management or Association rights arising out of the Collective Agreement.

6. The contractual language under Article 10.02 goes on to state the desire of the parties to have their joint consultation committees discuss matters of mutual interest and make committee recommendations to the appropriate level of Management, functioning in an advisory capacity only, not dealing with grievances. Article 10.04 contemplates establishing various levels including a National Committee with up to six representatives from each side, an Area Committee, and a Branch Committee, with defined meeting times under Article 10.05 which should not be less than semi-annual, with agendas and drafts to be circulated. Plainly, the Corporation in dealing with the COVID-19 response throughout 2020 and 2021 through its policy approach did not use the joint committee format, at least there was no evidence that it did. It bears observing that the language of Article 10(a) states that the Parties "subscribe to the principle of joint consultation", but does not state any requirement to utilize the joint committee format as opposed to having meetings outside the framework of the joint consultation process as necessary "to discuss matters of immediate concern or problems of human relations". One also notes that Article 10.01(a)(ii) states: "nor does it interfere with Management or Association rights arising out of the collective agreement." The Corporation holds to the view that in exercising its management rights outside the joint committee format under Article 10 there nevertheless was suitable interactive communication with the Association prior to invoking the Mandatory Vaccination Practice which covered whatever consultation requirements may have existed.

7. This being a case of management having established a unilateral policy affecting employees' individual rights as a stated exercise of management rights, the Association cited the long-standing guidance provided in *Lumber & Sawmill Workers Union, Local 2537 and KVP Co.* (1965) 16 L.A.C. 73 (Robinson), known for setting out its test for assessing the boundaries of management's unilateral rule-making authority, needing to satisfy a number of conditions. Its undeniable value has been remarked upon over the decades in case law and summarized in Brown and Beatty, *Canadian Labour Arbitration* as addressing the criteria for rule-making. It contemplates the rule not being inconsistent with the collective agreement and cannot be unreasonable, which the Association takes to be relevant in the manner by which the Corporation implemented its mandatory vaccination policy. Its imposition in the manner done was said to have left the Association without the ability to adequately advise its members as to the scientific and/or medical basis for such a privacy invasive, physically intrusive, requirement embodied in the policy. It presumably means its having too little information provided by the Corporation during their discussions to assist its membership in making their individual choices of whether to comply in order to continue working. The Association places its membership in the approximate 8,000 active-employee range with there having been roughly 600 vaccination refusals or non attestations (7.5 % noncompliant) without a sufficient scientific and/or medical analysis provided, resulting in their taking on enforced leave-without-pay (LWOP) status, and in some cases quitting their employment.

8. Given the known reality of the raging COVID-19 epidemic and the associated health concerns, one also notes the provisions of *Part II,* of the *Canada Labour Code,* governing health and safety of employees in the federal jurisdiction, dealing with controlling workplace hazards and the need to take preventative measures towards eliminating such hazards. It can also be observed that Article 17.05 of the Collective Agreement confirms that the parties agree that the *Code* will be observed with respect to health, safety and environment, its providing for the existence of a national policy health and safety committee with equal representation. Article 17.01 confirms recognition of an employee's right to work in conditions which show respect for one's health, safety and physical/psychological well-being. There was no allegation of any violation of this language, and in any event the Association's complaint currently centres on the Corporation's failure to disclose enough information for consultation purposes, and its not delaying implementation.

9. On behalf of the Corporation, Mr. Pigott in his opening remarks submitted that were this matter to be considered on its merits, one cannot ignore the reality that the Corporation's operations-wide "Mandatory Vaccination Practice" issued on October 26, 2021 which has recently been determined at arbitration to have been valid and enforceable. See *CPC and CUPW* (N00-20-00008 issued April 27, 2022, Jolliffe). This other case is viewed by the Corporation as having disclosed the same material facts, leading to the policy being found reasonable on the basis of the overall analysis undertaken therein, and relying on the very recent mandatory vaccination awards from several different arbitrators. Counsel pointed out that the same affidavit evidence, testimony, and expert reports from the CPC/CUPW hearing are agreed by the Parties to be placed before me in this current matter.

10. The Corporation views the Association's approach here to be an attempt to create a new, unfounded, legal requirement for management in October 2021, after some 18 months of a hugely analysed and devastating worldwide pandemic, needing to share all its information, medical and/or scientific, in order to have justified the policy prior to implementation. It cannot be missed, he said, that by the fall of 2021 the pandemic was highly publicized, including the danger it presented to workplace environments everywhere, certainly not excluding the Corporation's nationwide operations, and within society at large. The Corporation contends that by the time a mandatory vaccination policy was under consideration, the vaccination approach in combatting COVID-19 should have been well understood by the Association, including its safety and efficacy. Certainly, by then, a general consensus had developed over utilizing broad-based vaccination as a principal weapon against it, as urged by local and national health authorities.

11. The Corporation relies on the evidence introduced in the CPC/CUPW hearing, which stands as relevant information for purposes of this current hearing. In that hearing it was disclosed that CUPW strongly supported vaccination of its working membership, while opposing the mandatory requirement aspect, as did the Association when it joined the Corporation's other unions in seeking prioritization from provincial health authorities for its membership. The Corporation holds to the view that all the same factors are at play in this matter as they were in CUPW's national grievance decided at arbitration. Further it has asserted that the level of information which was available to the Association was significantly informative, were that an issue in reality, in addition to there being

ongoing regular interaction between the parties. This would be despite there being no legal requirement for the Corporation to have reviewed the available scientific and medical information verse and verbatim with its bargaining units' representatives, nor any requirement to formally utilize the joint Association/Management consultation committee process under Article 10. I am urged to find that there should be nothing found about implementing the mandatory vaccination requirement as it applies to the Association's membership which can be viewed as violating either the *KVP* principles concerning reasonableness or the Article 10 consultation principle.

12. As it currently stands, the Corporation has suspended the mandatory vaccination program for all its employees as at July 6, 2022, which has resulted in its contending through counsel that there is an issue of mootness with which to deal at this point in that the policy which gave rise to the grievance in the first place is no longer operable. It was presented as a preliminary issue, the Corporation seeking dismissal of the grievance on that basis, which the Association rejects in asserting that the reasonableness requirements and contractual rights applicable at the time of the policy's issuance, remain a live issue needing to be determined. It holds to the view that whether or not the policy was eventually altered or suspended with the passage of time does not extinguish the grievance based on their pre implementation interactions, failure to provide medical and/or scientific information for consultative assessment, and its timing. The Association takes it to have raised a significant labour relations issue at the point of filing, and going forward.

13. It was agreed that the mootness issue would be determined following my hearing the entirety of the evidence in this matter.

**Evidence**

14. As already mentioned, it has been agreed that the evidence, including testimony, affidavits and expert opinions placed before me at the CPC/CUPW arbitration hearing held in April 2022 stands as evidence in this matter, and was again reviewed by me in writing this award. I take it to include all the case law which was referenced in this other matter. It bears observing at the outset that the evidence in this other case described at some length the background of the Corporation's adding to its existing "COVID-19 Playbook" protocols in October 2021. Throughout the previous several months the Corporation's policy directive approach had included such elements as

cleaning/sanitizing and decontamination directives, physical distance, staggered start and break times in all sections across all shifts, frequent testing through on-site rapid testing clinics, and voluntary vaccination. The same mandatory vaccination requirement as eventually incorporated into the protocols and implemented across the Corporation's national workforce on October 26, 2021 had been alleged in the CUPW case to be unreasonable under a *KVP* test in balancing the competing interests of the parties. The evidence from CUPW's National Executive Committee member Carl Girouard in the CPC/CUPW hearing indicated Union support for the various mandated diagnostic and preventive practices short of mandatory vaccination. By his evidence, they viewed vaccinations after their starting to become available in 2021, as "a very important tool", his having been involved on CUPW's behalf in lobbying local authorities to give early vaccination access to its members, as urged in its circulated internal bulletin, taken to be a union priority across the country for its 43,000 bargaining unit members. While objecting to mandatory vaccination, Mr. Girouard acknowledged that CUPW's approach by October 2021 was "the more employees the better" when it came to protecting their health through a widespread vaccination program, but not as a mandatory requirement.

15. Nevertheless, the CPC/CUPW hearing raised no issue over whether there was any violation of the collective agreement under the contractually mandated consultation process, nor whether the Corporation had wrongfully failed to provide medical and scientific support for the Association's evaluation prior to implementation. Certainly there were ongoing interactions between the parties, although Mr. Girouard indicated surprised on being notified of the policy change inasmuch as he thought they were still moving forward with a version of the "vaccinate or test" model at that point, which they had very recently still been discussing. No doubt, the CUPW developed its own scientific information on which it came to rely subsequent to filing its grievance, and first utilized during the hearing unsuccessfully seeking interim relief from Arbitrator Burkett. Ultimately, following the April 2022 hearing into the merits it required a determination on all the information presented, including expert scientific evidence, whether the mandatory vaccination program was a reasonable response to protect workers in the CUPW bargaining unit. The discussion covered a variety of valid concerns including health and safety, operational and other business-related reasons, and recognizing the interests of the CPC customers as well as members of the general public whom they served. Following my analysis of the facts and case law, I found that it was reasonable and dismissed the

CUPW grievance.

16. I will now turn to the rather voluminous additional pertinent facts and circumstances presented in the case at hand. The earliest documentary reference of note discussed in evidence was an email sent by the Association's National President, Brenda McAuley, in response to a bargaining unit member's inquiry in mid-November 2020 over mandatory masking in Canada Post premises, which did not have universal acceptance amongst its membership or its customers. It was an issue being reviewed by the Association at that point and Ms. McAuley raised a number of points in her email response. These included that the responsibility for health and safety in its workplaces was a matter addressed by the collective agreement and subject to federal law. She pointed to the Association's position that although local regulations could require coworkers to do certain things, there was nothing preventing Canada Post from requiring employees to take safety precautions as "they control their own premises and what employees are required to do". She went on to state the obvious that there was a significant risk of one catching COVID-19 both inside and outside the workplace, and further stating:

> If there is community transmission of the virus, I can't imagine why Canada Post would suggest that people should work in small spaces without masking. If someone gets sick from the virus and they can trace it to the workplace, at the very least, the Corporation may face a claim that it is a compensable workplace illness. If Canada Post was aware there was a problem, and that the Union raised it, and someone became seriously ill or dies, the Corporation as well as the manager may face severe consequences under federal law. Why would Canada Post not require all people working in a small enclosed space to mask if the risk is significant... We are entering a period where ventilation will be poor [winter months]. This makes the problem significantly worse.

17. The Association did not dispute mandatory masking of employees and various other protective workplace measures enforced by the Corporation by reference to the published COVID-19 Playbook protocols. This policy included requiring masking of customers which led to more than a few confrontational situations within the Corporation's business premises needing to be handled by on-site staff.

18. Further, on the issue of whether the Association's national leadership understood the seriousness of the pandemic and the significance of mass vaccination, in late February 2021, the Association in conjunction with CUPW, APOC and UPCE, communicated in writing with Dr. David

Williams, the Chief Medical Officer of Health in Ontario, to express their support for the "unprecedented task of rolling out COVID-19 vaccines in Ontario" as set out in the introductory paragraph of their letter. In addition to indicating that they applauded the efforts already underway and fully supported completing this crucial first wave of vaccinating front-end healthcare workers, support workers and those most vulnerable to the virus before moving on to other groups, they were asking that health authorities give consideration to the essential role of Canada Post employees in the rural, urban and remote areas of Ontario. They submitted to Dr. Williams that "while we have worked together and introduced measures to reduce the risks, we believe that the nature of our work warrants special attention in the prioritization of the distribution of vaccines" asking him to determine the best rollout plan and indicating they "would be happy to provide any information he may require regarding our people, our operations and the role we play". In thanking Dr. Williams for the important job he was doing they recognized the "incredible and tireless efforts of the public health officials tasked with the difficult job of keeping our communities safe". The communication further stated while they were national organizations, the support and guidance received at the local level from public health officials "has been incredibly important to our employees and those tasked with keeping them safe in very difficult circumstances". There was no request made for any additional scientific and/or medical information in support of their asking health authorities to additionally prioritize vaccination past the approach already being taken for healthcare workers, support workers and those vulnerable to the virus. Nor was there any concern expressed to the Chief Medical Officer of Health as to efficacy or safety, or bodily integrity issues.

19. There is no doubt that as with CUPW, the Association was supporting membership vaccination, at least through voluntary compliance which was the model being used for the first 10 months of 2021. Nevertheless, the issue was creeping into the conversation as to whether consideration should be given to using a mandatory approach, or not. There was a growing general recognition, really impossible to miss, that there were sizable numbers of people across the societal spectrum known as "antivaxxers", as that term is used in common parlance. There was a variety of espoused reasons being circulated for vaccine denial, none of which were being advanced by any of the Corporation's unions, excepting medical and religious concerns.

20. In moving on to examine the vaccination issue within Canada Post's employment framework, in the context of its management right concerning policy directives, the accepted approach at Canada Post in mid-2021 included the "vaccination or test model" in addition to all the other precautions and limitations set out in the Playbook. However, there is no doubt it quickly became well publicized that on August 13, 2021 the Government of Canada announced plans to require vaccination as early as the end of September across the federal public service. It was said in its published materials to be "our best line of defence" against the pandemic conditions. Therein the Prime Minister made the following statement regarding vaccines in the fight against COVID-19 in Canada:

> Vaccines are the most effective tool against COVID-19, and countless Canadians – including many public servants – have already done their part and gotten their shots. But no one is safe until everyone is safe. We have enough doses in Canada for every person to be fully vaccinated across the country, so I encourage all Canadians who have not been vaccinated to book their shot today. Together, we will finish the fight against COVID-19.

21. In his hopeful message to Canada, the Prime Minister also stated that the Government:

> .... 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.

22. As widely known from that point onward, certainly to the unionized federal sector employers and their unions, the Government in its published materials described having relied on information indicating there existed more transmissible and dangerous variants of concern than previously thought, referencing its analysis showing that there were already 71% of eligible people fully vaccinated across the country, with more than 82% having had their first dose by then, but there were still some six million eligible people left unvaccinated in Canada as the fall months approached. By mid-2021, the emphasis in Canada would be on having as many citizens vaccinated as possible for all those reasons discussed on the nightly news, there being real concern over both workplace and community transmission. The Government was pointing out that the likelihood of continued widespread transmission was looming.

23. Within a few days, the Corporation received an email from the Association's National Vice-President, Dwayne Jones, indicating that it had been receiving questions from its branches with respect to the Government's announcement on mandatory vaccinations for its public service employees, and that the Prime Minister was expecting the federally regulated sector to follow suit.

The Association wanted to know what would be the directive coming from the Corporation "so that we can follow up with the Branches and everyone hears the same message". The prompt response from the Corporation was that it had been studying the vaccination situation internally, with the August 13, 2021 announcement by then coming under discussion. In the meantime it was encouraging all employees to complete their COVID vaccinations, although recognizing that some people could not be vaccinated in line with its legally recognized duty to accommodate. Mr. Jones replied, recognizing that as yet there was no directive over whether vaccinations would be mandatory. He was understanding the Corporation to be going no further at that point than continuing to recommend that anyone who had not yet received a vaccination should do so, and the Association would be advising its membership on that basis.

24. The Corporation's Director of Labour Relations, Jeewan Sachdev, responded to Mr. Jones' email that same day, August 17, 2021, four days after the Government's announcement. He reported that the Corporation was reviewing its obligations. He suggested that the Association hold off advising its membership until general communication was sent out. The quick email reply from Mr. Jones was: "ok, I'll hold off sending the paragraph to the officers but if you could coordinate with us so that we can reach out to them when the communiqué goes out that would be great". The following day Mr. Sachdev emailed Ms. McAuley to advise he was hoping to set aside 30 minutes with her to review the Government's announcement, asking her what her availability would be over the next week. Her immediate response was to advise that the Association had received numerous inquiries, and the issue was "fairly time sensitive". She was hoping to meet later that same week. Mr. Sachdev responded that he was aware there were a lot of employees asking questions about the Government's announcement and that the meeting was going to be set up for the following Monday, being the first available time slot, which is what occurred. He named the participants expected to be attending on behalf of the Corporation.

25. Ms. McAuley testified after reviewing the various documentary materials relating to whatever interaction occurred between the parties following the Government's August 13 announcement that it "expects" Crown corporations to follow suit. She was familiar with the approach taken to that point in the Corporation's having imposed various COVID-19 safety protocols set out in its COVID-19 Playbook. By her description, not to be doubted, she has always taken a hands-on approach with

members over issues raised in the field or otherwise becoming known through interaction with the Corporation's representatives on various topics as they arise. Needless to say, what the Corporation was planning to do about the possibility of expanding the workplace precautions past mandatory masking and the other protocols which had been published in the Playbook, which is to say falling in line with the Government of Canada's expectations, was concerning. She saw it to raise real issues of bodily integrity and personal privacy, at the very least.

26. On August 17, 2021, the Corporation provided an update memorandum meant to be shared by the Association, and the Corporation's other unions, with their membership. It disclosed management's position that it had been exploring what implementing the mandatory measure would mean for Canada Post employees, being in the process of seeking more information from the Government. It stated its intention to work closely with its bargaining agents, and would share more information as soon as it could, while recognizing that its approach going forward would need to respect any requirements to accommodate employees under the *Canadian Human Rights Act* and also the *Privacy Act.* In the meantime it was expecting that employees would continue to follow all COVID-19 related protocols closely and consistently, listing a number of them being applied at that point such as wearing face coverings at all times, not holding or attending social gatherings, self-assessment, maintaining distance, washing hands and following cleaning protocols. It had been left to the Association's membership to enforce customers' utilizing masking within operational premises under their control.

27. At that point, late August 2021, the Corporation was circulating a document titled "TALK TRACK" to its unions, described therein as providing important updated information on COVID-19 issues, including setting out the Government of Canada's announcement and its declared expectation that all Crown corporations and other federal sector employers would develop their own program towards requiring vaccinations. It was advising that it had a working team in place exploring what implementing the measure would mean for Canada Post employees. It would be seeking further information from the Government, sharing it as soon as it could, and would work closely with its bargaining agents. There was no indication what the expected further information might be, but presumably relating to the position it would be taking in response to the federal government's expectation of compliance, a possible additional policy directive to be issued.

28. Throughout September 2021 the Corporation was said to be evaluating the parameters of its taking an updated/revamped COVID-19 policy approach with its unions, the largest by far being the 43,000 member CUPW component. The National Director of Health and Safety, Leah Lewis, by her description, had researched publicly available information, relying on the public health authorities' materials and trusting the information they were providing to the community at large, keeping in mind there was a critical workplace protection emphasis from the Corporation's perspective. She was also aware of the Corporation's compiled weekly figures for COVID-19 infections in its operations across the country from the start of the pandemic. She testified having established to her satisfaction, as previously described by her in the CPC/CUPW matter, also standing as evidence in this matter, that vaccination reduced the possibility of contracting COVID-19, that it was effective at reducing transmission to someone else, and that lower viral loads and resulting shorter duration of illness had been observed in vaccinated individuals who subsequently became infected. It was what health authorities across the country were saying to the public at large. For Ms. Lewis, these were the identifiable elements supporting full vaccination in the Corporation's many and varied workplaces, needing to safely and productively manage its cross-country operations, including those employees interacting with the citizenry they served. The attendance information indicated that amongst non vaccinated employees throughout 2021 across its operations, there were many more identified infections occurring, resulting in the need to quarantine and consequential lost time from work. She was also aware that the age demographics at Canada Post, its approaching an average 52 years for employees, suggested a higher risk for serious consequences once infected than with younger persons as was widely known from publicly available information.

29. It is to be observed that in her lengthy affidavit adduced by the Corporation at the CPC/CUPW arbitration hearing, also constituting evidence in this matter, consisting of some 171 paragraphs, Ms. Lewis detailed her understanding concerning the seriousness of the COVID-19 pandemic in Canada, by her publicly sourced information there had been over 30,000 deaths by January 2022 with almost 300,000 active cases. The figures were rising daily. In her affidavit, she deposed to the safety of Canada Post's employees and its customers, a very large cross-section of Canadians, being its top priority and the guidance provided by the Public Health Agency of Canada (PHAC), provincial and local public health authorities during the pandemic. By her description, the Corporation "has been unwavering in continually adapting to changing guidance and best practices"

and being knowledgeable concerning the COVID-19 outbreaks occurring in 2021 in several of its facilities, as well as being familiar with community spread which likewise was a problem for the Corporation in keeping its employees safe. In 2020 the Corporation recorded some 752 COVID-19 cases amongst its employees, and in the first seven months of 2021 some 1348 more cases causing consequential lost time from work through illness and quarantine, even two deaths. This was still prior to the Omicron variant arriving in late November 2021.

30. Ms. Lewis's evidence at this earlier hearing focussed on the CUPW bargaining unit situation which came within the same policy procedures described by the Corporation within its COVID-19 Playbook initially published in December 2020, and revised as changes needed to be made being, as distributed to employees. Certainly, both the CUPW and CPAA members' working relationship, as well understood, came within the Corporation's health and safety obligations under the *Canada Labour Code, Part II* as set out at s.122.1: "to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies", imposing duties on employers and employees.

31. In all, having considered the range of publicly available investigative materials Ms. Lewis advised her management colleagues that vaccination was the best tool for the Corporation to ensure a safe and healthy workplace, as opposed to limiting itself to a rapid antigen testing (RATs) protocol. This realization was not thought to come as a surprise to anyone, in that the leadership of its largest union, CUPW, was already urging bargaining unit members, to become vaccinated as the best protection available; indeed as with CPAA it was looking for vaccination prioritization from local health authorities. In dealing with employee inquiries, whichever the bargaining unit, by Ms. Lewis's description, she had been "consistently" directing them to the "trusted" public health information readily available, meaning from federal, provincial and local authorities. She was aware that the medical-based "literature" which she reviewed was available to anyone for the asking covering the basics of transmission and resulting consequences, and the efficacy and safety of vaccination as the weapon of choice. She said she had no hesitancy in sharing the information or the reference points, Health Canada being a principal source. From this well-publicized information she was aware that serious side effects were "exceedingly rare", but also recognizing that were one to consult the Internet there was a "wide range" of opinions displayed on social media, no doubt contributing to

"vaccine hesitancy" which in her view, did not alter the reality that public health authorities were consistently and strongly supporting universal vaccination except where contraindicated for medical reasons. She also understood that "as more and more information came out, vaccine hesitancy eroded, but there was a divide."

32. At the same time, it is notable that Ms. Lewis's management team in September 2021 was still evaluating the possibility of recommending a less intrusive policy approach as set out in the draft policy outline provided to its unions that month. Mr. Sachdev sent a copy of the initial draft policy to Ms. McAuley by about September 20, and to others including Mr. Jones. Mr. Sachdev testified that his aim, concerning which he believes he followed through, was to engage the Corporation's bargaining agents in an interactive process following the Government's announcement prior to ultimately deciding on its next step. As yet, the Corporation had not committed itself to the federal government's approach.

33. Mr. Sachdev emailed Ms. McAuley on September 21 indicating that he was hoping to set aside some time to review the draft policy under consideration at that point, as yet no inclusion of a mandatory vaccination program. The following day he sent her an updated draft which included a noncompliance provision to the effect that employees who did not provide attestation of their being fully vaccinated, or a negative COVID-19 test, would not be permitted to attend work and could be placed on leave without pay, as well as providing false information resulting in progressive discipline. At that point, regular RAT testing was still under consideration. He confirmed in a follow-up email that the updated draft did not include all the Association's suggestions/changes from their most recent discussion, which document would be updated and further considered going forward. Mr. Sachdev requested the availability of those from the Association who wanted to attend their follow-up discussion. Ms. McAuley confirmed that the following morning was workable which resulted in a meeting lasting approximately an hour.

34. The possible policy approach under discussion at the September 22 meeting, but not yet finalized, nor committed, would require employees to attest to being fully vaccinated by October 30 or provide another attestation by November 15, failing which they would need to undergo COVID-19 testing twice-weekly and test negative in order to enter a Canada Post facility or other facility.

They could be asked to provide proof of a negative test result. Those unable to provide attestation of vaccination or competitive negative test results would not be permitted to attend work and could be placed on leave without pay. The various long-standing protocols were to remain in place. An updated draft along the same lines was circulated. Such was the nature of the discussion between the Parties in late September 2021, essentially suggesting a "vaccinate or test" approach was still under consideration at that point. But, no doubt a problem still existed in that infections were not tailing off to any great degree, and there was no universal acceptance of vaccination amongst employees, many of whom were being regularly RAT tested.

35. There were at least two more meetings between the parties in early October 2021 as mentioned in emails between their respective representatives. By Ms. McAuley's description, whatever one's view on the significance of vaccination compliance as the best alternative going forward, she was concerned that no one from the Corporation had provided the Association with any supportive scientific or medical materials for discussion purposes. At the same time, the Association leadership undoubtably was well aware of the management's view concerning the significance of employee vaccination to its business concerns. Indeed, for many months it had been supporting the vaccination tool, needed for the health of its working complement in the midst of an unrelenting pandemic; nor can it be doubted that the bargaining agents dealing with Canada Post were in a position to do their own research, as indeed occurred with CUPW in enlisting an expert's evaluation in preparation for bringing its unsuccessful interim cease-and-desist application before Arbitrator Burkett in November 2021.

36. By the end of September 2021, the Association was at least wanting to be updated on the Corporation's position going forward, given the well-publicized Government expectation of federal sector compliance with its approach. As at the first week of October 2021 the latest practice document shared with the Association, under discussion by the parties on October 5, still allowed for rapid testing as the alternative approach. The day following this latest meeting, Ms. McAuley emailed Mr. Sachdev expressing her concern that the "vaccination or test" approach set out in the draft policy under review might be a short-lived option, and stating as follows:

> Can you please let us know if this is the final draft. Our Board of Directors noticed that Mr. Trudeau did not make mention of rapid testing as an option.

> Therefore has your practice changed in any way? Would it be possible to get your final copy of the practice in both official languages.

37. Ms. McAuley's brief follow-up email went on to advise that numerous members had reached out, and the sooner the information was received the better. However, she made no express reference to needing any shared research or seeking scientific and/or medical substantiation at that point. Mr. Sachdev responded within the hour, indicating that the draft had not yet been updated on the issue of compliance with the Government's announcement and he was waiting for word from the Corporation's government relations team on how it would impact employees. He would keep her posted. Plainly, as was Ms. McAuley's concern, he was not dismissing the possibility of the Corporation falling in line with the Government's expectation of mandatory vaccination for all federal sector operations. His follow-up emails to her that day indicated that he did not have anything yet to confirm and would update the Association on whatever he heard, even possibly something of an interim nature.

38. Nothing further transpired over the next few days prior to Mr. Sachdev emailing Ms. McAuley on Tuesday, October 12, 2021, asking for her availability that week "for the next discussion on vaccination practice". He was thinking they should set aside about 30 minutes. According to Ms. McAuley, she was still concerned that no one from the Corporation was explaining the scientific and/or medical rationale supporting the possibility of management requiring testing as a condition of one continuing to work, were that the course of action under consideration following the Government's announcement which she admittedly was expecting would be the case.

39. At the same time, there was no indication from Ms. McAuley's testimony that the Association raised the issue of lacking enough information at that time or needed scientific or medical analysis from the Corporation to evaluate on its own. The Association, as with CUPW, had been supporting its membership becoming vaccinated, including on a prioritized basis as already pleaded to the health authorities, but not on a mandatory basis. It would be trite to point out that by the fall of 2021 there had been an enormous amount of information made available to the public by a host of government authorities, including federal and local health agencies, and experts in their fields concerning the efficacy and safety of mass vaccination as a preventative tool. Nevertheless,

unquestioningly, it remained controversial on an individual compliance basis, as the Association was becoming increasingly aware, its later being deluged with membership concerns.

40. The situation was about to change. Mr. Sachdev and Ms. McAuley had their next conference call discussion the following day, October 13. In preparation, Mr. Sachdev had already provided a copy of the latest draft titled Draft - Vaccination Practice 2021-10-12. The accompanying email was short and to the point in communicating that it still needed to be reviewed internally and: "Talk tomorrow". He testified that with everyone being aware of the direction urged upon the Corporation, and other Crown corporations by the Government, he was still engaging all the bargaining units in a continuing interactive process, providing drafts. The new approach was confirmed in a follow-up email sent out by Mr. Sachdev the following day which included an attached document dated October 14. This "handout" provided to the Association, intended to be shortly released to its membership, was titled "COVID-19 vaccination practice being developed for all employees", containing an opening section which reads as follows:

> Since the start of the COVID-19 pandemic, Canada Post has followed the guidance of federal and local public health agencies.
>
> Canada Post is currently in the process of developing its vaccine practice in line with the approach recently outlined by the federal government.
>
> The practice will apply whether an employee is working remotely or on-site. Please be assured that our approach will ensure all information shared by employees on the vaccination status will respect the *Privacy Act* and the *Canadian Human Rights Act.* Discussions are currently ongoing with our bargaining agents to finalize details.
>
> Further details and instructions will be shared with you and your team leaders as soon as they are ready. In the meantime, we would encourage any employee who is not fully vaccinated to book an appointment to begin the vaccination process.

41. The new direction was becoming obvious, the handout having referenced the Corporation's falling in line with the Government "approach". The following day, October 15, Mr. Jones emailed Mr. Sachdev. While not asking for any backup scientific or medical research, he expressed his concern that he had never had the chance to ask in their last meeting how the Corporation would be looking at directing offices that could potentially face staffing issues because of employees being placed on leave without pay for noncompliance. He indicated not thinking that it would happen on a large scale but was concerned over some offices not having sufficient term employees to cover the shortages. Seeming to focus on operational concerns, he went on to state:

> We want to start inquiring now about these types of staffing concerns because the worry is that as we head towards peak season and this new change in direction regarding rapid test kits not being an option, gives concern for sufficient and adequate staff... Happy to discuss further if you'd like.

42. Mr. Jones did not indicate in his email response having any other concerns needing to be further discussed at that point. Within the hour Mr. Sachdev emailed Ms. McAuley, Mr. Jones and Mr. Maheux, stating:

> I am not sure of the operational plan and we may not have a better view until we start the attestation piece. The company is aware of these potential scenarios but not certain we have contingencies in place. We will connect once I find out more.

43. Later that same day, October 15, 2021, Mr. Sachdev followed up with another email to the Association's national executive members, Ms. McAuley, Mr. Jones and Mr. Maheux:

> Thank you again for meeting with us over the last few weeks on the upcoming vaccination policy. As mentioned we met internally today to discuss the policy, and I wanted to confirm with you that there is an additional discussion with our executives which is scheduled for Monday, October 18th. Following this, we will reach out to you with any updates, and ensure we provide you with time for review and comments on the policy and implementation plan.

44. His email generated a quick response from Ms. McAuley later that same day:

> "Thanks Jeewan, I know it's hard trying to cover every base and any potential problems that could arise".

45. Again, the Association was not saying that it lacked sufficient background scientific or medical information in order to advise its membership, or discuss with the Corporation's representatives. Mr. Sachdev testified about a follow-up telephone conversation with Ms. McAuley on the morning of October 21, his wanting to touch base with her over any concerns she might raise at that point, and later that same day provided another Draft-Vaccination Practice 2021-11-15 to Ms. McAuley and Mr. Maheux as an attachment to his email. He stated therein:

> Attached is the close to final practice document. You will notice the document has dates of implementation. I will connect with you on Monday to confirm those dates. In the interim I would ask that no communication (from either side) on the dates or practice be posted or further communicated until we connect on Monday.

46. Ms. McAuley, being in receipt of the draft policy document on the Thursday, did not contact Mr. Sachdev that day, but by her description she was concerned. As mentioned in her testimony, there was no provision anywhere in the draft policy for a requirement to educate either the

Association or its membership, and there was no indication from Mr. Sachdev that the Corporation would be providing any scientific or medical analysis either with respect to advancing a vaccination requirement or doing away with the testing choice as an alternative. This concern is difficult to reconcile with the Association's position taken several months earlier with the provincial health authority in Ontario seeking prioritization for its membership, and together with the Corporation's other unions was encouraging its membership to become vaccinated. During her testimony she provided a detailed critique of what she saw as the shortcomings with the policy, but there was no indication she personally interacted with Mr. Sachdev over the next few days, or otherwise communicated any concern at that point respecting safety or efficacy, or lack of scientific or medical substantiation from the Corporation.

47. Suffice to say, at that point Mr. Sachdev was not aware that the science behind vaccination efficacy and safety was an issue for the Association. On October 25 he sent another email to Ms. McAuley, Mr. Jones and Mr. Maheux, attaching the team leader materials that would be distributed to supervisory staff, and advising that the dates for implementing the mandatory vaccination program had by then been set out in the practice document they had previously received for their review. It was a matter of confirming that the rollout of materials to team leaders was set for the following day, with an intranet link to the full Mandatory Vaccination Practice document. He ended the email by asking them to let him know if they had any questions as he could set up another conference call if they preferred a virtual face-to-face discussion at that point. To that point, as the documentary materials entered in evidence indicate, there been some 19 email communications passing between the parties following the federal government's announcement, with at least eight containing draft document attachments, having had at least a half dozen meetings with Association executive members and several follow-up telephone discussions, although admittedly much of it centered on the "vaccination or test" approach as still being a possibility until the second week October. There is no indication in these materials, or discussions between the parties, that anyone had yet raised the specific issue of the Association needing to receive and assess the Corporation's scientific and medical information supporting its ultimately following the federal government's announced expectation for Crown corporations and other federal sector employers.

48. Subsequent to the late October 2021 rollout, setting a November 21 deadline for employee cooperation with the policy requirements, communication between the parties continued, initially seeming to focus on the detailed requirements needing to be sent out to employees and the kinds of formatted letters which were going to be received by them, essentially informational in nature setting out their options and time limits associated therewith. There is no doubt the Association executive was growing increasingly concerned over the level of negative feedback from its membership. There were entered in evidence numerous letters and emails of concern sent to the Association by bargaining unit members, following implementation of the mandatory vaccination policy, several of which showed absolute rejection for a variety of reasons including raising safety, efficacy and privacy concerns.

49. On November 5, 2021, some 10 days after the policy was implemented, Ms. McAuley emailed Mr. Sachdev to confirm that she had left him a voice message indicating that the Association had been "extremely busy" with members' concerns and asking if there was any way the Corporation could push back the implementation date until February. As she pointed out: "with peak season and so many of our members who are saying they're not getting vaccinated, staffing will be a serious issue at Christmas time". This email contains the first mention of the Association's wanting further supporting information, in stating:

> We would also like to get the scientific data supporting the decision to remove the option of rapid testing being available to our members who cannot or will not get vaccinated. Originally, that was an option then it was taken off the table ... I look forward to discuss further.

50. By way of follow-up, the Association's National Vice- President, Daniel Maheux, emailed Mr. Sachdev four days later on November 9, 2021, wherein he advised that they were filing a national grievance later that same day "with regards to the implementation date of the vaccination practice", which is what occurred thereby giving rise to this arbitration hearing. He stated in this email that the Association felt strongly that the compliance deadline was not soon enough to allow members to make plans to mitigate or lessen the financial hardship of being placed on leave without pay. It anticipated that "a high number" of its members would be in that situation one month before the peak season, being too disruptive to the Corporation's operations. He also stated in reference to requesting further information at that point:

> In a telephone conversation Brenda [McAuley] had met last week with Mr. Deveen [General Manager, Labour Relations] about the practice, the Association asked to be provided with the medical and/or scientific evidence used to formulate the vaccination practice and specifically the removal of the weekly testing provision from the practice. By virtue of this email, we formally reinstate that request.

51. Mr. Sachdev responded by email to Ms. McAuley, Mr. Jones and Mr. Maheux, on November 16, 2021. It was not meant as a reply to the grievance filed a week earlier, but rather he was responding to Mr. Maheux's most recent request:

> The Practice was developed to ensure a safe workplace, in light of vaccines' effectiveness in reducing the transmission of COVID-19 and protecting against severe consequences of this virus, and it is in line with direction from the Government of Canada. The Association was consulted on numerous occasions, and employees were informed well in advance that they would be placed on LWOP if they are unwilling to be vaccinated. The LWOP is not disciplinary; it is based on employees' choices and is not prevented by any clause in our collective agreements. We believe that the implementation of the Practice, including LWOP, is consistent with the collective agreement and reflects a balanced and reasonable approach to ensuring workplace health and safety.
>
> Let me know if you would like to further discuss? I can set up a call for us after the pay meeting Thursday.

52. Ms. McAuley responded to Mr. Sachdev's email two days later on November 18, 2021 in emailing him and Mr. Deveen as follows:

> CPAA is requesting that Canada Post provide us with the scientific information and documentation supporting the decision to enforce a mandatory vaccine policy without an exemption for employees who would wish to submit to mandatory regular testing instead. We assume that, in deciding to do so, the Corporation considered and rejected the less-intrusive testing alternative.
>
> Given that the Association has to evaluate whether the rule about vaccination in order to work is reasonable, we need to have all of the currently available information the Corporation relied on, or would rely on to support the decision and to reject testing.
>
> We assume that, until we have this information, and until we determine whether we accept the Corporation's rationale, it will not be necessary to file a grievance. Can you let us know if Canada Post is requiring that CPAA file a grievance about its vaccine requirements.

53. Unless she was thinking about the possibility of filing another grievance isolating the consultation issue, the apparent misconception contained in this email relates to the Association's only grievance. It had been filed and served on Mr. Sachdev on November 9, 2021, with a first level grievance hearing scheduled or about to be scheduled for November 23. Mr. Sachdev nevertheless responded by email on December 6, 2021:

> I am writing about your request for the underlying scientific evidence in support of the Vaccination Practice. As this relates directly to the national grievance you already filed, and is therefore the subject of litigation that is currently active. We will defer to the litigation process for the production of further evidence about the merits of the Practice. CPAA and the Corporation will both have an opportunity to obtain and question each other's evidence, including any further medical and scientific evidence.

54. There is no indication any such additional meeting occurred outside of the grievance hearing process, or that any further detailed information was provided by way of possibly continuing the consultation process. At the same time no one can dispute that staffing difficulties were materializing at various operational locations, the first breakdown of office closures due to insufficient staffing being forwarded to the Association on December 8, 2021, affecting some 24 locations. Employee compliance with the policy requirements certainly was not universal. The Corporation compiled periodic vaccination status summary reports. By mid-January 2022 there were some 552 bargaining unit members holding LWOP status for being unattested, unwilling or unvaccinated. There were also an additional 136 members unable to vaccinate due to religious reasons or medical reasons. As indicated by Ms. McAuley in her testimony, there were some members who simply chose to leave their employment with Canada Post as opposed to being forced onto unpaid leave status.

55. By way of explaining her concern over having insufficient information to assess, Ms. McAuley testified that with the mandatory vaccination policy coming into effect on October 26, 2021, setting a November 26 deadline for attestation compliance, the Association's executive was made aware there were numerous bargaining unit members "leaning towards being antivaxxers", as she put it, and others who were said to be "vaccine hesitant". Indeed, as the numbers indicate, there were many concerned members across the bargaining who were indicating reluctance, even outright refusal, and were looking for answers. Suffice to say, by the Association's assessment from the questions being asked, it was often a matter of their having too little information in making individual choices on whether to comply with the physically invasive vaccination requirement, or face the consequences. By her assessment, given in testimony, all during the time that the full scope of the policy driven requirements was still under consideration, with back-and-forth communications, had the Association been able to assess and comment/advise positively on the Corporation's scientific and medical evidence on which it was presumably relying, "it might have assisted members with their decision", which is to say that in her view there should have been more investigative/researched guidance made available to the Association through Mr. Sachdev's

communications, emails and attachments, and at their meetings. Nevertheless, with the Association's executive having long supported its members being vaccinated, even having sought prioritization, there was no evidence that it expressed any doubts over efficacy or safety when pushing for a "vaccinate or test" approach. Its executive members did understand there would be concerns expressed by reluctant members were it to become mandatory, and presumably could have used more help in persuading its membership to cooperate.

56. By way of explanation for her concern, Ms. McAuley testified about the many inquiries she received from bargaining unit members through correspondence and emails and phone calls, those who refusing to be fully compliant with the policy or were at least reluctant, although having no exact figure. She provided example emails subsequent to the policy being initiated covering the numerous areas of doubt over the issue of the Corporation acting without employee consent. By Ms. McAuley's description, the questions being asked were many and complex. By example, there was an email from a 28-year member received on November 8, 2021 (one day prior to the Association filing this grievance), being a postmaster in a rural Alberta community, who indicated having "some questions". These included the legality of the Corporation putting employees on LWOP, citing the financial and mental hardship related thereto; the coercion aspect and whether it amounted to harassment and intimidation; whether it amounted to discriminatory treatment; and seeking complete disclosure on how the Corporation came to determine its vaccination mandate.

57. In another example email from mid-November 2021, a postmaster in a rural Ontario office, following a discussion with coworkers, claimed that they were not getting the answers to their questions when they called their Association representatives. This postmaster with 21 years service had not yet responded to the Corporation's entreaty to comply and indicated not knowing what to do, stating "I am also very fearful of the vaccine. I have never been vaccinated in my life and I do not put anything into my body. I have severe anxiety and this is something I just cannot do," going on to express confusion over why it was that rapid testing was not sufficient, and fully expecting to be shortly unemployed despite the financial ramifications for self and family. The membership inquiries, it might be said, were examples of the pressure being applied on the national executive members subsequent to the vaccination policy implementation.

58. In her evidence, Ms. McAuley stated her view there had been too little scientific and/or medical formation presented for the Association's assessment to allow it to adequately or reasonably answer the many questions being asked by reluctant and/or outright antivaxxer members. By her description, had such supporting information been forthcoming from the Corporation, it may have assisted the Association in persuading numbers of them to cooperate. In taking this approach, she also indicated being in agreement that the Corporation has a principal obligation to ensure a safe workplace and take all reasonable steps in that direction. She also acknowledged that the Association received letters and emails from members supporting the vaccination program, remarking that the "vast majority" cooperated with the mandatory program and were vaccinated. The numbers indicate there was an approximate 7.5% refusal, a similar rate to the CUPW membership.

59. At the same time, there was no indication from Ms. McAuley in her testimony that the Association at any point was conducting its own research other than what was widely made available to the general public at large, either prior to or subsequent to urging the Chief Medical Officer of Health in Ontario, in February 2021, to prioritize vaccination for the Corporation's workers. She testified that the first topic addressed in the "National President's Report" issued at some point in December 2021, but written prior to the mandatory policy's October 26, 2021 implementation, was aimed at dealing with the vaccination situation. Therein she stated it was "inevitable" there would be mandatory vaccination and that they could expect more turmoil in the branch locations, even some people quitting before committing to be vaccinated. She mentioned the Association's being concerned over the likelihood of serious staffing issues, but did not indicate that the Association was seeking any production, review or analysis of the Corporation's scientific or medical research in support of following the federal government's expectation for mandatory vaccination, while stating:

> Overall, we are pleased with the way Canada Post Corporation has handled the pandemic. Our weekly calls with Canada Post were extremely helpful with getting information out to our members as soon as possible. We wanted to know how the frontline members felt about working through a pandemic, so we sent out a survey.

60. There was no evidence that the survey information was shared with the Corporation in any of their discussions prior to implementation.

61. Ms. McAuley's Report also included a reference to the legal opinion the Association had received, in the excerpt titled "The Legal Side of Vaccination Mandates". No doubt this section had

been drafted after the mandatory vaccination policy was announced, expressing the national officers' informed view that arbitrators and the courts accepted that employers had discretion to make workplace rules that are reasonable, and that there was nothing explicit in the collective agreement preventing the Corporation from implementing in a rule about COVID-19 to make the workplace safer. No doubt they were becoming aware that arbitrators had started upholding mandatory vaccination policies as reasonable where there was sufficient evidence that it could reduce a significant health risk in the workplace. They went on to state:

> It is our view that, even if CPAA challenged it, overall, an arbitrator would likely say most, or all of the proposed mandatory vaccination policy is reasonable.
>
> Depending on how it is implemented in individual cases, it might be possible to file a grievance saying that member circumstances were not handled appropriately.

62. While there was no reference to the consultation process, the document went on to include a specific section titled "Message from the National Officers", no doubt likewise drafted following the announced mandatory vaccination policy, its referencing the grievance having already been filed. The Message which Ms. McAuley confirmed as being her view of the time, reflecting their collaborative viewpoint in having to deal with the mandatory vaccination requirement, included the following paragraphs:

> We have had to make sure that people are able to work in a safe environment. That is particularly hard in our small offices. We have had to respond to people who are unable to comply with the Corporation's requests, and to find solutions. Now you have the vaccine mandate.
>
> There are people who are legitimately unable to be vaccinated, usually for medical reasons. We are continuing to make sure those people can be accommodated to the extent possible.
>
> There are also people who have said they are fearful of the vaccine and are unable to bring themselves to get the shot and we are working with the Corporation to see if there are measures that might be available: for example, a delay for the requirements in some individual situations.
>
> We also face the reality that there are many members who have been vaccinated and want to minimize the risk of catching COVID, or a severe case of COVID. They don't want to expose a vulnerable family member, or child who is not yet able to be vaccinated, to the disease. That is a perfectly understandable and legitimate concern.
>
> We are speaking with Canada Post regularly to find the greatest range of options to try to satisfy those legitimate concerns on both sides of this issue. It is not easy, and the consequences, no matter where the balance ends up, can be severe for someone who feels their interests were not protected we did request an extension until February 2022 from Canada Post, so our members could have more time to adjust and make alternate

> arrangements. Canada Post stated that they have to follow the Ministers orders cannot change the timelines. After much consideration, CPAA has filed a National Grievance on the Mandatory Vaccination Practice.
>
> We will not back away from these issues. We will get the best information we can, and make sure Canada Post makes its decision based on the science, not just a directive from the government. In the end, no matter what we do, some will be disappointed some will be angry. That troubles us, but we have a responsibility to make the best decisions we can for the good of each member and for the good of the membership as a whole. Balancing acts are always less fun to perform than they are to watch. We will continue to work to make sure that the balance is the best possible.

63. Ms. McAuley in her testimony did not back away from the sentiment expressed by the Association's National Officers in this Message to members, accepting that the situation in which its membership found itself had become very difficult for those not convinced they should cooperate. Nevertheless in having referenced the Association's getting the best information it could and making sure the Corporation made its decision based on science and not just due to a directive from the government, she acknowledged in cross-examination that the Association would have had access to independent scientific evaluation at any point, "but not from Canada Post" as she put it. By then, having filed its grievance, the Association was in the same position as CUPW, needing to find its own scientific support were it to continue disputing the policy through to arbitration. This scientific evaluative approach was taken by CUPW following its filing a national policy grievance on November 15, 2021, having instructed its own outside analysis covering the various compliance issues, such as safety, efficacy and privacy, both for purposes of initially unsuccessfully seeking an interim cease-and-desist order from Arbitrator Kevin Burkett in November 2021, and at the arbitration hearing before this Arbitrator in April 2022.

**Discussion of mootness argument**

**Corporation**

64. Following my hearing the evidence in this matter, Corporation counsel presented its argument covering the issue of alleged mootness, seeking a dismissal of the grievance on that preliminary basis. The Corporation asserts there is no benefit to the Parties having any determination made on its merits. From its perspective, the grievance serves no real purpose at this point inasmuch as the mandatory vaccination policy which founded it was suspended in July 2022. The Association's

having grieved the situation as it stood in the fall of 2021, including apparently the manner in which the Corporation went about organizing its information and reaching its decision to implement the policy, without delay, has been "exhausted and is no longer relevant" to quote Mr. Pigott in his presentation on this issue. It was said that whether the Corporation acted reasonably or unreasonably in October 2021 with respect to the manner in which it invoked the policy, it is currently not being enforced, nor is it being challenged as being ultimately reasonable, and therefore any challenge to the policy at this point, or any aspect of that policy, should be considered moot.

65. In that respect, counsel submitted, the redress sought in the grievance, which includes a declaration that it was unreasonable to refuse an extension to the deadline to be fully vaccinated, with compensation for any affected members suffering a loss, does not at this point raise any issue of policy formulation or its legitimacy whether or not the Association would have liked more interaction or seeing it delayed. Counsel submitted that societal responses to pandemics are said to be fact specific, and this particular dispute should be seen to have ended at the point of the Association no longer disputing the Employer's mandatory vaccination policy. Further, were there any individual complaints, they should have been initiated in the form of individual grievances on a case-by-case basis. The Corporation takes the entire complaint to have been derailed in that the Association no longer disputes the legitimacy of the mandatory vaccination policy in combatting the pandemic and protecting its workforce.

66. In support, the Corporation has cited an Ontario Grievance Settlement Board award in *O.P.S.E.U. v. Ontario (Ministry of Community, Safety & Correctional Services)*, 2010 CarswellOnt 10247 (Abramsky) said to be similar. In that case, the union filed a policy grievance alleging that the employer had violated the collective agreement by refusing to provide H1N1 flu vaccinations to institutional employees, with the Employer's response being that its refusing to vaccinate staff did not arise under the collective agreement, and also asserting that the grievance was moot requiring the grievance to be dismissed on that basis alone. By the time the matter came to arbitration the H1N1 flu crisis was over. The "only potential relief" at that point was declaratory which the employer viewed as being only a matter of scoring some debating points, as was the conclusion reached in another arbitration award which was under consideration. The employer urged the arbitrator to not exercise the Board's discretion to hear the case on the basis that the concrete dispute

had disappeared and the issues had become academic, relying on the guidance provided in the leading judgement on the issue of mootness delivered by the Supreme Court of Canada in *Borowski v. Canada Attorney General)*, [1989] 1 S.C.R.342. Justice Sopinka, in dealing with a lawsuit advanced through the lower courts described the doctrine of mootness as follows starting at para.15:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the right of the parties, the case is said to be moot...

67. Accordingly, the first step according to the Supreme Court as Arbitrator Abramsky quoted, is "to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic" which if answered in the affirmative leaves the tribunal to consider whether it should exercise its discretion to hear the case, or not, and in *Borowski* it was found there was "no longer a live controversy or concrete dispute as the substratum of Mr. Borowski's appeal has disappeared". This was the same judicial guidance cited by Mr. McGee in the Association's response to preliminary objection on mootness, but construed differently on the facts and issues presented here.

68. Arbitrator Abramsky went on to discuss several case law examples in support of the reasoning that in the event there was a future pandemic raising the issue of the employer's obligation to provide vaccination, it could be decided on the specific facts existing at that time. She found that a decision respecting the H1N1 crisis in 2009 was unique, for a variety of reasons, and a decision concerning that situation would not be useful for future potential pandemics "which would present their own unique circumstances and issues". Mr. Pigott submitted that Arbitrator Abramsky's approach should persuade me not to exercise my discretion to hear the grievance on the merits. However, it bears observing that the Arbitrator also reasoned, as she put it at para. 40: "there are no 'collateral consequences' to the Employer's actions in regard to vaccinations that require a decision", there being no individual damages claimed nor any continuing impacts or consequences at that point flowing from the Employer's actions giving rise to the grievance. Hence it was taken to be

distinguishable from the line of cases where alleged collateral consequences would require determination by the arbitrator.

**Association**

69. In reply, Mr. McGee on behalf of the Association submitted that essentially the Corporation's position claiming the grievance to be moot was tantamount in a policy grievance situation to finding that it can escape any real consequences for having violated the collective agreement. The Corporation seeks to sidestep the possibility of having to deal with the consequential aspects, the "collateral consequences" as it were, in a policy grievance where damages have been sought for affected individuals, and it presents a larger issue than simply relating to the mandatory vaccination policy eventually not being disputed some months following its invocation. By the Corporation's logic, defeating a filed grievance could simply be achieved by its taking a different approach months later to correct the situation giving rise to the violation. But, the Association contends that subsequent circumstance should not be any suitable ground for an arbitrator not hearing the grievance were any accompanying issue to remain unresolved. By the Association's assessment, the issue confronting the Arbitrator currently centres on the Corporation's failure to provide suitable scientific and/or medical information for the Association's assessment in a timely fashion, and failing to set a reasonable deadline for compliance. There was no allowance for an extension of time, which the Association has sought to prove on the evidence as reasonably required under the circumstances, tied into not having sufficient information, with possible financial consequences for the affected noncompliant employees. The resultant consequences, whether or not the vaccination policy is no longer disputed eight months later, presents a continuing unresolved issue between them relating back to what the Association viewed to be unreasonable at the time of filing the policy grievance, and currently.

70. In support, Mr. McGee referenced the Brown and Beatty, *Canadian Labour Arbitration (5$^{th}$ ed)* summary in the Association's authorities for their discussion centering on needing a real issue between the parties. They remark at topic 2:3240 as follows:

> But since the parties to a collective agreement relationship have a continual course of dealings with each other, most of the reasons which theoretically underline the doctrine of mootness are weakened or do not exist, and it may be appropriate to retain jurisdiction to deal with a grievance notwithstanding that in the particular circumstances the award may have no immediate consequences for either party. Indeed, even where in a specific instance

> there can be no practical effect from the award, there may well still remain a difference between the parties.

71. Counsel referenced another textbook summary, Mitchnick and Etherington, *Leading Cases on Labour Arbitration* at Chapter 3.5 where it was said that in situations of arbitrators having to assess the issue of mootness "i.e. whether there is any practical purpose to making a determination", generally it comes down to inquiring whether there is a "live controversy", an underlying issue which needs to be addressed whether or not the employer thereafter took steps to correct the precipitating occurrence. They cited Arbitrator Goodfellow's award in *Toronto Star Newspapers Ltd. and C.E.P., Local 87-M* (2001), 98 L.A.C.(4th) 428 in support, where the employer had offered retention bonuses to employees without consulting with the union, but following the grievance being filed withdrew the offer. The Arbitrator determined that the alleged violation was not just in the payment but also in offering it. Accordingly the union was within its rights to seek a determination as to what had taken place and whether it constituted a violation of the collective agreement. As summarized by the learned authors following their case law analysis: "in general terms, the granting of relief by the employer is less likely to lead to a finding of mootness where the grievance raises an underlying issue of contract interpretation that remains unresolved". The Association contends that there is an underlying contract interpretation issue in terms of how the Corporation went about imposing the mandatory vaccination policy with long-standing individual consequences by reference to the facts and circumstances placed in evidence, being a separate issue than its having decided months later not to dispute the vaccination policy itself, or recognizing that the policy was eventually suspended in July 2022.

72. In further support the Association cited additional case law where arbitrators addressed the issue of mootness. This included arbitrator Shime's recent award between these same parties in *CPC and CPAA, (Lisa Bowles grievance)*, unreported May 4, 2022. There had been an allegation of workplace harassment, bullying and intimidation, with the Corporation alleging that issues giving rise to the complaint had been fully resolved. Accordingly the employer by way of a preliminary objection sought the proceedings to be declared moot. Arbitrator Shime's analysis started with *Borowski.* It included his referencing *Sherbrooke Community Society v. S.U.N., Local 22* (1981), 2 L.A.C. (3d) 97 where in distinguishing between judicial and arbitral approaches to dispute

resolution, Arbitrator Norman stated at para.20:

> The parties before an arbitrator by definition must continue to live together in a work relationship under a collective agreement. The parties before a court are seldom intertwined. Appellate courts find questions of law to be moot when there is no real relationship left between the parties. In a continuing relationship once a systematic issue is raised by a particular grievor, it simply does not disappear due to a change in that particular person's circumstances.

73. Arbitrator Shime went on to quote Arbitrator Kennedy from *Niagara South Board of Education v. O.S.S.T.F., District 7* (1980), 2 L.A.C. 332 where the issue had become academic to an individual grievor, but it was found appropriate to proceed where there was a real potential for the issue arising again, "and the award can therefore be of assistance to the parties in avoiding future conflict under the collective agreement." The same approach was taken by Arbitrator Luborsky in *Hilltop Manor Cambridge and SEIU Local 1,* (2018) 295 L.A.C. (4th) 17. Arbitrator Norman in the CPC/CPAA arbitration denied the preliminary objection on the basis that there were certain "live issues of concern" still existing, despite there being resolution of a number of practical work related issues raised by the grievance.

**Ruling - mootness**

74. The Association takes there to be a continuing issue requiring resolution which is to say the Corporation's alleged improper failure to have provided it with suitable background information supporting the analysis behind invoking the policy, prior to implementation, documentary in nature ("scientific and/or medical"), as a matter of assuaging membership concerns; also disputing its invoking the vaccination policy when it did with the stated compliance deadline as opposed to extending it past one month. This is irrespective of the Association no longer disputing the vaccination policy itself. Not only is it seeking a declaratory award but it is also alleging there could be compensable personal loss for affected noncompliant employees some of whom, by the Association's assessment, would have possibly come to a different decision had it had more time and more information from the Corporation to consider and share with numbers of concerned members. At least that is the Association's position.

75. This is to say, in the labour relations context, there are remaining live issues. In my view, on the circumstances presented, it goes beyond needing to recognize that an award, following a

substantive change to the situation giving rise to the grievance in the first place, can be helpful to the parties in appreciating their responsibilities under the collective agreement, being the approach most often taken in labour relations matters where there has been a correction subsequent to filing. On the circumstances of this matter presented in evidence, I agree with the Association's position that the grievance continues to raise live issues related to the Corporation's implementing the vaccination policy when it did and whether it should have provided more scientific and/or medical information in support thereof within the consultation process, with possible individual consequences, which is at least the allegation needing to be considered on the evidence.

76. I accept that the Arbitrator Abramsky award in the *O.P.S.E.U.* case is distinguishable on its facts, there being no ongoing live issues found to exist by the time of the arbitration taking place, in that any allegation of there being an obligation to provide vaccinations to staff in the event of a future pandemic would realistically need to be decided based on the specific facts existing at that future time. The arbitration, over which I am seized, raises the issue of whether the Corporation somehow violated its obligations under the collective agreement in any aspects of its implementation as an exercise of management rights, and were that the case, possibly causing compensable consequences for both the Association and affected members. I find that the case law provided by the Association, pointing to my needing to consider the mootness issue in the labour relations context, to be compelling. This is not a case where the arbitrator's discretion could be exercised against hearing the policy grievance. Ultimately, there are collateral issues. These are live issues to be dealt with and decided. The primary objection on the issue of Mootness is denied, leaving this matter to be determined on the merits of the live allegations and issues presented.

**Discussion of Argument on the merits of grievance**

**Association**

77. Ms. McEwen submitted on the Association's behalf that the pertinent facts reveal the Corporation's having wrongly refused or otherwise unreasonably failed in its interactions with the Association's executive team, Ms. McAuley, Mr. Jones and Mr. Maheux. In particular, it failed to provide sufficient background assessable information to justify infringement on its membership's privacy and personal integrity rights in invoking its mandatory vaccination policy when it did, allowing for no postponement. The Association contends that having legitimate regard for its

responsibilities in the Corporation's fairly administering its managerial rights should have meant sharing the scientific and/or medical analysis on which it was relying for discussion purposes. Consequently it should be taken as unreasonably having failed to properly support its policy decision. Counsel cited the *KVP* principles in addition to the line of case law indicating there is a duty of care resting with parties in their dealing with each other within a contractual framework, a requirement to act fairly, including in collectively bargained relationships.

78. Counsel addressed the evidence of the Corporation's Health and Safety Director, Ms. Lewis, admittedly having done her own analysis, with management relying on the information she had reviewed supporting a mandatory approach to the vaccination issue. There was no indication that she ever provided her researched information in any detail to the Association, nor any backup materials. The Association asserts that the obvious consequence was leaving the Association in no position to analyse the Corporation's scientific and/or medically-based rationale, if such was the reasoning behind the policy as opposed to simply falling in line with the Government's expectations, nor appropriately advise its membership in order to allay their concerns if possible. It was not enough to simply follow the Government's lead.

79. In support, the Association relies on case law centering on a liberal interpretation of the *KVP* principles, typified by an early COVID-19 arbitration award by Arbitrator Stout in *Electrical Safety Authority and Power Worker's Union*, 2022 CanLII 343 where he had noted that the case was not about the merits of being vaccinated or the effectiveness of the COVID-19 vaccine, having accepted that the science was clear that the vaccines currently being used were safe and effective in reducing the likelihood of becoming seriously ill. No doubt vaccinating the general population was an important component of battling the pandemic. However, the language in the collective agreement did not specifically address vaccinations. Notably, the Arbitrator accepted there were ample case law examples of applying the *KVP* reasonableness principle, supporting a "balancing of interests" approach to assess unilaterally imposed policies infringing on one's privacy, including those dealing with personal autonomy and bodily integrity. He found for the union on the evidence presented for his review at arbitration but pointed out that the situation could change going forward. While there was no issue in that case of failing to properly consult with the union before implementation, the current situation, according to the Association, required the Corporation to have reasonably shared

and discussed its scientific and/or medical analysis before setting any deadlines as an application of *KVP*. It is management's failure in that respect which was said to have arguably impacted employee compliance irrespective of whether taking a mandatory vaccination approach ultimately could not be disputed by the Association by the time the grievance process advanced to arbitration, and irrespective of the health and safety concerns driving management's thinking.

80. In further support the Association relies on the Supreme Court of Canada's judgement in *Communications, Energy and Paperworkers Union of Canada, Local 30 and Irving Pulp & Paper, Limited,* [2013] 2 S.C.R. 458 for its discussion of the *KVP* reasonableness principle in circumstances involving the employer's unilaterally imposed policy covering random alcohol testing under the management rights clause. The Court observed the general rule long applied within the labour relations community that any policy unilaterally imposed, in addition to its needing to be consistent with the collective agreement, must be reasonable, referencing the *KVP* test and arbitrators' use of a "balancing of interests" approach. At para. 31, Abella J. stated that while the dangerousness of the workplace, however it might be described, was highly relevant, it was "only the beginning of the inquiry", never found by arbitrators to be automatic justification for unilateral imposition of unfettered random testing with disciplinary consequences. She stated that evidence of enhanced safety risks was required such as there being a general problem with substance abuse in the workplace. The requirement for a reasonableness assessment is taken by the Association to be suitable recognition of there needing to be a fulsome analysis of the evidence concerning the safety issue at hand in a particular case, including that it should be shared with the union for its analysis, meaning informed interaction, *before* invoking the policy.

81. In reviewing *Irving*, one observes that while stating that the decision concerning random testing ultimately should be evidence driven, the Court did not remark on the consultative role of the union in assessing the supporting evidence prior to the imposition of the disputed policy. The case law suggests that at some point, whether within the grievance process or earlier, the employer would be called upon to demonstrate the need for its policy as an exercise of management rights in balancing the competing interests; indeed where sought to be enforced in the disciplinary sense it is unquestionably subject to the test applied at arbitration of needing to have reasonable cause. The Court observed the *KVP* principle to be applicable, namely that all company rules with disciplinary

consequences must be reasonable. Abella J. went on to state at para. 37, referenced by the Association, that she had been unable to find any cases where an arbitrator had concluded that an employer could unilaterally impose random alcohol or drug testing "absent a demonstrated workplace problem", citing numerous cases to that effect. The learned Justice also observed at para. 53 that unions are always free to negotiate an extraordinary incursion into the rights of employees. Nevertheless, as she stated: the employer "must comply with the time-honoured requirement of showing reasonable cause before subjecting employees to potential disciplinary consequences" going on to reference the arbitral consensus, that an "employer would be justifiably pessimistic that a policy of unilaterally imposing random alcohol testing in the absence of reasonable cause would survive arbitral scrutiny." The emphasis in *Irving*, as with the labour relations cases cited therein, was on the disputed unilaterally imposed policy being subjected to critical review and analysis within the grievance and arbitration process with due regard to the *KVP* principle of reasonableness. It was a matter of focussing on the factual backdrop allowing the arbitration board to determine whether the employer had shown that requisite problems existed sufficient have reasonably justified the policy, again not a consultation issue.

82. The Association contends that *Irving* supports the view that it cannot simply be a matter of the Corporation making a bald assertion concerning the need for mandatory vaccinations in its interactions with the Association while the policy change was under consideration, but rather it is a matter of fulfilling the *KVP* reasonableness principle throughout. The Association takes it to include interacting with the Association in a consultative format so as to adequately explain its action through sharing its scientific and/or medical information prior to invocation. This would be irrespective of the issue in *Irving* centering on the supporting evidence, or lack thereof, being presented to the arbitration board in the employer seeking to have the balancing of interests applied in its favour. There was no discussion of the sufficiency of a consultative process as with numerous other cases discussed in the judgement where the evidence at arbitration dealt with the rationale behind the unilaterally imposed policy. It can be observed that in various COVID-19 cases decided since January 2022 there was expert testimony for the arbitrator to consider in assessing the balancing of interests, as was the situation in the CPC/CUPW matter heard in April. Indeed that was the arbitral exercise facing arbitrator Stout in the *Electrical Safety Authority* case cited by the Association.

83. Nevertheless, in the context of the Corporation's mandatory vaccination policy, no longer being disputed by the time of this arbitration hearing, and suspended in July 2022, the Association views the logical implication of the *KVP* requirement for reasonableness to be that the scientific and/or medical information on which it was relying should have been made available to the Association's representatives prior to invoking the policy. It was said to be necessary for its internal discussions. Certainly this was the subject of Ms. McAuley's complaint to Mr. Sachdev about not having sufficient scientific and/or medical information from the Corporation to do its own analysis covering the safety, efficacy and body integrity issues at hand, and seeking postponement of implementation. Admittedly, it would be difficult for the Association to say that its leadership was not aware of the overall significance of universal vaccination as a valid COVID-19 response tool inasmuch as it had been seeking prioritization from provincial health authorities for its front-line workers since the previous February and was in favour of its membership becoming vaccinated, unless medically contraindicated, as was the CUPW leadership. Nevertheless, I am urged to consider this reality to be an unrelated circumstance not limiting its right to have an appropriately informed consultative process once the meetings started occurring following the Government's announced expectations in mid August 2022.

84. In support, the Association relies on the Supreme Court of Canada's judgement in *Bhasin v. Hrynew*, 2014 SCC 71 (CanLII), which involved a contractual dispute between a company and its retail dealer, where one contracting party's contractual issues with the other were said to require that each should have "appropriate regard" for the other party's interests, albeit depending on the context of the contractual relationship. The Court accepted, as stated at para. 93, that there were certain principles to apply, such as good faith underlying many facets of contract law, as Cromwell J. put it: which had implications in "in particular types of situations and relationships", reflecting on duty of honest performance and good faith "which requires the parties to be honest with each other in relation to the performance of their contractual obligations". This guidance has been cited by arbitrators, including in *Bell Canada and UNIFOR,* 2016 CanLII 11,573 (Surdykowski), being a management rights case involving two employee reassignments following a testing process requiring a passing grade, said by the union to have been improper. The Arbitrator accepted the *Bhasin* principle of needing to recognize there was an obligation coming within the collective bargaining relationship which required honest and reasonable contract performance, a requirement pertaining

to both parties. He rejected the employer's preliminary objection as to arbitrability based on its having exercised management rights in the collective agreement, and directed the hearing to be heard on the merits. Arbitrator Surdykowsky, accepted that it was "germane for collective agreement interpretation purposes" quoting from *Bhasin*, including the Court's summary of the principles under Canadian common law concerning the general duty of honest contractual performance.

85. In further support, the Association cited *UFCW and Islamic Foundation School*, 2018 CarswellOnt 8662, the *Bell Canada* award, being one of 26 arbitration awards and judgements referenced by Arbitrator Anderson. The union had grieved the employer's having eliminated a certain tuition benefit which had been available to teachers for their children, done immediately following their negotiating a first collective agreement. There has been some discussion with the union during negotiations but the language was silent. The Arbitrator having cited several arbitration awards dealing with issues allegedly impacting the fair and honest administration of the contractual duties under a collective agreement, accepted the "general organizing principle of good faith recognized in *Bhasin*", requiring that the parties to a contract be honest with each other in relation to performance of the contract. This included a duty to bargain resting with the employer which included disclosing information respecting pre unionization benefits. Ultimately the Arbitrator determined that the unilateral removal of the benefit was done for discriminatory reasons on the basis of their union membership contrary to the collective agreement. In reaching that conclusion there was much discussion concerning the requirements existing under *Bhasin* being applicable to a variety of circumstances. While not alleging a lack of honesty or acting in bad faith, the Association submits there is a requirement under the *Bhasin* guidance and the arbitration award which have referenced its guidance for the Corporation to have disclosed and discussed the scientific and/or medical information on which it was relying, presumably to ultimately assist the Association in dealing with its reluctant members' concerns.

86. While consultation was not raised as an issue in *Bell Canada*, or in the *Islamic Foundation School* case the Association takes this *Bhasin* related requirement, and the *KVP* reasonableness principle, to have contemplated more meaningful, informative, consultation, albeit done outside the joint committee format covered by Article 10, nor was there any argument made that the parties were required to use that structure under the wording of Article 10.01. Counsel submitted that there was

still the requirement to adequately consult once that process was involved. Sufficiency of consultation was raised in *BC Public School Employers Association/School District No. 23 (Central Okanagan) and BC Teachers Federation*, 2019 CanLII 104,263 (Fleming) where the issue to be discussed by the parties concerned how a contractual provision restored to the collective agreement should be implemented. It involved criteria developed by the employer said to have triggered the contractual consultation process. As outlined by Arbitrator Fleming, on pp 29 -30 of his award, having reviewed the case law references which had "extensively discussed" the requirements of consultation, in having noted that the contractual provision did not require any specific form of consultation. He summarized as follows:

> Its characteristics can be summarized as involving a bilateral interaction in which both parties have an active role in making their views known and considering the other party's views. Each should be informed of the others views and each should have a meaningful opportunity to give and receive information.
>
> Each party must be open to the others views to seriously consider them a final decision is made consultation is not negotiation ignores the veto power and mutual agreement is not required.

87. The Association takes the sharing of available information to be critical to the consultation process, and that advocating for membership centres on one side working to understand the other's position through what reasonably has been made available. Ms. McEwen submitted that it was a matter of "Give it to us... We will look at it... If not (acceptable) we will fight about it", that process which the Association submits did not occur in any reasonable fashion, the onus realistically resting with the management team to provide the information on which was relying, said to be also required under the *KVP* reasonableness principle and the *Bhasin* guidance. In their review of the evidence of those participating in the communication between the Parties, counsel submitted that management's presentation was insufficient, not interactive enough in terms of providing appropriate clarification and substantiation for the policy it was about to pursue at the urging of the federal government as clarified through the testimony of Ms. McAuley. The "balancing act" relative to the Parties' competing interests needed more engagement by management and more information presented, meaning by the Association's assessment that the consultation requirements were not reasonably fulfilled. In this instance it should have included any scientific and/or medical information supporting management's analysis of the vaccination requirement. As counsel also put it: "a meaningful opportunity is crucial", having been overlooked by management despite the numerous

discussions and communications between the parties. As counsel put it: management, apparently, did its work on this highly sensitive bodily infringement issue, but just did not share it, "even if it was publicly available". Counsel submitted that in reviewing the various COVID-19 cases, by the Association's analysis, in virtually every case there was evidence addressing the reasonableness of the mandatory policy vaccination policy weighed against the significance of individual rights. The Association says that when one reviews the cases, in arbitrators considering whether the policy was justified, they looked at whether the evidence needed to justify the policy on the basis of the information provided at arbitration.

88. My having reviewed all the COVID-19 related mandatory vaccination cases of which I am aware, so far it includes *UFCW, Local 333 and Paragon Protection Ltd.*, unreported November 9, 2021(von Veh), *Adam Wojdan et al and Attorney General of Canada,* [2021] FC 1341 (Fothergill); *CBC and CUPW (Interim), unreported November 30, 2022 (Burkett); Electrical Safety Authority and Power Workers Union,* unreported January 4, 2022 (Stout); *Bunge Hamilton Canada, and UFCW, Local 175,* unreported January 4, 2022 (Herman); *Teamsters Local Union 847 and Maple Leaf Sports and Entertainment,* unreported January 12, 2022 (Jesin); *Power Workers Union and Elexicon Energy Inc.*, unreported February 4, 2022 (Mitchell); *Chartwell Housing REIT and Healthcare, Office and Professional Employees Union, Local 2220,* unreported February 7, 2022 (Misra); *Teamsters Local Union 938 and Purolator Canada Inc.,* unreported March 15, 2022 (Wilson); *UNIFOR Local 973 and Coca-Cola Canada Bottling Limited*, unreported March 17, 2022 (Wright); *The Toronto District School Board and CUPE, Local 4400,* unreported March 22, 2022 (Kaplan); *BC Hydro and Power Authority and IBEW*, Local 258, 2022 CanLII 25764 (Somjen); *Revera Inc. (Briarwood Gardens et al.) and CLAC,* unreported April 1, 2022 (White); *Maple Leaf Foods Inc. Brantford Facility, and UFCW, Local 175*, unreported April 10, 2022 (Chauvin); *CPC and CUPW,* unreported April 27, 2022 (Jolliffe); *Alectra Utilities Corporation and Power Workers Union*, unreported June 9, 2022 (Stewart); *Coca-Cola Bottling Inc. and Teamsters Local 213*, unreported July 11, 2022 (Noonan). These were cases considered in *CPC and CUPW.*

89. In their case law review, counsel specifically cited *The Toronto District School Board* case, referenced by this arbitrator in the *CPC and CUPW* final award. Arbitrator Kaplan had cited Arbitrator Burkett in his *CPC and CUPW* Interim Award where two expert witnesses had squared

off against each other in giving evidence before him in a situation where the union was seeking interim relief under the collective agreement by way of a cease and desist application, ultimately unsuccessful. One can observe, as Ms. McEwen pointed out, that Arbitrator Burkett relied heavily on the expert evidence presented before him, the same two witnesses who testified before this arbitrator several months later in the follow-up hearing on the merits. Indeed, as is obvious from their Awards, Arbitrators Kaplan and Burkett carefully considered the totality of evidence placed before them in addressing both sides of the mandatory vaccination issue. Arbitrator Wilson took the same approach in *Purolator* in order to know with reasonable assurance why the mandatory vaccination policy in that particular workplace environment was justified. I would add that on my review of the numerous cases cited in the previous paragraph the numerous different arbitrators studied and assessed the evidence presented before them in analysing the pertinent issues of efficacy, safety, and bodily integrity pertaining to the mandatory vaccination requirement in addition to considering the other alternatives, including their examining the specific workplaces and their health and safety needs wherein the mandatory vaccination policies were to apply. My review of all these cases listed in the previous paragraph discloses that they were not decided on the basis of sufficiency of consultation prior to unilaterally invoking the variously described mandatory vaccination policies as an exercise of management rights, health and safety driven decisions, including the consequences for noncompliance. In assessing reasonableness, the arbitrators focussed on the evidence presented at the arbitration hearing to demonstrate the reasonableness of the approach taken. Nevertheless, the Association contends that the same kind of presentation and discussion of available evidence, as the arbitrators ultimately considered, should apply at the consultative stage in the pre commitment assessment process, where such failure comes within the broad parameters of the grievance and is raised as an issue at arbitration, requiring an assessment of the Corporation's actions on that basis. It was said to be an application of *KVP*.

90. Whether using the available joint committee format available under Article 10, or not as appears to be the case, one can observe that Article 10.01 contemplates consultation, and management did follow a consultative process of sorts, that which the Association asserts should nevertheless be taken as deficient and actionable. It contends there were compensable financial consequences for those employees who realistically would have needed some persuasion after due consideration by the Association of whatever materials were known and appraised by the

Corporation and could have been provided to assist the consultative process. This deficiency would require a subsequent monetary assessment for affected employees once the declaratory award has been issued.

**Corporation**

91. Mr. Lejasisaks and Mr. Piggot reviewed the evidence, focussing on the numerous emails, and the telephone conferencing and meetings between Mr. Sachdev and the Association's executive team subsequent to the federal government's August 13, 2021 announcement, prior to the mandatory vaccination policy being implemented on October 26. Their emphasis was on the Association's National President, Ms. McAuley's participation in the process through her numerous interactions over that period of time with Director Sachdev, her raising the issue of wanting the Corporation to provide scientific and/or medical substantiation only after the policy was implemented, when the Association was starting to have persuasion difficulties with its reluctant members. Presumably, at that point, it was wanting the Corporation to help out. It should be apparent that her apparent assumption that the Corporation was keeping back its scientific and/or medical substantiation on which it was supposedly relying in some critical way, was faulty. By the Corporation's assessment, the Association would have one believe that somehow in the midst of the COVID-19 worldwide epidemic, its no doubt having massive implications for every facet of modern life throughout 2020 and 2021, the Corporation's own review of available supporting information of a medical or scientific nature was a significant factor in invoking the mandatory vaccination policy. It was information readily available to the Association from a variety of credible sources had it wanted to discuss efficacy and safety during the numerous interactions subsequent to the federal government's announcement and prior to the decision being taken respecting the mandatory vaccination policy's implementation. But essentially, for one to understand the Corporation's situation during that time, it was simply a matter of relying on widely available public health information, as with a host of other businesses across the country, as lying at the core of its decision making process, and also the widely conveyed expectations of the federal government which itself no doubt was relying on the public health authorities' published information, and an element of common sense. No one was operating in an information vacuum. The Corporation takes it to be notable, and reflective of the Association's long-standing understanding of the significance of being vaccinated as a bulwark against infection and serious consequences. Speaking rhetorically, counsel posed the question of why

would the Association need to look at scientific or medical evidence in October 2021, which it presumed was in the hands of the Corporation, when eight months earlier in its dealings with the federal health authorities, together with other Canada Post unions, it was seeking vaccination prioritization for its members. They had all been urging their members to vaccinate. Apparently, it was a well-established Association position, although it clung to the "vaccinate or test" alternative as more palatable for the reluctant segment of its membership. Its executive had never expressed any doubts over the efficacy or safety of vaccinations as had been the situation with the CUPW executive.

92. Counsel submitted that this espoused, late developed, concern over scientific and/or medical evidence, surfacing in Ms. McAuley's communications subsequent to the policy's implementation, was not raised during the Association's executive team's numerous interactions with Mr. Sachdev, not shown in any of their meetings nor in their email communications, covering the six weeks they dealt with each other prior to management implementing the policy on October 26, 2022. Nor was there any evidence that the policy was somehow formulated as a result of a fresh and compelling look after August 2021 at scientific and/or medical analysis, although Ms. Lewis indicated being confident concerning what was known about vaccinations, including the supporting materials she had reviewed, available to anyone for the asking. But, while no one from the Association was seeking input from her on a health and safety basis, with scientific backing, counsel submitted that there was no evidence that her own research lay at the root of the Corporation's decision. The Corporation acknowledges that she was certainly comfortable from a health and safety perspective. The only Corporation generated experts' report concerning the efficacy and safety of the available vaccines relative to the Corporation's workforce, and formally relied upon, was obtained from epidemiologist Dr. Loeb subsequent to the filed CUPW grievance in November 2021, his assistance sought in preparation for the arbitration process which lay ahead for that union.

93. Further, counsel expressed the Corporation's doubts that the filing of this grievance was ever about any failure to share information, or breaching a consultation requirement. By reference to the grievance document, initially the Association was disputing the policy on the basis of preferring the "vaccination or test" approach, and at least wanted it delayed, presumably due to those concerns raised by Ms. McAuley in her communications with Mr. Sachdev following implementation and the

Corporation's setting a deadline. She had pointed to the difficulties they would face with the Association's members, and the operational problems needing to be overcome in the short term were the one month compliance deadline not enlarged. Further, the Corporation relies on Ms. McAuley having acknowledged that the Association would have had access to scientific and/or medical substantiation independent from whatever the Corporation could have provided, but it wanted it from the Corporation, although there is no evidence this request was ever made during their interactions prior to the October 26, 2021 implementation. Nor was there any evidence the Corporation would not have shared whatever information was being sought during their pre implementation interactions, were that to have been an issue. Counsel submitted the best likelihood is that the Association's membership on learning of the implementation, and shortly receiving form letters concerning their resulting responsibilities, and consequences for noncompliance, the blowback for the executive grew louder as the compliance deadline approached. Counsel described the Association in dealing with the Corporation, to have been well aware that implementing the mandatory vaccination policy and setting a deadline compliance came down to the usual broad-based variety of considerations in dealing with the pandemic, and principally whether it would follow federal government's expectation, as Ms. McAuley's and other executive members from their interactions with Mr. Sachdev, no doubt were anticipating it would do.

94. In dealing with the Association's submissions of law, counsel submitted that the arbitration awards and judicial statements tabled by Ms. McEwen did not assist its case, not *Irving* which dealt with an employer's rule-making authority and needing to act reasonably in imposing a unilateral policy given the particular circumstances, apparently no longer an issue in our situation in that the Association is not disputing the policy itself. That case did not deal with the consultation process, whether or not there was any consultation before the employer implemented its mandatory drug and alcohol testing policy; nor *Bhasin* which dealt with fulfilling one's contractual obligations honestly and in good faith. The fact that the Parties interacted with each other over the vaccination issue on numerous occasions between the federal government's August 13, 2021 announcement and the Corporation's implementation of the policy, counsel submitted, should not be seen to suggest any actionable conduct on management's part for whatever went on between them in their discussions, including their numerous emails, irrespective of some arbitrators finding room to apply the *Bhasin* guidance in labour relations matters. There should be no finding of any lack of candour or failing

honesty. The COVID cases tabled by the Association, and those referenced in the earlier *CPC and CUPW* were said not to have discussed the consultation process, but centered on the evidence produced at the arbitration on the issue of reasonableness, often citing the *KVP* reasonableness test having being met.

95. In counsel's case law citations, which included some of the cases that I have earlier set out, they directed my attention to the emphasis placed by arbitrators on reviewing the reasonableness of a particular policy in a described workplace, all things considered, and the wide variety of operations both in the private industry and within the broader public sector, where mandatory vaccination policies were upheld. These included cases dealing with mail distribution, being this arbitrator's decision in *CPC and CUPW*, Arbitrator Wilson's award in *Purolator*, neither of which, as with numerous other COVID awards, dealt with any consultation issues.

96. In dealing with Article 10.01, counsel submitted that no doubt the Parties taking a consultative approach is important, but it contains no language specifically requiring the Corporation to share all its information, although presumably requests can be made, nor is there anything within this provision, or in dealing with consultation in general, preventing the Association from doing its own research to be shared, or not, although here the information no doubt discussed in their many interactions centered on the federal government's announcement its urging Crown corporations to cooperate, and the resultant effect on bargaining unit members. There was known information coming from health authorities, federal and provincial, and the Corporation's unions were already urging their members to become vaccinated. As it was their interactions went on for weeks as documented in the numerous emails entered in evidence.

97. In urging me to consider that there was no violation of the consultation process as it unfolded, counsel would have me observe that the pre implementation interactive process was not even expressly mentioned in the grievance as presenting a problem. One can see that the Corporation shared various policy drafts between August 21 and October 25, leaving all proposed draft policies open for further discussion. Ms. McAuley's seeking further information following weeks of discussions came after the policy implementation occurred, after it was finalized and announced, and even then her concern was answered by Mr. Sachdev in his November 16 email.

98. Counsel urged me to conclude that no contractual violation should be found, nor any unreasonableness on the Corporation's part with respect to invoking the mandatory vaccination policy when it did without delaying it, despite what it was hearing from the Association during the consultation process. The Corporation contends that the grievance as filed should be dismissed, including on the basis that there is no current dispute at this point over the validity of the policy itself, with which the Association no longer takes issue.

99. Subsequent to the last day of hearing, Mr. Lejasisaks submitted the recently decided *The Regional Municipality of York and CUPE, Local 905*, 2022 CanLII 70,173 issued by Arbitrator Raymond on August 30, 2021, a COVID-19 mandatory vaccination policy case dealing with a municipality owned long-term care home, where the issue of consultation was raised. The parties had agreed that the *KVP* framework was applicable, requiring that a policy not be inconsistent with the collective agreement and not be unreasonable. In determining that a three-dose vaccination policy was reasonable Arbitrator Raymond noted the union's frustration that it was not consulted before issuance of the mandatory vaccination policy or its amendments. He reasoned that failure to consult could not form the basis for violation of the collective agreement unless there was language that required consultation, and that had no power to "censure" the employer for its failure inasmuch as he found no such language. As he put it: "I need a provision in the collective agreement to be violated to make a finding favourable to the Union in respect of the lack of consultation", not found to exist on his review of the contract language. The Arbitrator also stated:

> The *KVP* test which has been used by arbitrators for decades to determine whether to permit an employer to introduce and rely on a policy is only about unilaterally imposed policy. It presupposes that there has not been consultation. For that reason, absent specific collective agreement language to the contrary, the failure to consult alone cannot form the basis of a successful grievance.

100. That said, counsel submitted that with respect to the language of Article 10 dealing with the Joint Consultation Committee format, the evidence showed that the Corporation did engage in extensive consultations outside the committee format as was permitted by the language and would have met any requirements under this Article.

**Association Reply**

101. In reply argument, counsel submitted that the Association disputes there was no reliance on medical information and one need only review the evidence of Ms. Lewis to accept its position,

given her own research about which she testified. The fact that the Corporation may well have relied on other aspects, such as the federal government's expectations or information generally available from health authorities urging the general public to vaccinate should not discount that factor. The issue should still come down to whether or not whatever occurred between the parties prior to implementation was acceptable under *KVP*, said to provide a general reasonableness test able to be construed differently in different circumstances, i.e., including consultation, not having restrictive application. The Corporation could have provided more information during management's interaction with Ms. McAuley and the other executive team members prior to implementing the policy and did not do so.

102. Ms. McEwen also replied to the lately submitted *York* award, her submitting that it should not be missed that Arbitrator Raymond was assuming there would be no consultation over the imposition of the unilaterally imposed policy, not dispelled, which he saw as not detracting from the reality of it being unilateral. But, the jurisprudence is not supportive of his approach particularly in the Corporation's collective bargaining relationships, where there is clear indication that in exercising its management rights, needing to be done reasonably and not contrary to the collective agreement, the duty to reasonably consult as contemplated by the CPAA collective agreement at Article 10, and jurisprudence between the Corporation and its unions, is not eliminated. The Association contends that in order to meet the balancing of interests' test and determine whether ultimately the policy falls in line with *KVP*, it must be able to assess the Corporation's rationale for interfering with the bodily autonomy of its members to be gleaned through accessing its information. In any event, the duty to consult principle is specifically contemplated by Article 10. Counsel summed it up by stating in their written submission presented in response to the *York* case:

> CPAA is arguing it is entitled to the basic information (in this case information relied on by the employer, in the possession of the employer, and which it has said it could easily provide to CPAA) that led the employer to impose the rule in a manner that deprived employees of work. The union is entitled to this information to assess whether or not the policy was justifiable. It is also entitled to this information in order to be able to effectively communicate with his members to satisfy its statutory obligation to ensure that they can make the best decisions to protect their income and their health and safety... A union can only know that the policy is reasonable through the proper weighing of interests when it knows what science the employer is relying on in order to justify the intrusion on bodily integrity. While the Corporation argued that at least some of this information was publicly available, information of all kinds is publicly available, and some more reliable than others. In this case, where the Employer argued at least some of this information is publicly available, information of all kinds is publicly available, and some more reliable than others.

> In this case, where the Employer argued that it relied on no science at all in making the policy, a policy that could potentially have been justified and now lacked the type of foundation relied upon by Arbitrator finding the policy to be reasonable.... In summary, the Union is not arguing that *KVP* automatically creates a duty to consult. It does not need to do so because it has already bargained this duty. The *York* decision does not stand in no here there for the proposition that *KVP* does not include an obligation to disclose information. It only held that, based on the collective agreement, there was no implied duty to consult. The fact that he makes specific mention that the parties had not negotiated a duty to consult and support of this ruling makes the *York* case clearly distinguishable.

**Conclusion**

103. Firstly, my thanks to counsel, Ms. McEwen and Mr. McGee instructed on behalf of the Association, and Mr. Lejasisaks and Mr. Pigott on behalf of the Corporation, and my appreciation for their focussed and purposeful presentations.

104. The Association has grieved the Corporation's moving away from the rapid testing alternative, meaning it initially disputed the mandatory testing requirement, and also for its refusing to allow extension of the time for members to obtain their vaccinations. Evidence was adduced in great detail covering the Association's current contention, in that it no longer disputes the mandatory vaccination policy, namely that the Corporation either outright refused or otherwise unreasonably failed in its interactions with the Association's executive team, headed by National President, Ms. McAuley. For the Association, the issue is apparently tied into the failure to extend the time for compliance under the policy. It has become whether the Corporation fulfilled the consultation requirements in reasonable enough fashion, which presumably would have meant delaying implementation while the consultation continued, possibly with a different result. Its case centres on management's not providing more scientific and/or medical substantiation prior to implementation, needing to be analysed and assessed, as a contributing factor to its overall understanding and ability to provide advice to its membership, and possibly gain additional time.

105. In my considering this issue, it would be impossible to say on the evidence that the Association did not support vaccination for its membership inasmuch as the executive team in February 2021 had sought health authority prioritization for vaccination. The problem for the executive team was not one of needing to be convinced of the critical importance of vaccination in combatting the pandemic, but one of assisting persuasion in dealing with its membership. In her

year-end Report to membership, in its first section written prior to implementation of the policy, Ms. McAuley stated it was "inevitable" there would be mandatory vaccination, but she could see that it would result in more turmoil in the branch locations, including staffing issues, but there is no indication that she was at that point needing something more scientific from the Association for its analysis on the merits of vaccination. It would seem that Ms. McAuley's emphasis at the point of the policy being announced was on slowing the process down, rather than being against widely vaccinating members or needing to be convinced further as to efficacy or safety. Personal privacy and bodily integrity raised another issue, being policy, not science driven, but still part of the balancing of interests approach towards validating the policy. Following implementation, the executive team, no doubt, grew increasingly aware that a decidedly reluctant and even outright antivaxxer component had surfaced, seeking answers.

106. The numerous interactions between the parties' respective teams, prior to policy implementation, being through emails, telephone conversations and meetings, mostly between Mr. Sachdev and Ms. McAuley were described in evidence, one after the other, covering the approximate 11 weeks between the federal government's announcement of expecting Crown corporations and federal sector employers to follow its mandatory vaccination policy approach, and the announced policy implementation by the Corporation. In claiming these interactions to be insufficient to fulfill the consultation obligation, the Association cites *KVP* as covering the need for a unilaterally imposed rule or policy to be reasonable, a long accepted principle within the arbitral community as addressed in *Irving* dealing with mandatory drug and alcohol testing and an assessment of reasonableness in that context, and also citing the *Bhasin* guidance as applied in some labour relations matters in accepting there should be honest and good faith contract performance. It is what the Association contends has relevance in assessing the consultation process in the matter at hand, tying the Corporation's consultation efforts to the reasonableness test, there being no supportable indication of bad faith or dishonesty from Mr. Sachdev's interactions. It comes down to the contention that there should have been more informed interaction form of scientific and/or medical substantiation, that which possibly falls within the realm of acting reasonably, or not, in the given circumstances, and not being a matter having dishonest intentions to any degree.

107. Given that interactions did occur, and the issue of mandatory vaccination was discussed, no

doubt in the context of the recent federal government announced expectations, it is necessary to address Article 10. It is always preferable in dealing with the parties' obligations to start with the contract language. On my reading, taken as a whole, it contemplates the existence of joint consultation committees at the National, Area and Branch levels with up to six representatives from each side at the National level to discuss matters of mutual interest and make recommendations to the appropriate level of management. However, there is no language requiring that the joint committee approach needs to occur in every instance of the Corporation's exercising management rights, in formulating a policy or rule. Obviously that possible approach, while it may arguably have been helpful, simply did not happen in this current situation. It was not required by the contract language. But, that said, it is still noteworthy that Article 10.01(a) in recognizing that meetings can occur outside the joint committee framework, the Parties nevertheless "subscribe to the principle of joint consultation". Frankly this is not surprising, as it would be foolhardy for an employer with many thousands of employees to create and implement new nationally applied policies and rules without informed discussion with the affected unions.

108. I accept that this is the position in which the Parties found themselves subsequent to the federal government's announcing its mandatory vaccination expectations. The numbers of interactions between Mr. Sachdev and the Association's executive team as described in considerable detail in evidence, suggests that there was an effort to provide consultation. The question comes down to whether this bilateral interaction, where both parties need to have the opportunity to make their views known to the other, giving and receiving information, to be seriously considered, was sufficient. The parties needing to act reasonably after undertaking a consultation process has to be accepted as necessary, whether one wants to advance an extension of the *KVP* principle, which is arguably questionable in seeking to apply it to consultation, in that the case was decided in the context of a unilateral rule, or simply rely on the general case law. There is nevertheless a reasonableness element to successfully pursuing this process, being quite separate from whether anything can actually be negotiated within their bilateral discussion. See such cases as *BC Public School Employers Association*, pointing out that there have been many cases where arbitrators have assessed whether the interaction was suitable enough in the given workplace and under the circumstances addressed in evidence. That kind of assessment is what faces us in the matter at hand.

109. I would add that our situation is distinguishable from that examined by Arbitrator Raymond in the *York* award in that the language of Article 10 is specific and establishes the consultation principle, whether inside or outside the joint committee set up. It realistically could have application either way when management is in the midst of considering a significant policy or rule change by exercising management rights. Whether or not it needs to consult in every instance is not the issue before me, inasmuch as I am satisfied that it pursued that course in dealing with the policy under consideration, which raises the issue of whether the interactive approach was reasonably applied in the circumstances, as it unfolded, and fulfilled its obligation to reasonably consult.

110. In all, I have determined on the specific facts and circumstances of this matter having reviewed them at considerable length and in considerable detail, that the bilateral interactions between the parties from the time of the federal government's announcement on August 13, 2021 that it was expecting Crown corporations and federal sector employers to initiate their own mandatory vaccination policies, to the time of the policy's implementation on October 26, constituted a suitably reasonable consultation approach. I say this on the basis of the evidence heard, and case law cited, and for reasons pertaining thereto which are briefly summarized below:

- The sheer number of interactions between the Corporation and the Association, both sides led by persons acting in very senior roles in terms of dealing with the possible policy change issue at hand, namely the Director of Labour Relations, Mr. Sachdev, and the Association's National President, Ms. McAuley, is telling and points to the Parties setting out to pursue a consultation approach in meaningful fashion.

- There is no indication that either side was secretive or holding back on any information that was being sought during this period of time, prior to implementation, with policy framework being under discussion including reviews of draft policy documents, whether or not the evidence was that initially there was a possibility of continuing the "vaccination or test" approach. The Association no doubt was anticipating a change towards following the Federal Government's expectations.

- Both sides were well aware of the workplace significance of *Part II* of the *Canada Labour Code* addressing the health and safety of employees in the federal jurisdiction, as well as Article 17.01 of the Collective Agreement, there being no evidence that either side in their discussions was taking a position against the weight of this language, and the Corporation's responsibilities attaching thereunder.

- The Association's emphasis was not on needing more scientific and/or medical information during these discussions but rather on the operational problems that would exist and compliance difficulties. The issue under discussion became whether to stay with the "vaccination or test" program or follow the federal government's expectations of a mandatory vaccination policy. No one was in doubt about the issue, nor hiding from it.

- Prior to the policy's implementation, which was the culminating event in the consultation process, no requests for further information or meetings, whether in person or through conferencing, were denied by either side. The frequent interaction continued unabated during the relevant period of time.

- The Association had long since internally concluded, at least at the executive team level, that vaccination was a crucial step in combatting the COVID-19 pandemic, and keeping in mind the numbers of affected Canada Post employees, coast-to-coast, which figures were not being disguised or downplayed by anyone, whether management or union side. No one said the statistics were not open for discussion.

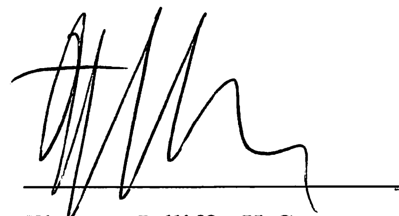
- The initial request for scientific and/or medical information, which had never been raised as an issue during the consultation process, was only advanced by the Association subsequent to the policy's implementation. The Association in any event had access to whatever scientific and/or medical information it would have liked to consult, much of which was publicly available through such sources as national, provincial and local health authorities. There is no indication that the Corporation in October 2021 had yet obtained any experts' reports.

- There was no evidence that the eventual completion of the consultation process and setting a one month deadline for compliance should have required further delay. There was enough time for the Association's membership to comply with the vaccination process, as the large majority did. The fact that there was approximately 7.5% noncompliance only suggests their steadfast intransigent refusal, not that more time to comply would have added anything to the scenario, being speculative at the best.

- On the circumstances presented, and in light of the overall contentious issue of mandatory vaccination of unionized workers employed both in the public and private sectors, as evident from the numerous arbitration awards, any subsequent compliance difficulties the Association executive encountered with its membership does not rest with the Corporation. It was under no obligation to educate them as opposed to ensuring that the policy was consistent with the collective agreement, not being unreasonable, being clear and unequivocal and brought to the attention of the affected employees before it could be acted on. All of this was accomplished, and none of which was interfered with by the consultation process as it unfolded which I accept was pursued in sufficiently reasonable and co-operative fashion.

111. In the result, I must respectfully dismiss the grievance, remaining seized in the event that there is any clarification needed or further involvement required on my part.

DATED this 29th day of September, 2022.



Thomas Jolliffe, K.C.