

IN THE MATTER OF A FORMAL ARBITRATION

B E T W E E N:

**CANADA POST CORPORATION**

The Corporation

-and-

**CANADIAN UNION OF POSTAL WORKERS**

The Union

**Grievance Re:**

**CUPW No.:**

**CPC No.:**

CUPW/STTP NATIONAL  
(Mandatory Vaccination Practice)

N00-20-00008

**A W A R D**

BEFORE:

Thomas Jolliffe, Q.C.

COUNSEL FOR THE CORPORATION:

Christopher Pigott  
Lennie Lejasisaks

COUNSEL FOR THE UNION:

Paul Cavalluzzo  
Jackie Esmonde  
Kylie Sier

HEARING DATES VIA ZOOM:

December 16, 2021  
January 18, 2022  
February 12, 2022  
March 21-22, 2022  
April 5, 2022

**DATE AWARD ISSUED:**

**April 27, 2022**

**Introduction:**

1. This matter concerns the National Policy Grievance N00-20-00008 filed by the Union on November 15, 2021. It disputes the Corporation's unilaterally imposed mandatory vaccination policy issued on October 22, 2021 as described in the "Mandatory Vaccination Practice" document formulated in response to the continuing COVID-19 pandemic. All Canada Post employees, including the approximate 42,000 employees working in Urban Postal Operations covered by this current Collective Agreement, were thereunder required to attest to their vaccination status as fully vaccinated; partially vaccinated and intending to become fully vaccinated; unwilling to be vaccinated; or unable to be vaccinated which is to say coming within a prohibited ground of discrimination under the *Canadian Human Rights Act* such as having a medical exemption which would require suitable accommodation. Employees failing to complete attestation by November 26, 2021 would be considered unwilling to be fully vaccinated and would be placed on leave without pay which is what has occurred. There were anticipated ramifications with respect to those employees on leave without pay for more than 30 days, their having to pay higher biweekly premiums for basic life insurance, disability insurance and extended health care.

2. Following the Union filing this National Policy Grievance it brought a cease-and-desist application before Arbitrator Kevin Burkett, filed under Article 9.87 of the Collective Agreement which by operation of Article 9.93 allows the arbitrator hearing the application to issue an interlocutory order to cease-and-desist were he or she to be satisfied of certain criteria, such as the evidence disclosing a *prima facie* case of a contract violation, the situation is urgent, the balance of inconvenience favours granting of such order, without such order the consequences of contravention would be severe and could not be eventually corrected or compensated adequately, and there is no other useful recourse. Having considered the circumstances presented before him, including testimony received from two expert witnesses who again testified in this hearing, and having considered numbers of affidavits from affected employees which were again entered in evidence in this proceeding, Arbitrator Burkett denied the injunctive relief sought on the basis that any harm arising could be remedied by means of compensation, the restoration of seniority, etc. were a determination to be made on the merits that the mandatory vaccine policy constituted an improper

exercise of managerial discretion under the collective agreement. In short it was taken to be a reparable harm. He referred the grievance to be heard on its merits by way of priority, which is to say referred it to the national list of arbitrators, which resulted in my appointment.

3. Following issuance of the Mandatory Vaccination Practice requirements, while the Corporation thereafter found itself in the situation of requiring satisfactory proof provided by those employees requesting accommodation, failing which they would be considered non-compliant with the attestation requirement, employee compliance by reference to the Corporation's statistical analysis showed itself to be significantly higher than the vaccination rate of the general population across the country. While the rate of full vaccination in Canada was hovering in the 80% range, by the Corporation's analysis as at January 24, 2022 for its Urban Postal Operations unit covered by this collective agreement, those actively at work, an assessed 92.14% were fully vaccinated, and 2.80% were at least partially vaccinated by then, meaning that outside of the small percentage seeking accommodation on medical or religious grounds, only 3.37% had been found unwilling to attest, or stood undisclosed or unvaccinated, thereby having left themselves open to being placed on leave without pay. Its non-compliant bargaining unit members at that point, by the Corporation's calculation, numbered 1,412. There is no doubt that the approximate 1,200 other employees actively working in January 2022, were not fully vaccinated, as they are either being accommodated or awaiting their second dose. They were receiving rapid antigen testing as much as three times per week. It is known that there were some 2,180 cases recorded between November 28, 2021 and January 20, 2022 across its system.

4. It is to be noted at outset of this Award, that the current context of this grievance where evidence tendered by the Parties extended through to March 21, 22, 2022 and argument was finalized on April 7, includes the emergence of the Omicron variant and the significance of its appearance on scene and ongoing ramifications.

**Stated positions:**

5. The Union holds to the position that the Mandatory Vaccination Practice as it has been developed by the Corporation and applied to this CUPW bargaining unit was and remains unreasonable, and should never have been implemented. It has proposed the alternative approach that

frequent, even daily, rapid antigen testing (also known by its acronym “RAT”) should have been the model made available for those bargaining unit employees who have been placed on unpaid leave when either refusing/neglecting to become vaccinated or not properly attesting. The Union contends that its case has been strengthened by the advent of a more infectious strain over the last few months, known as the Omicron variants, and the growing acceptance of rapid antigen testing as a suitable diagnostic tool. It seeks both declaratory relief and monetary damages for the affected bargaining unit members from the time of their imposed unpaid leaves.

6. The Corporation takes the view in asserting the initial and continuing reasonableness of its mandatory vaccination policy, in needing to balance competing interests, that one cannot downplay or discount the crucial significance across the Corporation’s national working environment of its reducing COVID-19 transmission and/or the seriousness of illness for those employees who become infected. Further, the Corporation takes it to be currently apparent that a consensus has emerged in the arbitration awards issued since January 2022. It would have me recognize and consider that challenges to mandatory vaccination policies have been rejected by arbitrators in circumstances which the Corporation takes to be substantially the same as here, both factually and legally, and resolution of this matter should present no different result. The proposed RAT alternative to avoid complying with the Mandatory Vaccination Practice implemented by the Corporation should not be considered appropriate in all the circumstances of this continuing pandemic and the crucial importance of Canada Post’s national responsibility towards keeping its employees safe and serving all Canadians.

**Factual background not in dispute:**

7. It is appropriate to set out some background, not materially in dispute from this Arbitrator’s perspective, as largely communicated through the affidavit evidence and testimony of the Corporation’s Director of Health, Leah Lewis, and the Union’s National Executive Committee member Carl Girouard, together with the numerous documentary materials entered into evidence by consent. During the months subsequent to the onset of the COVID-19 pandemic in early 2020 the Corporation was encouraging its employees through updates and reminders to follow screening requirements and safety protocols such as washing hands regularly, conducting a self-assessment



each day based on the self-assessment tool from the Public Health Agency of Canada, wearing face coverings applicable to all Canada Post facilities across the country, maintaining physical distancing where possible within the workplace, staying at home when suffering any symptoms, and avoiding close contact with people showing symptoms of respiratory illness.

8. By December 2020, with the pandemic continuing to run its destructive course, the Corporation compiled and distributed a detailed document, known as of the “COVID-19 Playbook” outlining what were taken to be “best practices” at that time. As indicated during the evidence of Mr. Girouard, who sits on the National Joint Health and Safety Committee, much of its work in dealing with the pandemic involved reviewing, discussing, and providing feedback on the Playbook’s various paths toward reducing the risk of COVID-19 transmission. The latest version “v.5” was published on May 7, 2021, at a time when distribution of the COVID-19 vaccines were still in the early stages of being made available to the general public. This 86-page document assembled by the Corporation with the guidance of the PHAC was entered in evidence, described by Ms. Lewis as a “living document” meant to be continuously updated to align with evolving guidance. It included confirming mandatory use of second-generation face coverings supplied by the Corporation, and ensuring availability of disposable single-use medical masks. Notably, the mandatory face covering practice had been made applicable in 2020 to all employees, visitors and customers, with signs posted at all Canada Post locations to remind customers of the requirement to wear a mask or face covering.

9. The Playbook protocols included implementation of numerous other requirements such as cleaning/sanitizing and decontamination directives, physical distancing guidance, staggered start and break times in all sections across all shifts, with letter carrier shifts reorganized to start in ways to allow them to maintain physical distancing where possible. There were also training modifications, travel and group restrictions, limitations on social gatherings within premises, food handling directives, workstation redesigns, alternative delivery methods to customers to encourage physical distancing protocols such as removing the requirement to obtain signatures, leaving packages at the door, and limiting contractor access. Notably, there was reference in its latest May 2021 version to the availability of on-site rapid testing clinics taken under Health Canada guidance to be “a screening tool to support employee safety and promote business continuity”, there being a possible risk of

asymptomatic employees spreading the virus within the workplace setting or even in their interacting with the Corporation's customers within postal outlets or in the community at large. To put it bluntly, ultimately there was no real diminution of the Corporation's concerns by reference to its Playbook requirements.

10. Further as the Corporation's approach currently stands, no doubt it started working on phasing in certain identified de-escalation aspects to its pandemic response, set out in its published framework dealing with indoor interactions with the public and employees, masking, distance separation. By March 2022 it had reached Phase 4 of 10 defined phases, which involved reinstating some indoor activities previously not allowed under the Playbook requirements, and moving on to Phase 5/6 commencing on March 28, 2022 with more indoor activities being permitted. On March 28, 2022, the Corporation's Manager, Labour Relations emailed the Union executive members including Ms. Simpson and Mr. Girouard to reflect that Health Canada had authorized two new vaccines and to reflect current best practice for frequency of testing to reduce probability of transmission. It included increasing the frequency of testing requirements for employees unable to be vaccinated on human rights grounds to three times per week, and those still in the process of being vaccinated, meaning partially vaccinated. She advised that "this change in frequency is reflective of recent evidence that shows a meaningful reduction in transmission when testing frequency is increased from twice per week to three times per week and aligns with the frequency required under the federal public servants mandatory vaccination policy". It is noted that she did not however indicate that the Corporation was finding any less worth in continuing with the mandatory vaccination process where it was needing to be completed, nor any indication of that regular testing was thought to be an adequate replacement for vaccination.

**Testimony and affidavit evidence from non-experts:**

11. Mr. Girouard in his testimony acknowledged the "unique" position of Canada Post where Canadians across the country are dependent on its services, expecting that bargaining unit employees will be attending work each day to perform their assigned duties in processing and delivering mail, some of which customers are admittedly members of vulnerable groups. By his description the Union likewise encouraged its members to be aware of their responsibilities involving self screening,

physically distancing at work and accepting the reality of rapid testing as it came to be used. The Joint Health and Safety Committee was involved in those kinds of discussions, and the Union supported the various preventive and diagnostic practices. Mr. Girouard also acknowledged that the Union saw vaccinations, as they started to become available in 2021, as “a very important tool”, and he recalled the Union being involved in the lobbying of local authorities to give early vaccination access to Union members. He referenced a May 12, 2021, Union bulletin where its leadership was indicating there should be a vaccine priority for its members across the country. He said that he was aware that the Government was prioritizing vaccines for certain groups “and we wanted our members on the priority list”, the Union having no doubt about the importance for postal workers to be protected from infection whenever possible. He said that he had no specific number in mind but it was a case of “the more employees the better”, when it came to protecting workers’ health. However, plainly put, this is not to say that Mr. Girouard, or the Union, in exercising their representational responsibilities, were ever agreeable to a mandatory vaccination policy.

12. At the same time, there is no dispute about the numbers of declared COVID-19 “outbreaks” at Canada Post locations starting in March 2020, defined as having at least two concurrent cases in a workplace. Placed in evidence through compiled and charted Corporate information, there were at least 10 outbreaks in Canada Post facilities in 2020, as identified by local public health units within the provinces, seven of which involved dealing with more than 10 positive cases. There were another nine outbreaks in 2021 prior to the emergence of the Omicron variant near the end of November, known to be more transmissible than the previous Delta variant. At Canada Post’s largest parcel processing plant, the Gateway facility located in Mississauga having approximately 4500 workers on-site, the worst outbreak commenced in November 2020 and lasted into February 2021 where there were 308 positive cases identified amongst employees and tragically one resultant death. By mid January 2021, with a spike in cases occurring, the Corporation under the guidance of Peel Public Health had started using the RAT approach at its on-site clinic. David Deeks, the Director of Operations at Gateway East, in his filed affidavit described the difficult situation which unfolded at that facility, his concern being both for the health and safety of employees and the Corporation’s operational needs. At one point Gateway experienced a complete shutdown of Shift 3 for two weeks, its busiest shift, which according to the statistical information analysed by the Corporation, caused

an increase in parcel and packet processing times representing a 46.8% variance between throughput volumes of parcels and packets during the two weeks between January 13 and January 27, 2021. The Corporation has calculated the financial impact of this multi-week outbreak at Gateway as showing \$5.1 million additional overtime expenses for January and February 2021 when compared to January and February 2020. Another employee died on March 30, 2021 near the start of another outbreak at that location involving 22 employees. By Mr. Deek's affidavit, the Corporation has calculated that 227 cases were reported at the South Central Letter Processing Plant in Toronto occurring between December 9, 2021 and January 21, 2022, by which latter date there were 89 employees self-isolating. During this time there were some 2180 new cases recorded across the national system.

13. By the Corporation's information as set out in Ms. Lewis's affidavit, it became apparent that COVID-19 cases amongst employees were both community and workplace acquired, which either way was considered to have significant implications for the workforce, and the Corporation's mail processing and delivery operations. Despite the safety protocols, affected employees were having to quarantine in addition to some suffering serious and lingering symptoms-related illness, and possibly other employees working around them likewise facing quarantine. The Corporation's statistics show that from March 2020 through to the end of that year it recorded 752 COVID-19 cases amongst its workforce nationally, and from January 1, 2021 until July 22, 2021 there were another recorded 1,348 cases. Between August 2, 2021 and the first Omicron variant case recorded near the end of November 2021 there were another 276 total positive cases amongst its workforce nationally. Approximately 1,300 of these cases came within the 40-59 year age group, perhaps not surprisingly since the average age of a Canada Post employee was said to be 49 years, with 65 percent of the workforce being in the range of 45 to 64 years of age as of 2016. Given its aging workforce, the Corporation considered it to be "most concerning", according to Ms. Lewis, that there was a high number of employees over the age of 50 who had tested positive, it having been well established by the Corporation's statistical investigation that the risk for severe COVID-19 related illness increased with age. By her information in 2020 and 2021 some 67 employees initiated Worker's Compensation claims, the difficulty in processing them being whether the infections were acquired at the Corporation's workplaces or in the community, there having been a difficulty in contact tracing and identifying the source in many cases. In response, the Corporation was offering two main COVID-19

related leaves to employees, the first being paid quarantine leave made available to eligible employees that were required to self isolate due to potential exposure, were awaiting testing results, or had tested positive and came within public health guidelines; and secondly the Corporation's providing access to a paid "special leave" for those who needed childcare or elder care accommodations, or required time during working hours to become vaccinated, and were considered to be in a "high-risk" category such as being over the age of 70.

14. By the Union's calculation, from the reports it received from the Corporation there were 1,746 recorded COVID-19 cases in Urban Postal Operations between March 2020 and November 16, 2021, although the reports identified workplace transmission in only a small portion of the cases. By Mr. Girouard's description, in a large number of the cases the source of infection could only be identified as "unknown", which information fell in line with Ms. Lewis's understanding that there were real difficulties encountered in attempts at tracing the source. However acquired, obviously there were significant workplace ramifications both for the affected population and the Corporation's overall national operations. The Union relies on a March 28, 2022, i.e., 10 days prior to making its argument from Corporate representative Ashley Aucoin to the Union addressing a meaningful reduction in transmission when testing frequency was increased from twice per week to three times per week for those accommodated individuals needing to be frequently tested.

15. From the Corporation's perspective, moving to a mandatory vaccination position was not considered in a vacuum. In her affidavit Jaime Gomes, the Director, Retail Business Operations, having responsibilities which include retail data and reporting, retail strategy, and retail investments project management, described the significance of the Corporation's having some 3,700 (out of 6,000 retail postal locations) corporately owned retail post office outlets staffed by 494 CUPW bargaining unit members. The remaining 2,300 dealer operated locations, by her description, worked closely in conjunction with letter carriers and mail service couriers picking up and dropping off letters and parcels in the same fashion as they would at any corporate owned location. She described the services supplied at these retail postal outlets as relied upon by as many as 1.2 million Canadians, including receiving their daily mail. Indeed, by her description the "full-service retail outlets are the backbone of Canada Post retail segment of its business". During the initial phase of the pandemic, the retail outlets experienced a decrease in traffic due to lockdowns across the country resulting in

customers staying home. But their shopping habits changed resulting in an increase in online shopping to record levels. By Ms. Gomes' information, parcel volumes overall in 2020 were up 21 percent from 2019, the domestic component being up 29 percent. By the Corporation's assessment it meant that due to changing shopping habits Canadians were relying on Canada Post's parcel deliveries more than ever, causing a significant impact on the retail post office locations due to increased parcel volumes. As she put it: "Canadians continue to rely on retail post offices as a key service to meet the changing shopping habits as a result of the pandemic". Notably, while some locations have stand-alone spaces, others operate within a commercial or office building, or within another retail environment such as the large national drug store chains where the landlord or the commercial business owner essentially controls the space and Canada Post must follow their policies. The protocols set out in the Playbook were implemented at these locations, including splash guard barriers installed in every retail counter, physical distancing signage or markers, face covering requirements, enhanced cleaning and sanitizing procedures, and limits on numbers of customers allowed to be served at one time. Nevertheless the assigned employees do not know whether customers visiting their retail locations have ignored their own self screening, taken any real precautions, or are COVID-19 infected.

16. Whatever the level of Corporation employees' adherence to the Playbook approach in 2021, such as the mandatory face covering at all its facilities across the country, including its retail outlets, by Ms. Lewis' description there were challenges in enforcement of health and safety protocols involving customers. By the Corporation's documentation, there were numerous episodes of disgruntled customers acting inappropriately, even including some level of intimidation by those who would not wear a mask or face covering, experienced since the start of the pandemic. As Ms. Lewis described it, the number of difficult interactions that have occurred across the country within these retail outlets, given the high level of interaction with the public, "represents an uncontrollable variable in certain circumstances". At the same time the Corporation was looking at every effort to be made in sustaining its mail delivery services across the country. During the pandemic some retail postal locations have been closed for periods of time due to the operational impact of COVID-19 in light of the numbers of positive cases.

17. According to Ms. Lewis, by mid 2021 the Corporation was evaluating a vaccination implementation program at Canada Post, with her research having established three points which she took to be reliable; namely that vaccination reduces the probability of contracting COVID-19; that it is effective at reducing transmissions; that lower viral loads and reduced duration of infectiousness have been observed in vaccinated individuals who subsequently became infected. From her research into available investigative materials Ms. Lewis' advice to management was that vaccination was the best tool the Corporation had to ensure a safe and healthy workplace in dealing with a workable COVID-19 response, including the significant aspect that following vaccination, even if becoming infected, there would be a less severe outcome.

18. At the same time, the Corporation in 2021 had been considering a less intrusive vaccination policy than mandatory vaccination, as set out in a draft outline it provided to the Union on September 22, 2021. Its language would required employees to attest to being fully vaccinated by November 15, 2021 or undergo Covid-19 rapid antigen testing twice-weekly, and those refusing to comply could be placed on leave without pay. By Mr. Girouard's description, there were follow-up discussions with the assigned Corporation representative who indicated that Health Canada would be providing the testing kits at no cost to the workers. In any event, whatever the import of these discussions over what was anticipated to occur, an outside administrative event of some consequence had already occurred on August 13, 2021 when the Government of Canada announced plans to require vaccination as early as the end of September across the federal public service, being "our best line of defence" according to its information. The announcement further 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". It cited the existence of more transmissible and dangerous variants of concern pointing out that while its analysis showed there were 71% of eligible people already fully vaccinated in Canada, with more than 82% having had their first shot, there were also more than six million eligible people still unvaccinated. By Mr. Girouard's description the Union nevertheless had continued to be under the impression at that point that the Corporation would be finalizing its previously discussed policy approach very shortly. In anticipation, the Union issued a bulletin to its members announcing the expected upcoming "vaccination or test" policy.

19. Ultimately, by Ms. Lewis' evidence, the Corporation determined that the rapid antigen testing option as an alternative to vaccination did not satisfactorily meet its operational needs nor comply with its health and safety obligations under Part II of the *Canada Labour Code*. As she explained their approach, in addition to having considered the guidance provided by the federal government, there was the known potential for false-negative results, and having lower sensitivity when compared to the PCR testing. There was the possibility of such a test being done incorrectly, also the concern that the RAT approach relied on prolonged compliance with protocol which might prove problematic. In her opinion, based on the research she conducted, vaccination was the best tool which Canada Post had available to ensure a safe and healthy workplace during the pandemic, and the plan to move to mandatory vaccination was proceeded with on that basis.

20. By Mr. Girouard's description, it was on or about October 7, 2021 that the Corporation advised the Union it would be substantially revising its draft vaccination practice to "mirror" the federal policy, namely that it may eliminate testing as an alternative to vaccination. The Corporation by then was aware that some dealer operated post office locations, or landlords in commercial buildings with a post office, had or were about to implement their own mandatory vaccination policies that would apply to all contractors conducting business in these locations, and any vendor representative visiting the location. This included London Drugs and Rexall, in whose numerous premises the Corporation had placed retail postal outlets and from whom the Corporation has received notices requiring proof of double full vaccination status before conducting any business on their properties. By Ms. Gomes assessment, without a mandatory vaccination policy the Corporation's ensuring that only vaccinated employees, such as letter carriers and mail service couriers, would be entering the postal outlets "would be extremely challenging and operations would be significantly disrupted". At the same time, the Corporation was facing another operational problem, in that the federal government, airports and airlines across the country, were implementing mandatory vaccination policies that would apply to Canada Post's employees dealing on-site with those entities in their mandated areas of operation.

21. Accordingly, the Mandatory Vaccination Practice came into effect as issued by the Corporation on October 22, 2021, stating a compliance date for attestation of November 26, 2021. In advance of this date the Corporation sent generic warning letters to employees. There were follow-



up meetings with the Union including with Mr. Girouard and its President, Jan Simpson. Attestation reports were compiled by the Corporation and started being provided on November 25, 2021. Accommodation requests were received and reviewed and while under assessment the affected employees continued to self-administer rapid antigen tests twice per week. Those employees accommodated on approved medical or religious exemptions have continued self-administering this testing twice per week. Thereafter, bargaining unit compliance was similar to all other Canada Post employees positioned across the country, which is also to say rather more significant than the vaccination rate for the general public across Canada which by mid-January 2022 was hovering in the 80% range for full vaccination. As indicated earlier in this award, for the active Urban Postal Operations employees covered by this collective agreement, the full vaccination compliance rate by then had reached 92.14%, valid exemptions aside.

22. In addition to the affidavits of Ms. Simpson and Mr. Girouard, the Union submitted numerous affidavits from bargaining unit members working in Urban Postal Operations, which is to say those executed by full-time letter carrier Michael Jeffrey, full-time mail service courier Rico D'Ovidio, letter carrier assistant Darrell Ward, full-time letter carrier Brittney Lagah, full-time letter carrier Jonathan Fontaine, part-time letter carrier assistant Barbara Chalupa, and letter carrier assistant Jamie Leonard. None of these bargaining unit members qualified for exemptions to the vaccination policy. Their affidavits were sworn or affirmed between November 19, 2021 and January 10, 2022. They all attested to the impact of this policy on their personal lives and the grave doubts they have over submitting to the vaccination process. Those who nevertheless complied clearly indicated that they consider themselves to have been forced into making that decision against their will, not being able to fulfil their personal financial responsibilities were they to be placed on unpaid leave. Whether compliant or not, they all found themselves to be very upset by having to comply and be deprived of their ability to choose if and when they would receive any vaccination. In one affidavit it was said that the entire experience had taken a major toll on the deponent physiologically and made him feel "very low". Another deponent who felt "compelled" to cooperate experienced heightened blood pressure and had chest pains following his first vaccine dose. Another wanted more testing to be done before having to make a decision. Four deponents had refused the vaccination process and had been placed on unpaid leave, one indicating that he felt it necessary to "stand by my

convictions” despite the financial detriment and personal sacrifice in receiving no pay. Another indicated that he was not opposed to vaccinations in general but considered there was not enough information. Another felt it had been sufficient to comply with the earlier protocols which included wearing masks etc. and that her personal life situation did not lend itself to her being exposed to any COVID vaccine and the possible negative ramifications associated therewith, having a family history of “early death” as she described it. At the time of executing her affidavit on January 7, 2022 she was not willing to be vaccinated due to having read that there could be some effect on one’s heart. This deponent stated that she and her husband who likewise had refused to comply were by then in “survival mode” relative to their family. Another deponent, having refused, indicated that such a requirement made him feel paranoid and by his estimation, having an option like rapid testing “would be a way to keep contagious people out of the workplace”, which he would absolutely comply with however frequent the rapid testing would be, but not vaccination.

**Experts’ evidence through filed reports and testimony:**

23. In support of its position that the use of frequent, even daily, rapid antigen testing within the workplace, as a suitable workplace screening tool, was a viable alternative to mandatory vaccination, the Union called Dr. Colin Furness to provide expert evidence in the form of his November 21, 2021, report entered in evidence, and testifying in defence of his report on February 12, 2022. He also dealt with the report earlier provided to the Corporation by its expert witness, Dr. Michael Loeb.

24. Dr. Furness is a non-medically trained infection control epidemiologist, currently an assistant professor at the University of Toronto, with a Masters Degree in Epidemiology and a PhD in Information and Knowledge Management. He also has an appointment to the Institute of Health Policy, Management and Evaluation in the Dalla Lana School of Public Health. He used his epidemiology qualifications over an eight-year span while employed at Infonaut Inc., a Toronto-based company that specializes in the use of geospatial analysis to track infections both in communities and inside buildings. At one point he led the development of a tuberculosis tracking system, working with Ontario Public Health, Toronto Public Health and Peel Public Health to refine his understanding of disease transmission in populations. He led the design of an integrated hardware and software system to track the movement of people and equipment in hospitals to measure

infection risk, later piloted by the Toronto General Hospital, and has published his research in the area of hand hygiene behaviour and hospital risk. Dr. Furness has been retained as a subject matter expert several times in the area of epidemiology, and as described in his CV: “ensuring that I stay abreast of the rapidly changing scientific understanding of transmission and the rapidly changing epidemiology of COVID-19”. Dr. Furness has given numerous public presentations on COVID-19 risks and safety since October 2020, as he put it, “aimed at educating the public about the disease, problems with its management, and issues with the use of information, knowledge and expertise”. As such, he has been active in media commentary and analysis on a national level with major television networks and news publications, pertaining to COVID-19, since January 2020, having logged some 2,000 media interviews by his calculation, his CV having listed 12 selected publications where he has stated his opinion, no information about any peer-reviewed studies or papers. He stated in his CV: “the overarching purpose of these appearances and commentaries is to promote public education and build public awareness of COVID-19 safety and risk, as well as engaging in policy advocacy”.

25. In his expert’s report, as confirmed in his follow-up testimony, Dr. Furness stated that the available COVID-19 vaccines can reduce workplace transmission “to a remarkable degree, when combined with other mitigation efforts” and that rapid antigen testing generally has been considered to be a means of complementing, rather than duplicating or replacing vaccination, as a screening tool. From his perspective, antigen testing, nevertheless, is an excellent choice to answer the very narrow and specific question, seen by him to be relevant for the Corporation’s managing its Urban Postal Operations, of whether “are you contagious right now?”, taken as a significant component in protecting the workplace, screening out infected persons. By Dr. Furness’s reckoning, as an epidemiological assessment, the Alpha variant which succeeded the original COVID-19 appearing in early 2020 was widely considered to be 50 percent more contagious than the originating strain, followed by the Delta variant which was estimated to be nearly 50 percent more contagious than Alpha. No doubt, asymptomatic transmission became a defining characteristic of COVID-19 which “makes it extremely difficult to detect and control using standard screening measures” presumably meaning observational in nature such as taking temperatures. In response to the specific question posed by the Union requiring his opinion, namely the effectiveness of vaccination reducing the

transmission of COVID-19 in the workplace, Dr. Furness answered in three parts starting at p. 10 of report. He firstly dealt with the safety of approved vaccines, secondly the effectiveness of the vaccines in preventing disease, hospitalization and death, and thirdly stated his opinion on the role of vaccines in reducing workplace transmission of COVID-19.

26. Firstly, noting the available statistics covering rare neurological syndromes associated with vaccination and possible other diagnosable health issues, Dr. Furness cited US data, indicating:

In terms of absolute risk and based on U.S. data, the rate of serious (mostly neurological) side effects from vaccination among those vaccinated but not infected is approximately 0.002%, or 1 in 50,000. By contrast, approximately 4% (1 in 25) of Canadians have been diagnosed with COVID-19 to date [presumably meaning by mid-November 2021, there being no mention in his written report of the complicating factor posed by the about to emerge Omicron variants, appearing at almost the same time as the vaccination approach was becoming mandatory], and the probability of death following diagnosis is 1.7 percent, or about 1 in 59.

27. Secondly, with respect to effectiveness, Dr. Furness stated in his report that “the scientific literature supports the contention that vaccination significantly and substantially reduces transmission of COVID-19”, having accepted that the viral load in vaccinated infected persons is up to 20 times lower than an unvaccinated person. As he put it:

This is important because lower viral load would imply less viral shedding and a lower viral dose for those exposed. In September, 2021 a new review of evidence cited multiple studies that Pfizer vaccination reduces transmission substantially, regardless of outward symptoms. One study did quantify the difference in community transmission between vaccinated and unvaccinated people, finding the transmission was 50% higher from unvaccinated individuals. That is to say, both vaccinated people and unvaccinated people can contact COVID, and both can be involved in transmission. But unvaccinated people are far more likely to get sick and also significantly more likely to spread to others when sick.

28. Thirdly, with respect to the role of vaccines in reducing workplace transmission, Dr. Furness stated that given the high percentage of vaccination in some populations:

...it is not possible to quantify the risk reduction posed by vaccination on its own, although I have no doubt that it is considerable. Moreover, there is a significant indirect benefit to every workplace, including Canada Post, by the use of broad vaccine mandates across society to reduce the prevalence of COVID-19. I recognize, of course, that this indirect benefit lies far outside of an employer’s safety purview. It should also be noted that the consequences of vaccination reducing workplace

transmission is not evenly distributed across a workforce. Workers with risk factors for serious disease derive greater benefit from vaccination because their individual risk profile is greater. A vaccine mandate is consistent with wanting to protect the most vulnerable in the workplace, at a cost of some individual bodily autonomy.

29. Dr. Furness went on to inject the possible element of “herd immunity” into his considerations, as at the time of submitting his report, noting that there was a postulated percentage of the population needing to be immune in order to achieve herd immunity, also dependent upon the contagiousness of the disease and effectiveness of the vaccine. By his information, the vaccination rate in Canada for those over 12 years of age was about 86%, by comparison with the Canada Post rate at about 92%. He reported that: “... because there is not yet published infection data for populations over 90% fully vaccinated, the expected drop in risk attributable to herd immunity cannot yet be quantified” [again, this assessment was pre-Omicron]. Under the same heading of considering the role of vaccines in reducing workplace transmission he went on to state:

There has been considerable debate about the extent to which being vaccinated or unvaccinated contributes to risky behaviour. As reported frequently in mainstream and social media, many seem to feel that vaccination means that other restrictions, such as limiting gatherings, or conscientious mask using is no longer important. On the other hand, the unvaccinated population includes many people who could be characterized as wholly unconcerned about the risks posed by COVID-19, or even sceptical that it is real...

In my opinion, unvaccinated people are more likely than vaccinated people to take greater risks in their personal and professional interactions with others, such as less mask wearing, tending larger gatherings, and associating with like-minded, higher risk individuals. Thus, the value systems implied by the choice to be vaccinated or refuse vaccination may mean higher exposure and infection risk among the unvaccinated. However, mandating vaccination should not be expected to result in less risky behaviour on anybody’s part; the advantage is simply lower likelihood of becoming infected as a result of risky behaviour.

To the question of whether vaccination reduces workplace transmission, the answer is unequivocally yes, to a remarkable degree, when combined with other mitigation measures. It is useful to recall from above that 88% effectiveness of the Pfizer vaccine against the Delta variant means that unvaccinated people are nearly 10 times more likely to get sick from a given exposure than vaccinated people. Whether they are tested or not, at whatever frequency, unvaccinated employees are nearly 10 times more likely to contact COVID-19 than vaccinated employees with a similar exposure. Moreover, clear evidence indicates the transmission by unvaccinated people is 50%

higher than by vaccinated people, a substantial difference.

To the question of whether mandating vaccination in the unvaccinated (~8%) minority of the CUPW workforce will materially reduce transmission risk, the answer must also be yes, but to some incremental degree for which we have no measurement. Increased vaccination inevitably reduces, but does not eliminate, COVID-19 transmission.

One last distinction should be made about the effectiveness of vaccination in workplaces. Setting aside transmission at work, a vaccinated workforce has a lower absolute risk of contracting COVID-19 and missing work. If the employer is particularly concerned about a critical labour shortage owing to high COVID-19 rates however required (rather than workplace transmission being a cause of illness) mandatory vaccination would be the most important tool to deploy. *However, if the primary concern is avoiding workplace transmission, and the question is whether vaccination or rapid testing would be more effective, clear argument can be made that rapid testing prior to every work shift should be preferred....* (emphasis added)

30. Thusly Dr. Furness moved his opinion into the realm of stating a preference for rapid antigen testing in the workplace as an alternative to vaccination were the primary concern to be avoiding workplace transmission. He admittedly could find no study evaluating “testing versus vaccination” for protecting workplace safety. He was aware there were two studies recommending combining the interventions to provide maximum protection, on the basis that each intervention complemented the other. In his opinion, keeping in mind various other mitigations (one notes the updated Playbook requirements), and although workplace rapid antigen testing of unvaccinated employees did not reduce the risk of their becoming infected through community transmission and arriving at work thereby infected, nevertheless it “is a viable and effective way to prevent workplace transmission”, possibly to be complemented by also testing vaccinated employees. Thereafter he stated that given the workplace transmission risk there was “a good reason to promote workplace rapid testing, irrespective of vaccination status”, seen as a “vital safety tool” particularly in larger facilities. As he put it in summary form at p.16:

In summary, super spreader events can still happen at Canada Post sites despite extensive and thoughtful measures that have been taken, because airborne risks have not been fully mitigated; rapid testing of employees prior to work shifts would be an effective tool to limit this risk.

31. In his report Dr. Furness thereafter stated his preference for rapid antigen testing prior to every shift, going on to remark on that issue at p. 17:

An emerging convention of twice-weekly testing using rapid tests may be based in logistical efficiency, but it is not based in evidence or even simple logic. Because a rapid test is useful only for assessing current infectivity status, in my opinion rapid tests need to be used at the start of every work shift. In saying this, I do acknowledge a lack of published evidence concerning to what extent daily testing would be safer than twice-weekly testing.

32. Dr. Furness drew his comparison from studied school outbreaks where the implication was that vaccination, masking and testing all contributed “synergistically” to preventing transmission. One might observe that for this nationally organized workforce, were regular testing to include fully vaccinated employees, those about to be vaccinated and those refusing, it would mean an ongoing regularized rapid antigen testing regime for over 40,000 employees working in the Urban Postal Operations component.

33. In his report Dr. Furness also dealt at p.19 with the issue of the implication of false negatives, or false positives in a rapid antigen testing regime, his view being that “an excellent test, would have sensitivity in the high nineties, which by his understanding the best such available testing now demonstrates sensitivity above 95% at the most contagious phase when viral load is highest, which is to say, by his understanding, immediately before symptoms appear. He again stated his view that the rapid test is “extremely sensitive” in answering the question “are you contagious right now?”, although acknowledging that there is some chance of a worker testing negative at the beginning of a shift, and then becoming contagious over the course of the work day. He also recognizes that typically a low viral load is not so easily detectable through the rapid antigen testing, although the testing efficacy is improving, but at the same time one should not be taken as contagious at that point. There would be even less chance of a false positive, which he described as “minimal”.

34. In his testifying in support of his expert report, Dr. Furness nevertheless acknowledged being a “big proponent of vaccination... an incredibly important tool to reduce the chance of being infected”, as he put it, and undoubtably, in that respect, serving to reduce the chance of transmission to others as a general proven proposition as well as likely causing less serious illness where a breakthrough infection occurs.

35. Having confirmed his opinion in testimony, Dr. Furness in cross-examination dealt with his previous expert report written some three weeks earlier, submitted on behalf of the employer in another mandatory vaccination case, *Electrical Safety Authority v. Power Workers' Union*, unreported November 11, 2021, with the arbitrator's additional reasons issued on January 4, 2022, 2022 CarswellOnt 395 (Stout). In this earlier report Dr. Furness had indicated being in favour of a mandatory vaccination policy over the vaccinate-or-test regime being advocated by the union in that case. It was entered in evidence, wherein, as pointed out to him during cross-examination, he had stated that mandatory vaccination was "clearly and substantially superior, to a vaccination-or-test regime". He had opined therein that it had "significant advantages" both in preventing transmission and preventing infection that leads to transmission.

36. Dr. Furness also held to the view that a vaccination rate over 95% in large Canada Post workplace would stop outbreaks, whereas in our matter he reduced his opinion to 90% as an estimate for herd immunity with the Delta variant, although he admitted to the subjectivity of his immunity figures inasmuch as the exact number was unknown due to lack of data. He also acknowledged it was difficult to find any herd immunity element to Omicron given the chance of breakthrough infection. Nevertheless, Dr. Furness would hypothesize for purposes of his current opinion that given the high vaccination rate across the Corporation's many facilities, known to be in the 92% range overall by mid-January 2022, herd immunity had become something to be factored into the equation, and further that the small minority who remain unvaccinated, i.e., in the neighbourhood of 8%, could be accommodated through. He offered no insight as to how was that the Corporation was able to achieve a fully vaccinated rate across its system in the 92% range which is to say appreciably higher than the general public vaccination rate, although noting its real-world significance in moving against the pandemic.

37. Dr. Furness also conveyed in testimony his understanding that the currently developing data shows that two vaccine doses, long-term, is currently providing full protection against Omicron in only the 37% range, being a far lower efficacy than would be normally expected from vaccines, and for him making the vaccination process more problematic at this point as a screening tool. He sees this lower efficacy for Omicron as supporting his view that rapid antigen testing is a viable alternative. Indeed, he testified on February 12, 2022, that in his opinion rapid antigen testing was



“more preventative” in dealing with Omicron than vaccinations, although acknowledging that one was likely to be away from work for a longer period of time, once symptomatic, were that person to be unvaccinated against this emergent highly transmissible variant. He acknowledged that testing did not affect the reality of one becoming infected outside the workplace and bringing it into the workplace while still asymptomatic, nor the anecdotal information about rapid antigen testing having a lower sensitivity for Omicron prior to it becoming symptomatic. He also agreed in cross-examination that it would be possible for a person to be incubating the virus at a relatively low level at the beginning of the workday, test negative, and then progress to an infectious state later in the workday, also admitting that there was no clear data showing that daily rapid antigen testing could be considered the equivalent of a vaccination overall, keeping in mind the myriad of factors at play outside the workplace. He would also accept that currently developing data indicates there is no demonstrated herd immunity for the Omicron variety with its propensity to re-infect, and its high transmissability rate, having shown itself to have a better chance of breaking through the vaccination shield than the previous Delta or Alpha variants.

38. Nevertheless, in Dr. Furness’s view, rapid testing is still a better preventative tool than vaccination for discovering whether there were any infectious employees at work at a given point in time, an issue of workplace screening, which he would think would be an employer’s main concern in protecting the workforce, especially significant in his view in that the efficacy of a vaccination following the emergent Omicron cannot be relied upon as much as with the earlier variants. But, in providing his opinion in defending rapid antigen testing as an alternative due to its diagnostic/screening qualities, he continued stressing that he was not against vaccinations, and “if anyone asked me should they get a vaccine, absolutely”.

39. In response to the expert evidence from Dr. Furness, the Corporation called Dr. Mark Loeb who provided his expert’s report and testified in defending it. Dr. Loeb is a medical doctor, having hospital privileges at Hamilton Health Sciences and St. Joseph’s Healthcare Hamilton. He is also Professor, Pathology and Molecular Medicine at McMaster University and holds the Michael G. DeGroote Chair in Infectious Diseases. He is certified in the fields of Internal Medicine and Medical Microbiology, holding a Specialty Certification in Infectious Disease, having been the Division Director at McMaster University for Infectious Diseases for some 11 years until 2020. He is a Fellow

of the Royal Society of Canada, and a Fellow of the Canadian Academy of Health Sciences. He is currently Co-Director of the World Health Organization Collaborating Centre for Infectious Diseases, Research Methods and Recommendations. Dr. Loeb has been active in obtaining over 100 research grants, has published 375 peer-reviewed papers and given more than 300 research presentations. He has served on 60 advisory, research or data safety committees, including for the World Health Organization and for the Centres for Disease Control and Prevention in the United States. He has served as a member of the Data Safety Monitoring Committee for international randomized trials of the COVID-19 vaccines, and serves on Canadian and International advisory boards for trials of the vaccines. Dr. Loeb has published 28 peer-reviewed papers on COVID-19, including studies on vaccination efficacy, has received 23 research awards and recognitions including the Gold Metal in Medicine from the Royal College of Physicians and Surgeons of Canada for research, and has participated in national and international guideline committees for COVID-19 prevention, diagnosis and therapy. Funded by the Canadian Institute for Health Research to study COVID-19, he is the co-investigator on 12 funded studies on COVID-19.

40. In his November 22, 2021, expert's report, again pre-Omicron, having been asked to describe health outcomes after contracting SARS-CoV-2 (for our purposes referenced as COVID-19), Dr. Loeb described them as being "highly variable", ranging from no symptoms to critical illness and death. It is known that most infected persons experience mild to moderate symptoms but long-term effects have become increasingly recognized as an issue. Risk factors for complications include the presence of other medical conditions and being of older age. Transmission is through respiratory droplets and aerosol particles, mainly over short distances, with some specific circumstances to be noted such as poor ventilation, crowding, being indoors. He described the currently approved COVID-19 vaccines as being effective as demonstrated in real-world studies, through large randomized controlled trials, including in Canada, citing Pfizer at 89% and Moderna at 92% in preventing symptomatic COVID-19 in individuals, dealing as he was during the fall of 2021 with the Delta strain as being dominant at that point. As he put it in his report: "these vaccines are highly effective in reducing hospitalization and severe illness from COVID-19, continue to be recommended by Health Canada, and other international health agencies". The most common side effects were said to be injection site pain, headache, fatigue, muscle ache and nausea following

injection, anything else being extremely rare.

41. Dr. Loeb went on to state in his report that the evidence taken from vaccine efficacy studies indicates that fully vaccinated persons are unquestionably less likely than unvaccinated to acquire COVID-19, “thus reducing the risk for transmission”. Even where not fully protected, vaccinations cause a lower viral load in those infected and accordingly there results less likelihood of transmitting to others. By his assessment, it follows that if any symptomatic COVID-19 infection is prevented through vaccination, or reduced, transmission will be reduced. He described a report dealing with screening through rapid testing in a public school district in the United States, noting that there was a 95% lower percentage of positive test results among school staff who had received two doses of Pfizer than those left unvaccinated.

42. In dealing with the issue of mandatory vaccination within the workplace to ensure a lower transmission rate, Dr. Loeb stated:

67. In my opinion, mandatory vaccination of those eligible for vaccination represents the most effective strategy to reduce transmission in a workplace such as Canada Post. It is for this reason that most healthcare facilities have adopted such a policy. Although it can be argued that the risks are higher in healthcare facilities given the vulnerability of patients, the same principles apply to workplaces. An unvaccinated employee poses a risk not only to themselves but for transmission to other employees. While rapid testing may have additional benefit to vaccination, it certainly should not be a substitute... [C]urrent vaccines in wide use are ~90 percent effective in preventing COVID-19. Most vaccinated employees will be unlikely to be infected by COVID-19 if they are exposed. It follows that if they are not infected, they cannot transmit COVID-19 to unvaccinated employees. Moreover, even if they are infected... the potential for them to transmit SARS-CoV-2 will be reduced. In contrast ... rapid antigen testing has never been demonstrated to reduce transmission. The ideal frequency of testing is unknown and early infection may not be detected. The premise of rapid antigen testing to reduce transmission is that removal of those that test positive from the workplace will reduce exposure to others. Since exposed employees may not be vaccinated, they may be exposed prior to removal of the infected employee... [T]he sensitivity of the rapid antigen test may be compromised when it is not conducted by trained laboratory healthcare professionals. Although regular rapid testing is a reasonable strategy for those that cannot receive the vaccine for medical reasons in the context of a mandatory vaccination policy, it cannot be considered equivalent to vaccination as a means of reducing transmission of SARS-CoV-2.

43. Having been asked by the Corporation to indicate in his report what aspects of Dr. Furness's report he disagreed with, Dr. Loeb stated as follows:

68. I disagree with Dr. Furness's statement (Page 14 of his report) that "much of the value of vaccination may have already been given by the large voluntary compliant majority". Every unvaccinated employee poses a risk to both themselves and to others, as they may efficiently transmit SARS-CoV-2. Dr. Furness suggested because the threshold for herd immunity is not known, this may be a reason to doubt the benefit of vaccination and protecting employees. This is not a reason to doubt the vaccination will lead to a reduction in transmission. Dr. Furness subsequently acknowledges that vaccination reduces workplace transmission "to a remarkable degree.

69. Dr. Furness appears to contradict himself when he states that mandating vaccination in the unvaccinated CUPW workforce will "materially reduce transmission risk" (Page 14) but then qualifies this by stating it will be "to some incremental degree for which we have no measurements". The pertinent issue is that vaccination can reduce COVID-19 transmission that otherwise would occur. Choosing not to vaccinate places employees who are susceptible to infection at a risk which is largely preventable.

70. Dr. Furness opines that rapid testing should be preferred over vaccination (Page 15).

44. Dr. Furness however does not cite data to support this view. Dr. Furness's assessment of school outbreaks for example (Page 17) provides no evidence that testing reduces transmission. His argument is that if testing was done every day outbreaks would not have occurred. However, since testing was not done every day there is no supportive evidence. In fact, Dr. Furness concludes that twice-weekly testing did not prevent outbreaks.

71. Dr. Furness states that only two COVID-19 vaccines are currently in use in Canada (Pfizer and Moderna). In fact, although these vaccines are approved, both Astra Zeneca and Janssen (Johnson & Johnson) are also authorized for use in Canada.

45. On January 22, 2022, Dr. Loeb provided his Supplemental Report. In further responding therein to Dr. Furness's opinion he opined that the apparent strengths of rapid antigen tests in preventing transmission had to do with the general characteristics, such as being easy to use, able to be conducted outside the laboratory, although there could be issues with quality control in that respect, less expensive than PCR testing, providing a rapid result, being highly specific, and

performing best where persons have a high viral load. It would mean that a person testing positive would be at a higher risk for transmitting COVID-19 at the time testing. But the weakness of this approach, by Dr. Loeb's assessment, is that these tests have a lower sensitivity than PCR testing, meaning unable to detect the virus at the very early stages of infection, which is a significant limitation because asymptomatic transmission can occur. He referenced data from 48 studies referencing asymptomatic infected persons which determined a pooled sensitivity at 58.1%. Another study he cited included 16,733 asymptomatic participants, generating a pooled sensitivity of 57%. Certainly, by his description, it is known that the positive predictive value of this testing will be increased with the prevalence of the virus in the workplace. However as prevalence is reduced, the positive predictive value is decreased. He went on to state that a significant limitation is that there has been no evidence developed which demonstrates that rapid antigen testing reduces transmission in the workplace or other settings, no observational studies or randomized controlled trials, and further, as he put it: "Moreover, test accuracy studies that exist cannot assess whether antigen tests can differentiate between those who are infectious and those who are not, because there is no reference standard for infectiousness".

46. Dr. Loeb dealt with the emergence of the Omicron variant in the January 22, 2022 Supplemental Report, having noted that as yet there was no published data on the accuracy of rapid antigen testing in detecting this variant. He noted one unpublished anecdotal report of 30 cases where the persons were said to be infectious for several days prior to being detected by the rapid antigen tests. Another as yet unpublished study dealing with analytic sensitivity to cultured virus in the seven tests reported a lower sensitivity for Omicron in comparison with other variants. He went on to restate his view in the Supplemental Report at para. 9, perhaps to be taken as a summary statement:

9. Vaccination is the most effective way to prevent transmission of SARS-CoV-2 in the workplace. This is because vaccines are highly effective at preventing infection with SARS-CoV-2 in those who are vaccinated. Importantly, vaccines also prevent serious complications of COVID-19, including hospitalization and death. The mRNA vaccines currently approved by Health Canada (Pfizer and Moderna) are highly effective in preventing COVID-19...

47. Dr. Loeb for purposes of compiling his Supplemental Report, was asked to deal specifically with the emergence of the Omicron variant as it pertained to transmission and severity, effectiveness

of vaccines, and the relevant strengths and weaknesses of a rapid antigen testing regime. He opined at paras. 14-16:

14. Compared to other variants, the Omicron variant has higher transmissibility. This would apply to both community and to workplace settings. The Omicron variant appears to be less virulent, that is, less likely in general to lead to severe disease than prior variants. As a prime example, a recent report from the Kaiser Permanente Southern California healthcare system, found that the risk of hospital admission with the Omicron variant, adjusted for age, comorbidity, receipt of vaccine, was approximately 50 percent compared to the Delta variant. The risk of ICU admission was reduced by about 75% with Omicron while mortality risk was reduced by 90% compared to Delta. Other studies have reported similar results, with reduced risk of hospitalization ranging from 20 to 80%.

15. Data on the effectiveness of vaccines against the Omicron variant are very limited at present. Data from the UK show that vaccine effectiveness after two Pfizer doses was 88% at two-9 weeks after the second dose, reduced to between 34% and 37% from 15 weeks post dose 2. From two weeks after Pfizer booster, vaccine efficiency increased to 76% for Pfizer primary course recipients. These data support the fact the vaccines do remain effective against the Omicron variant.

16. There are insufficient data at present to comment fully on the impact of the emergence of Omicron on the sensitivity and specificity of rapid antigen testing for the Omicron variant. If there is an impact, it is likely to be a reduction in sensitivity due to mutations of nucleocapsid, which is the target protein of almost all rapid antigen tests. These changes in nucleocapsid may be the cause for why emerging data suggest a trend toward lowered sensitivity. Data on the effect of Omicron on vaccination are also sparse. However, it would appear from the UK data outlined in para 15, that with booster doses although there is a reduction in efficacy of vaccines there remains a substantial protective effect.

48. In his Supplemental Report, Dr. Loeb took issue with the weight to be applied to Dr. Furness's report. He would have one note that although having training in epidemiology, Dr. Furness possessed what he referred to as "limited content expertise", his not having any training in virology, infectious diseases, or microbiology. There was no indication of any peer-reviewed publications on COVID-19, no attainment of peer-reviewed grants. He doubted the applicability to the issue at hand of much of what he saw in Dr. Furness's CV, including his calling himself an "infection control epidemiologist" which by Dr. Loeb's understanding should refer to persons employed by healthcare facilities to work in infection control, being responsible for such tasks as conducting outbreak investigations, implementing local infection control policies, overseeing surveillance. He saw none

of this in Dr. Furness's work history. By contrast, Dr. Loeb who had worked for many years in clinical epidemiology, stated: "my training, research publications, grants, advisory committee work, grant committee work, WHO activities, course instruction, graduate student supervision, and recognitions and awards are all based on epidemiology". In other words, he places his own medical training, experience as a research epidemiologist and developed expertise in that field well above that of Dr. Furness. He went on in his Supplemental Report to dispute Dr. Furness's overall approach to what he sees to be the discrete issue at hand, namely whether rapid antigen testing should replace vaccination as the permissible alternative. By his assessment, Dr. Furness has obfuscated the issue by focussing on the possible benefits of rapid antigen testing, without fully describing the benefits of vaccination in reducing risk. Further, he is aware that Canada Post has already been using rapid antigen testing, which means the issue is not whether it should be used or not but whether it should be used in place of vaccination for those having medical contra-indications, or other legitimate reasons to be accommodated. Further, Dr. Loeb disputes Dr. Furness's reference to the rapid antigen testing being viewed as a valid screening device as that term is commonly understood inasmuch as screening tests are done in asymptomatic populations while rapid antigen tests are used for testing both symptomatic and asymptomatic infection, which is to say diagnostic, normally used in high prevalence situations and not requiring any additional confirmatory testing.

49. Dr. Loeb also noted that Dr. Furness had used the Ontario Science Table recommendations for use of rapid antigen tests as supposedly supporting his position taken against mandatory vaccination, an issue broached with him in cross-examination. The report had been entered in evidence in this matter and cited by the Union as supporting its position about the preference for rapid antigen test. However, on Dr. Loeb's reading of the Ontario Science Table, he does not view it as making any recommendation for rapid antigen testing in the workplace at the expense of vaccination. He went on to dispute Dr. Furness's having opined that it would "largely prevent transmission", and reasserted in his Supplemental Report that there was no epidemiological evidence that rapid antigen testing reduces transmission. He also noted that Dr. Furness had cited a study said by him to show that rapid antigen testing has high accuracy for Omicron. Dr. Loeb takes this suggestion to be "misinformation". The study referenced by Dr. Furness, by Dr. Loeb's examination, did not assess clinical sensitivity. He disputes Dr. Furness's suggestion that rapid antigen testing has

a higher diagnostic accuracy than previously, not proven he says, but even so there are no studies indicating that these tests have been demonstrated to reduce transmission. He also points out that Dr. Furness has provided examples of settings where rapid antigen testing is used, which Dr. Loeb takes to be problematic inasmuch as there is no offering of scientific proof of the relative merits of rapid antigen testing as a replacement for vaccinations. Plainly, a key position taken by Dr. Loeb is one of disputing any assertion that rapid antigen testing will effectively prevent transmission, or is somehow superior to vaccination for preventing workplace transmission, or a reasonable replacement. This kind of thinking, he said, is flawed and unsupportable, including with respect to any new more transmissible variants, concerning which he remarked at para. 30:

30. Dr. Furness in paragraph 25 and 26 opines that vaccine breakthrough infections are reason for why rapid antigen testing should replace vaccination. He does not provide the more relevant scenario of a policy of both vaccination among employees being used in conjunction with rapid antigen testing, which is in fact currently in place at Canada Post. Independent of this, Dr. Furness's example is flawed for several reasons. First, Dr. Furness assumes that rapid antigen testing will effectively prevent transmission, which has never been demonstrated [going on to dispute Dr. Furness interpretation of a paper he had cited]. By preventing infection in the first place in the vast majority immunized, vaccination greatly reduces exposures in the workplace. The extent to which rapid antigen testing does this is unknown. Second, even in breakthrough infections, viral load is reduced and there is epidemiological evidence that transmission will be reduced.

50. During the course of his testimony Dr. Loeb in defending his Report and Supplemental Report again raised some of the points he had addressed therein, stressing the risk of infection and transmission being diminished through vaccination, and it being essentially unknown what level of a viral load can cause transmission to others, whether with respect to the earlier variations or the emergent Omicron which had proved itself to be more transmissible. But whatever the susceptibility to infection risk, for those coming into contact with a fully vaccinated person it is lowered "because the viral load is reduced". He again made the point that from his examination of available data one continuing problem with the rapid antigen testing is that there is a problem with it detecting the existence of a viral load early on, because the sensitivity is not as good as with the PCR testing. He said that in placing rapid antigen testing alongside vaccination there is "just no comparison"... no question that vaccination is superior" inasmuch as testing does not prevent transmission. In cross-



examination he acknowledged that in dealing with Omicron, while the severity was less, certainly it unfortunately had become apparent that its transmissibility to others was greater and vaccine efficacy could be considered reduced, which for the reasons he had already stated was no reason not to vaccinate. He said that whether or not the rapid antigen testing is a sufficient tool to prevent workplace contagion as a screening test is “theoretical only” and that there has been no evidence developed that it would lead to a reduction in transmission. He also again stated that even if there was a breakthrough of the Omicron of those vaccinated, even where the vaccinations prove ultimately to be in the 35% to 37% protection over time, the “waning” aspect, it is significant that the viral load would be lower, meaning less transmission and less severe when transmitted. By his description, using the rapid antigen testing as a diagnostic tool, having “relatively low sensitivity” could result in a negative reading where individuals are positive for the virus. It is well-known, at least anecdotally, that it is a better test for those persons already symptomatic which leads him to again opine that it is a questionable workplace diagnostic tool for the non-symptomatic and should not replace vaccination.

51. By Dr. Loeb’s approach, the answer to Omicron at this point is to have booster vaccinations once the waning effect becomes significant, for better protection, not to have ever abandoned the vaccination approach altogether for some other less effective workplace alternative, such as rapid antigen testing.

52. Included in the Union’s submitted documents was Ontario’s Science Table slide deck prepared by the members of the Behavioural Science Working Group and Science Advisory Table concerning which Dr. Loeb was asked to respond to what was set out as a frequently asked question remarked upon therein about staying safe over the holiday season in December 2021, given the fifth wave of Covid-19 through the emergent Omicron variant. It was stated, with which Dr. Loeb would not disagree:

2 doses worked well to prevent infection and severe illness for Delta. Omicron is not Delta. A 3<sup>rd</sup> dose is really important in preventing Omicron infection and keeping up your immunity... Get your 3<sup>rd</sup> dose as soon as you are able, especially if you are at increased risk. If you or someone you know is not vaccinated, it is also not too late to get a 1<sup>st</sup> or 2<sup>nd</sup> dose (especially given Omicron)....

53. The Union also entered into evidence the Science Table article from February 10, 2022 dealing with the emergence of the Omicron variant which was said to require reassessment of the diagnostic performance of rapid antigen tests. As noted in this article, by the advisory board's evaluation of available evidence, sensitivity was lower for the Omicron variant than for the Delta variant, particularly in the first few days of infection, and performing the tests frequently "will maximize their value". It recommended swabbing both cheeks, the back of the tongue or throat, nostrils, for rapid antigen tests, which was a more effective approach. It also recommended regular testing of asymptomatic individuals to find cases in moderate risk settings. Dr. Loeb does not take this article to provide any assistance, it having been noted therein that while rapid tests may help with detection of infectious cases they were likely to be insufficient for controlling spread due to a number of reasons including contact management, lab testing issues, and education. Perhaps, more to the point, from Dr. Loeb's perspective, there was no indication in the Science Table assessment that rapid antigen testing should replace vaccination in dealing with the emergent Omicron despite its propensity for breakthrough infections in vaccinated persons. By Dr. Loeb's approach, again, the answer to Omicron is to have booster vaccinations once the waning effect becomes significant, for better protection, not to have abandoned the vaccination approach altogether for some other less effective workplace alternative, such as rapid antigen testing.

54. In cross-examination Dr. Loeb was presented with the Director of the CDC, Dr. Rochelle Walensky's co-written article in the Health Affairs magazine supporting the view that rapid antigen testing was a better public health tool than PCR testing. Dr. Loeb sees this to be potentially valid going forward, while currently theoretical. The problem, from his point of view is that science has not yet established how much load is required for transmission. The article contends that antigen testing is appropriate as a screening tool over roughly the five-day window of maximum transmissiveness stretching from day three to day eight following exposure. It was described in the article as being "highly specific... ideally suited to yield positive results precisely when the infected individual is maximally infectious", and unlike PCR testing is not fooled by faint signals of lingering viral matter outside the period of infectiousness. However, as Dr. Loeb tended to repeat, the issue here is not contrasting rapid antigen testing with PCR testing, or any other test, but whether it should replace vaccination as a valid alternative in protecting the workplace. He disagrees, and is not about

to be persuaded otherwise.

55. At the same time Dr. Loeb cannot deny that in some provincial jurisdictions, for example Alberta, Manitoba, Ontario and Prince Edward Island there was a testing alternative presented for public servants during the fall of 2021 (pre-Omicron), meaning three times weekly for Alberta public service employees, every 48 hours for Ontario public service employees and three times weekly for Ontario education sector employees. He does not doubt that when compared to PCR testing, or any other testing, which can detect infection earlier than rapid antigen testing, it is not as practical for workplace purposes, being as he put it: “resource intensive” and more costly, but as he also continued to assert, the issue here as he understands it is not to conduct a comparison between rapid antigen testing or PCR testing, but whether rapid antigen testing is a suitable alternative to vaccination. He was not about to change his opinion that it is not an alternative approach that can be relied upon to reduce infection and transmission, being only complementary in his view, and additionally has no impact on reducing the severity of impact in those persons already infected. Again, no one even knows what the viral load is for transmission, still a matter of hypothesis, possibly not yet detectable while still being infectious.

**Argument:**

56. Both the Union’s and the Corporation’s respective counsel submitted detailed written submissions in argument and made oral presentations in support, all of which, together with the evidence, I have carefully reviewed in determining this matter. Certainly, it bears observing at outset that there have been a number of arbitration awards issued since the beginning of 2022 dealing with COVID related policies. Notably, there was no *Charter* rights’ argument made by the Union, which proceeded with its argument on the basis that the Mandatory Vaccination Practice, from the start, and continuing, is unreasonable which the Corporation disputes.

**Union:**

57. The case law provided in argument by the Union was in support of his contention that the vaccination policy does not meet the “reasonableness” analysis under *Lumber & Sawmill Workers Union, Local 2437 v. KVP*, 1965 CarswellOnt 618, 16LAC 73 known simply as the KVP principles

applicable to management when seeking to establish rules and direct its workforce through unilaterally imposed policies. They must be objectively reasonable, in that the rule “represents a proportionate response in light of both legitimate safety concerns and privacy interests” as stated in *Communications, Energy and Paperworks Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, [2013] 2 SCR 548 (SCC). These reasonableness principles have now been considered by arbitrators in dealing with COVID vaccination cases, as taken from the very recent arbitration awards submitted by counsel, such as *Power Workers’ Union v Elexicon Energy Inc.*, 2022 CanLII 7228 (Mitchell), *CKF Inc.; TC, Local 213 (COVID Testing)*, 2022 Carswell BC 198; *Chartwell Housing Reit and Healthcare, Office and Professional Employees Union, Local 2220*, 2022 CarswellOnt 1366; and *Electrical Safety Authority and Power Workers Union*, 2022 CarswellOnt 395, tabled by the Union.

58. It takes the COVID-19 awards to have acknowledged that determining reasonableness requires examination of the issue in the context of particular circumstances, which here should be taken as favouring the Union’s position that rapid antigen testing as an alternative should have always been considered appropriate, even more so after the advent of Omicron. To summarize the principles contained in these Awards, the Union takes there to be a legal duty resting with employers to take every precaution reasonable for the protection of workers, even if not established with scientific certainty, but the policy that is pursued must still meet the balance of an employer’s legal obligations; that employees do not give up their rights to integrity of the person when they accept employment so that it is unreasonable to impose a penalty where there is a reasonable alternative; that what constitutes a reasonable mandatory vaccination policy is contextual and highly dynamic. It requires a careful review and analysis of the circumstances revealed in the individual case, meaning it is a fact driven exercise keeping in mind the significance of bodily integrity.

59. In dealing with applying the reasonableness principle, in management needing to deal with the COVID-19 outbreaks, by the Union’s assessment, it would be a matter of weighing the safety risks it poses and the virus itself continuing to change rapidly. Legal precedents decided in a different factual context, and in a different workplace may not be relevant. What may have been reasonable at one point might no longer be reasonable at a later point, which is where the Union places its opposition to the mandatory vaccination policy, at the very least, although disputing that it was ever reasonable, inasmuch as it contends there was always the availability of the less intrusive option of

rapid antigen testing which would have allowed the Corporation to have achieved its health and safety objective without forcing anyone to be vaccinated against their will. Counsel has stated in argument that the policy was unreasonable from its inception, and has grown even more unreasonable in light of the very high vaccination rates which have been achieved both at Canada Post and for the public at large, also the advent of Omicron. In its written Overview, the Union has stated at paras. 3-5:

3. This grievance is unique. There is extensive evidence about the effectiveness of rapid antigen tests (“RATS”) and a consensus amongst Canadian jurisdictions that they represent an important COVID-1 screening tool. Canada Post has a deeply vaccinated workforce. The hearing concluded at a time when many jurisdictions and employers are rescinding vaccination requirements, and the evidence is now clear of the waning effectiveness of two doses of the vaccine (the standard for “Fully Vaccinated” at Canada Post). Canada Post has itself begun the process of “de-escalating” pandemic related health and safety measures. Yet, its vaccine requirement remains firmly in place.

4. The mandatory vaccination practice has harsh impacts for employees who do not wish to be vaccinated, not only by depriving them of employment income, but also by interfering with their common law rights [no longer alleging breached *Charter* rights] to bodily autonomy and privacy. These harms are not justified where vaccinated individuals who are more than two months past their second dose are being infected at rates similar to unvaccinated individuals, and where Canada Post’s health and safety obligations can be achieved through frequent rapid testing.

5. Despite its position in this arbitration, Canada Post agrees rapid testing is a reasonable alternative, as evidenced by its reliance on RATs as a critical screening measure to reduce workplace transmission, including for unvaccinated workers who have requested an accommodation. Indeed, Canada Post recently announced plans to increase the frequency of testing requirements for accommodated and partially vaccinated workers based on evidence that there is a “meaningful reduction in transmission when testing frequency is increased from twice-weekly to three times per week.

60. By the Union’s description, while no doubt the history of this matter indicates that unvaccinated people were more likely to get sick, more likely to experience serious illness or death, and more likely to spread the infection to others when sick, even so there all along has been an appropriate, less intrusive, alternative in rapid antigen testing. Nevertheless, the situation is viewed by it to have been significantly changed by the Omicron variant. While the Union acknowledges that

ensuring worker health and safety is of critical importance to it and its members, it contends that it is notable that Omicron, while being more transmissible, is less likely to lead to severe disease. The Union relies on the Ontario Science Table that vaccinated individuals who are more than two months past their second dose are being infected at rates relatively similar to unvaccinated individuals. The implication would be that the vaccination regimen is “not holding up” and accordingly should be discarded for those bargaining unit employees who have not been agreeable to it, replaced by regular, even daily, rapid antigen testing, although I do observe that the Ontario Science Table does not outright propose using rapid antigen testing as a replacement for vaccination, even in the era of Omicron.

61. The Union cites what it takes to be certain factual aspects as supporting its argument, including that due to the long-standing Playbook requirements, much of the work being done by bargaining unit members can regularly be done safely while respecting the need for physical distancing, that even though there have been instances of workplace transmission, even the tragic deaths of two bargaining unit members, its workers “do not appear to have elevated COVID-19 rates compared to levels in the community”, to quote Dr. Furness, which presumably is to say either that they should not be distinguished therefrom or that the infections are permissible at that rate.

62. The Union disputes the legitimacy of the probable impact on the Corporation from the federal government’s policy of requiring vaccination across the federal civil service, Canada Post being a Crown corporation, its employees not being part of the federal civil service. The decision to change its policy current in September 2021, relying prior thereto on the Playbook approach, was said to have resulted from the erroneous conclusion that vaccination is an “elimination” measure in the hierarchy of controls. The evidence was said to be unassailable that vaccination can reduce but does not eliminate transmission. Counsel cited the Health Canada acknowledgement and the Science Table that dealing with people who are asymptomatic, without any identifiable exposure, comes within the screening of presymptomatic or asymptomatic COVID, able to be met through rapid antigen testing. But, once again, I observe, it does not recommend abandoning vaccination as a viable workplace protection tool where needed. It does not recommend rapid antigen testing as a better alternative to the exclusion of vaccination. The Union relies on there being no cost attaching to the testing inasmuch as Health Canada can be enlisted to provide the tests. The Union views the

Corporation having already used this approach through voluntary on-site clinics, and providing test kits for employees to self administer home. Manager Aucoin's email to the Union executive of March 22, 2022 was said to be significant, where she acknowledged on behalf of the Corporation that a change in frequency of testing shows a meaningful reduction in transmission, although I would observe that the email comment referenced was not dealing with those requiring vaccination under the Mandatory Vaccination Practice, but rather those employees who were requiring accommodation. Further the Union cites the fact that Canada Post was currently "de-escalating" its COVID-19 protection related measures, adopting a phased approach, as another argument for moving to rapid antigen testing as a realistic alternative where requested, although again there was no mention in the Corporation's information proposing de-escalation measures to include abandoning mandatory vaccination at any point while infections continue to occur, indeed having the potential for increasing due to Omicron.

63. The Union relies on the report and testimony from Dr. Furness as suitably convincing in supporting its position that rapid antigen testing adequately reduces transmission by effectively identifying infected workers coming on site, which is to say the immediate here and now, and thereby provides an appropriate alternative for those employees remaining unvaccinated. Their personally held convictions on the issues of privacy and personal consequences suffered from of the Mandatory Vaccination Practice were ably described in the employee affidavits entered in evidence. It is the Union's position that Dr. Furness, in suitably setting out his professional credentials to provide expert evidence about the use of rapid antigen testing for workplace screening, can rely on his real-world experience to apply emerging pandemic evidence to provide decision-making advice. Where he disagreed with Dr. Loeb, I am urged to consider that his expert evidence should be preferred.

64. Counsel submits that no doubt, by Dr. Furness's observation, at one point vaccines were highly effective in protecting against symptomatic illness, which is to say prior to Omicron but with this variant emerging near the end of November 2021, at about the same time as the Mandatory Vaccination Policy was taking effect, it quickly became apparent that there was a significant risk of breakthrough infection. It became known that the standard two doses of the vaccine were significantly less effective in protecting against symptomatic infection. Secondly, infected

individuals were not necessarily contagious, being most infectious when they have a high viral load, and rapid antigen testing was able to identify individuals with a higher viral load. Thirdly, Dr. Loeb, should be viewed as being in agreement that allowing proof of a negative rapid antigen test is an appropriate alternative vaccination for that portion of the work force receiving medical or religious accommodation, which opens the question of why not allow that approach for all employees who are refusing vaccination. However, I would observe that Dr. Loeb declined to concede that rapid antigen testing necessarily reduces transmission through detection with which Dr. Furness would disagree. He does recognize that not everyone can be vaccinated, which leaves an employer looking for the best alternative. Rapid antigen testing for those individuals with valid medical and religious restrictions issues falls in line with the Corporation's legal requirement under human rights legislation to accommodate.

65. In dealing with their competing expert reports, to the extent their opinions differ, the Union contends that Dr. Furness's evidence should be preferred for five reasons. While Dr. Loeb talks about the gold standard of peer review of two studies, any supposed reliance thereon was said to be unreasonable in the context of a novel and evolving public health emergency concerning which, Dr. Furness made it clear, decision-makers should realign with the best available current evidence. This would be the emerging epidemiological data with which he is well acquainted. By contrast, Dr. Loeb's approach was said to be impractical. Secondly, Dr. Loeb's negative critique on the effectiveness of rapid antigen testing was said to be "based on the wrong measure", namely diagnostic accuracy (ability to detect presence of the virus) as opposed to it being used as a screening tool to effectively stop infectious workers from entering the workplace and thereby preventing workplace transmission, which is what would occur. Thirdly his opinion is heavily reliant on international studies, including one particular review which was said to include reviewing outdated testing technologies and poor quality tests, being of little value when sensitive rapid antigen tests are available for use by Canada Post. Fourthly, Dr. Loeb's disagreement with Dr. Furness would seem to stem from a fundamental misunderstanding that Dr. Furness was advocating for a program of antigen screening with no vaccination, despite his having stated his support for a program of testing applying to the small minority of workers still unvaccinated, which is to say, in his view, testing should be reasonably applicable to the approximate 8% percent remaining unvaccinated, including



the 3.37% who have been found by the Corporation to be noncompliant. Fifthly, counsel submitted that Dr. Loeb's position was internally inconsistent, having endorsed twice weekly testing for the subset of unvaccinated workers who have medical or religious reasons for declining and then stating that the same measure would be unsafe for the small subset of workers who do not wish to vaccinate.

66. As counsel put it in summarizing their separate approaches: "ultimately, Dr. Loeb's opinion is inconsistent with the evidence and with the widespread adoption of RATs as an effective, indeed essential, COVID-19 screening tool". It relies on there being some 1,200 employees actively working who are not fully vaccinated, those being accommodated, as clear evidence that the Corporation has determined that rapid antigen testing is safe alternative to vaccination for a subset of its workers, despite its moving against the approximate 3.37% declared to be uncooperative, calculated in late January 2022 to be 1412 bargaining unit members, and placing them on unpaid leave.

67. Overall, counsel submitted, the mandatory vaccination policy does not reasonably balance the harms to workers, namely the Corporation's ignoring that rapid antigen testing is less invasive and is a safe alternative. The vaccination rate is already high, at least 92 % of workers since December 9, 2021 when data was first provided and accordingly it is safe for the small number of unvaccinated employees to participate in the daily rapid test process. There is also the waning efficiency of vaccination under Omicron to consider, where the risk of transmission was said by counsel in his review of the evidence to be similar for vaccinated and unvaccinated people. There is also the de-escalation of pandemic measures which the Corporation is now involved in assessing and applying. This de-escalation, counsel submitted, demonstrates that if a mandatory vaccination practice was ever necessary, which is denied, it can no longer be justified. The Union takes the position that the policy was never justified, was always unreasonable from the date it took effect, and "has only become more unreasonable as the context has changed". In all the Corporation cannot be taken as having adequately established that the policy is necessary to establish its three primary objectives, protection and promotion of workplace health and safety, commercial interests tied to maintaining workplace production capacity, and compliance with customer policies which can be worked around. No doubt adopting health and safety measures towards reducing transmission of COVID-19 is a legitimate objective, however, as the Union sees it, there is no evidence that vaccinating the relatively small number of remaining employees at this point would materially

reduce workplace transmission, which it takes as a backup position inasmuch as it disputes the legitimacy of the policy from outset.

68. The Union set out a number of proposed remedies in its filed brief, including seeking an order directing immediate return of the affected employees to paid active employment, an order rescinding the impugned provisions, a declaration that the Mandatory Vaccination Practice and implementation thereof violated the collective agreement, which continues to be the situation, that any discipline should be rescinded, reimbursement for income loss and benefits or premiums, seniority, and any other entitlements, with interest. It also seeks an order directing the Parties to develop a mutually agreeable vaccinate-or-test policy, that the Corporation should pay all necessary costs for preparing and supplying rapid antigen tests, and that I should remain seized with respect to remedies, including remedies owed to affected employees who retired as a consequence of the policy.

**Employer:**

69. The Corporation did not set out to disparage the analyses contained in the case law cited by the Union dealing with workplace COVID-19 mitigation programs, needing to be determined within the context of the factual circumstances presented, while nevertheless asserting it is apparent that the same legal and factual issues as presented here have been adjudicated, with arbitrators having consistently dismissed challenges to the mandatory vaccination policies. The Corporation takes there to be a consensus which has emerged, and the very recent case law it has cited should be taken as providing a full answer to the grievance. The Corporation relies on its own assemblage of cases, all dealing with mandatory vaccination policies created by employers at some point during the last quarter of 2021, namely *Teamsters Local Union 847 v Maple Leaf Sports and Entertainment*, 2022 CanLII 544 (Jesin); *Bunge Hamilton Canada v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII43 (Herman); *Purolator Canada Inc. v. Teamsters Local Union 938*, 2022 (Unreported) (Wilson); *Unifor Local 973 v. Coca Cola Canada Bottling Limited*, 2022 CanLII 20322 (Wright) and *Toronto District School Board v. CUPE, Local 4400*, 2022 CanLII 22110 (Kaplan). All these cases were decided by arbitrators during the age of Omicron.

70. Counsel submitted that the established case law is persuasive in terms of how arbitrators are

currently analysing the competing interests in mandatory vaccination disputes, often facing the same kinds of arguments pressing for the vaccinate-or-test approach presented here by the Union. The Corporation asserts that, if anything, the nature of the Canada Post workplace, its experience in needing to respond to COVID-19, and the expert evidence from Dr. Loeb plainly favour mandatory vaccination rather than the rapid testing alternative. Counsel submitted that the situation at hand establishes an even more compelling basis to deny this grievance than described in many of those recently decided cases where the same kind of vaccination regimen was upheld. The Corporation relies on there being numbers of factual aspects revealing the impact of the pandemic in its nationally managed working environment, including its retail outlets, mail and parcel processing operations, mail collection and delivery obligations, across Canada which can be seen to have constituted a significant and ongoing threat to its employees and its business.

71. Both in their written and oral presentations, counsel referenced numerous factual aspects of the evidence said to be noteworthy in supporting the Corporation's having taken the mandatory vaccination approach when it did, and sticking to it. For convenience, I have bulleted the following points which I take to encapsulate what the Corporation is asserting to be significant in determining the issue of reasonableness.

- The bargaining unit performs work that involves high levels of interaction with customers who may or not be vaccinated, where maintaining physical distancing was not always possible.
- It had already developed detailed protocols in the Playbook, updated in May 2021, by reference to evolving public health guidance, being a "living document", but the outbreaks continued.
- Despite the introduction of rigorous health and safety protocols, from March 2020 through to the Omicron variant appearing in November 2021, the Corporation recorded 19 outbreaks, including nine in 2021, described by counsel as having had a "devastating impact" on Canada Post and its employees, noting that the informational analysis disclosed 752 positive cases between March 2020 and January 1, 2021, 1348 positive cases between January 1, 2021 and July 22, 2021, and 276 positive cases between August 2, 2021 and November 28, 2021.

- The Corporation faced a demographics' issue with the average age of employees being 49 years, and 65% of the workforce being in the 45 to 64 years range, and no doubt numbers of Corporation employees being over the age of 50 testing positive, and coming under the added risk for more severe illness.
- The Corporation specifically cited the outbreak experienced at two major processing plants, namely at the Gateway facility, its largest mail processing facility, one death tragically resulting there and another at South Central. By mid January 2021 management was conducting rapid antigen testing at the Gateway East facility, which nevertheless experienced a large spike in positive cases requiring complete shutdown of Shift 3 for two weeks. Through to mid February 2021 there resulted 308 positive cases amongst employees said to have had a significant impact on its operation with increasing parcel volumes needing to be processed during the pandemic but reduced capacity in the facility. There was a negative variance for throughput volumes of parcels and packets at one point. It resulted in there being a negative overall production impact as described in evidence compared with the same months in the previous year. Additional outbreaks followed in April 2021, noting the experience of the South Central mail processing plant, described in Director Deeks' affidavit.
- Even with the mandatory vaccination requirement, starting on November 26, 2021, the information set out in the Deeks affidavit is important in that the Omicron wave shortly arrived at South Central resulting in 227 more cases reported between December 9, 2021 and January 21, 2022, with 89 employees self isolating because they were confirmed or presumed positive.
- It became known that Omicron was having a significant impact because it was more transmissible than the Delta variant. Between November 28, 2021, being the first diagnosed Omicron case at Canada Post, and January 20, 2022 there were 2180 total positive recorded cases amongst its workforce, said to be more than double the recorded cases experienced during the first year of the pandemic. It is known that by then public health authorities were not conducting community or workplace contact tracing, which likely means the real case counts were even greater.
- The impact to the Corporation's retail post office organization is outlined in Director Gomes' affidavit, having some 6000 post offices across the country, both urban and remote, with approximately 494 of them staffed by bargaining unit members. Unquestionably Canadians depend on these postal retail outlets in various ways. By her evidence over 1.2 million Canadians receive their daily mail and parcels at these locations, there being shifting customer

habits occurring towards online shopping, indicating a 29% year-over-year increase. Despite the protocols set out in the Playbook, there was workplace transmission between employees at retail outlets and some store operations were closed for periods of time. It was described as a “fluid and evolving situation across the country, changing from region to region over the course of the pandemic”, and there were some reduction in business hours of operation involved, also several unfortunate incidents involving some members of the general public not being receptive to the COVID-19 protocols, including some exhibiting aggressive behaviour within the postal outlets.

- It is known that before introducing the Mandatory Vaccination Practice, the Corporation in September 2021 was considering the alternative of continuing with frequent rapid antigen tests as an alternative to testing, but that approach ultimately was seen to have flaws, there being a potential for false negative results and lower sensitivity when compared with PCR tested, with the additional possibility of not doing the test correctly which was difficult to confirm either way. Testing efficacy remained an issue. It became apparent that the best method for controlling and even eliminating the hazard was not to rely on rapid antigen tests as the replacement alternative, which was simply an engineering control. The Corporation was already using rapid testing and continued doing so throughout the pandemic, being an additional complementary tool as understood by Health Canada, and being the alternative for accommodated persons who cannot be vaccinated, but not a substitute for vaccination, nor did it fit within federal government’s direction that Crown corporations should have mandatory vaccination policies in place.
- Many of the Corporation’s governmental and commercial customers implemented mandatory vaccination policies, requiring visitors, contractors or suppliers, entering their premises to be fully vaccinated. Employers such as Canada Post needed to prove that it had a mandatory vaccination policy in place for its own employees. These large outside organizations were listed in the evidence, including pertaining to those facilities leased from third parties, such as the federal government, airports and airlines who had implemented mandatory vaccination policies that applied to Canada Post were it to operate in their premises. Failure to comply was taken to set up the situation where the Corporation’s employees would be prohibited from doing business in these premises. It would include letter carriers or mail service couriers needing to attend at dealer operated post office locations in publicly accessed commercial premises where mandatory vaccination policies had been implemented. It results in there being an obvious operational impact were the Corporation’s employees to be excluded from performing their assigned duties.

- The Corporation has provided the following summary of its position in terms of setting out the basis for implementing the Mandatory Vaccination Practice where it states:

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 Corporation should have a vaccinated workforce because vaccination is by far the best mitigation measures 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 family 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.

72. In further support, the Corporation relies on the testimony from Dr. Mark Loeb, and his two submitted reports. He should be accepted as a highly credentialed, knowledgeable and experienced COVID-19 medical epidemiologist, who has played a leadership role in numerous epidemiological studies related to COVID-19. Counsel has submitted that the expert evidence from this acclaimed epidemiologist setting out his analysis and conclusions should be considered more compelling than that of Dr. Furness, for numbers of reasons, where their opinions differ.

73. Much of what Dr. Loeb has communicated was said to be beyond dispute; such as the COVID-19 vaccines approved by Health Canada being safe; that unvaccinated persons in the workplace not only pose a risk to themselves but also present the possibility for transmission to other employees; that vaccination is the most effective method of preventing transmission, indeed said to be highly effective at preventing infection, hospitalization and severe illness, and thereby being the

most effective method to reduce transmission because it prevents infection in the first place. This would be unlike rapid antigen testing which can only identify the infection, but not always at an early juncture, depending on its sensitivity in the given circumstances.

74. In Dr. Loeb's dealing with the Omicron variant which unquestionably has a higher transmissive quality, vaccines remain effective but have reduced efficacy compared to the Delta variant, noting that a booster dose significantly increases effectiveness. Both experts agree that there has been no demonstrated issue of herd immunity with Omicron. Nevertheless, the Corporation submits that Dr. Loeb's evidence is persuasive that vaccination provides a substantial protective effect respecting level of illness related symptoms to be experienced were infection to occur. Further, with a reduced viral load resulting from the vaccination, there is a reduced likelihood that this individual will infect someone else. Having increased viral load through infection of the unvaccinated person would have the opposite effect both for themselves and passing it on to someone else, presumably even a vaccinated person. Against the evidence indicating the significance of vaccination, even with respect to the more transmissible Omicron variant, the rapid antigen testing should not be taken as an effective alternative or a substitute for vaccination, in that there was no real evidence demonstrating that it reduces transmission in the workplace, no data on the level of infectiousness that leads to transmission. While remaining a realistic strategy for those who cannot receive the vaccine for medical or religious reasons, a human rights issue with no other reasonable alternative, regular testing can never be considered an equivalent to vaccination as a means of reducing transmission of COVID-19. The ideal frequency for rapid antigen testing is unknown, but what is known is that its sensitivity is suspect. It has been observed to have difficulty detecting the virus at lower viral loads meaning, unlike PCR testing, its failing to detect COVID-19 in individuals at the very early stages of infection despite the possibility of asymptomatic transmission occurring. Indeed, by Dr. Loeb's analysis, it should be apparent that the diagnostic accuracy of rapid antigen testing, including with respect to Omicron, can be highly variable, and should not be taken as a reasonable alternative to vaccination for those who do not require accommodation on human rights grounds.

75. The Corporation specifically relies on Dr. Loeb's expert opinion evidence where he disagrees with a number of statements made by Dr. Furness, whom he takes to have limited content

experience, no peer-reviewed publications or studies on COVID-19, no involvement in diagnostic testing, nor having been involved in examining vaccine efficacy or other respiratory viral infections. Counsel pointed out that plainly put, Dr. Loeb takes Dr. Furness's conclusion that rapid antigen testing is somehow superior to vaccination at preventing workplace transmission to be flawed. By Dr. Loeb's assessment, Dr. Furness has offered no convincing data nor even dealt with the significant question of whether rapid antigen testing should have replaced vaccination as a means of reducing virus transmission and the severe complications of this pandemic amongst Canada Post employees, any one of whom could have brought it into the workplace despite any last-ditch effort of testing folks at the door where unvaccinated. The Corporation views Dr. Furness to be obfuscating the issue by focussing on the possible benefits of rapid antigen test and not offering any description of the known benefits of vaccination in reducing risk, other than indicating that he continues to be in favour of it. The Corporation takes the issue not to be whether rapid antigen testing should be used in some complementary fashion, or has been helpful in dealing with those employees unable to be vaccinated for medical reasons, but whether it should replace vaccination for those unwilling to be vaccinated. It can be noted that the Ontario Science Table relied on by the Union makes no recommendation that rapid antigen testing should be a replacement for vaccination. Nor is there any epidemiological support that it will largely prevent transmission, as Dr. Furness would assert. Much of the developed information focuses on a comparison between rapid antigen testing and PCR testing. Simply put, vaccines prevent infections, greatly reducing the significance of workplace exposure, and where breakthrough infections occur as can certainly happen with Omicron, the viral load will be reduced, there being epidemiological evidence that transmission to others will be reduced and also the severity of illness in the infected person.

76. In disputing various areas of Dr. Furness's testimony, a person who describes himself as having been engaged in "safety advocacy", noting his media involvement throughout the pandemic, counsel submitted that his opinion should not be preferred to Dr. Loeb with his vast epidemiological experience in leadership roles. Counsel also submitted that it should not be missed that in *Electrical Safety Authority v. Power Workers' Union*, Dr. Furness provided an expert report dated October 31, 2021 on behalf of the employer, being one month earlier than his report submitted in this matter. He stated therein that on the evidence which had been assembled he was in favour of a mandatory



vaccination policy over the vaccinate-or-test policy being advocated by the union. He had stated in this earlier report, entered in evidence, that in his opinion mandatory vaccination for ESA staff “will substantially reduce the likelihood of transmission in the workplace”, and that there was no available data to answer the question whether daily rapid antigen testing would be the equivalent to vaccination in preventing transmission. It was his opinion at that time that mandatory vaccination was clearly and substantially superior to a vaccination-or-test regime. Shortly put, counsel submitted, it should be difficult to walk back that opinion in the manner attempted in his next report provided the following month to the Union in this grievance matter.

77. In turning to examining the currently developing law over the last four months, dealing with this issue of whether mandatory vaccination policies are reasonable in the given circumstances, counsel submitted that it cannot be avoided that arbitrators have consistently held that such policies resulting in unpaid leaves where there have been refusals are reasonable and do not offend the *KVP* principles. One might observe that these mandatory vaccination cases dealing with COVID-19 have become a body of arbitration law unto its own. The discussions contained therein were said to be detailed and informative in describing the factual circumstances and applicable guidelines. Counsel take the cases which have been cited to have set out certain reliable factors, such as arbitrators citing occupational health and safety legislation, and the collective agreement provisions, requiring the employer to take steps to protect workplace through health and safety measures; needing to consider whether the employees made subject to the policy are able to work remotely, or do they interact with fellow employees, customers or the public, or are they required to attend at customer or third-party locations; whether the employer is subject to third-party or customer policies that require individuals coming into their premises be vaccinated; whether the workforce has experienced a high number of positive cases, illness or even deaths, or outbreaks; and whether the employer’s operation would be disrupted by the presence of unvaccinated employees raising the risk of passing on an infection, or causing closures and lost income. In this respect, through March 2022 it should not be missed that arbitrators are continuing to find “without hesitation” as counsel put it, that mandatory vaccination policies are reasonable in a variety of workplace circumstances, done in the face of some Canadian governments and health authorities have loosened pandemic related restrictions.

78. In dealing with case law, counsel submitted that starting at the beginning of this year, it can be noted that Arbitrator Jesin in *Maple Leaf Sports and Entertainment*, indicated that the weight of authority supports the position of having vaccine mandates in the workplace to reduce the spread of COVID-19, which observed emerging arbitral consensus has not been diminished by subsequent awards issued after the arrival of Omicron, as with the various subsequent 2022 decisions. Counsel cited arbitrator Herman's award in *Bunge Hamilton Canada* where he upheld mandatory vaccination in an oilseed processing facility, partly located on land leased from the federally regulated local port authority. The mandatory vaccination policy made effective near the end of November 2021 had replaced a policy where employees were not required to disclose their vaccination status. In finding the mandatory vaccination policy to be reasonable, Arbitrator Herman emphasized that the affected employees could not work remotely, that the rapid antigen testing would put the employer in breach of its lease obligations and thereby create operational problems, and there being no evidence suggesting that rapid testing would provide sufficient protection for employees and others entering upon its property, even that portion of the property which was not subject to the port authority's mandatory requirement.

79. In *Purolator Canada Inc.*, released on March 15, 2022, Arbitrator Wilson considered the application of the mandatory vaccination policy in the context of the employer's federally regulated freight and package delivery operations across Canada. The mandatory vaccination policy had been introduced in late 2021 under the collective agreement provisions dealing with protecting the health and safety of employees, and the *Canada Labour Code*. The affected employees worked across the gamut of driver, retail, warehouse and terminal placements, which the Corporation sees as remarkably similar to its own situation. In reviewing the circumstances, arbitrator Wilson noted the nature of the employer's business and the services it provided to its regular clients, including the public at large, its couriers and line haul drivers having to be frequently attending and entering the premises of its clients and third parties, which include hospitals, long-term care facilities and other healthcare facilities, telecommunications providers, private residences, commercial businesses, offices and industrial locations, and indoor retail malls. Purolator was expected to abide by the health and safety policies and protocols set by clients and third parties. Further, it is warehouse workers came into contact with drivers and retail employees who regularly interacted with customers and

other members of the public coming into its retail locations for pickups and drop-offs. In upholding the mandatory vaccination policy, Arbitrator Wilson noted that the industry had some prevalent risk factors, firstly the work was performed indoors in shipping centres and operations' facilities, and at times in enclosed vehicles, as well making deliveries and pickups. Keeping employees safe affected not only them and a variety of customers but also the public at large. Additionally there was the issue of the employer's major clients, pursuant to government direction, requiring vaccination for anyone coming onto their premises. The mandatory vaccination policy was ultimately considered reasonable.

80. The same conclusion was reached by Arbitrator Wright in *Coca Cola Canada Bottling Limited*, released on March 17, 2022, his having emphasized certain features of the employer's bottling operation such as employees having to attend the workplace to do their jobs, and most working in close quarters with fellow employees. The Arbitrator noted that its drivers regularly interacted with dockworkers and customers. Further COVID-19 had a significant impact on the employer generally, and at one particular facility some 870 employees had tested positive since the beginning of the pandemic, and two had died. Two of its facilities had been closed, and two partially closed, at various times costing millions of dollars. Further the Arbitrator noted that the virus has gotten worse over time with the advent of Delta, and then the more transmissible Omicron variants had arrived where the effectiveness and reliability of rapid antigen testing had changed. Interestingly, Arbitrator Wright cited the *Bunge Hamilton Canada* case in support and distinguished Arbitrator Stout's *Electrical Safety Authority* case where it was determined that in some workplaces, like the ESA situation a testing alternative could be appropriate. Nevertheless Arbitrator Stout in his award had noted that mandatory vaccination policies might well be reasonable and necessary in dealing with vulnerable populations needed to be protected while observing that there were workplaces where employees "can work remotely and there is no specific problem or significant risk related to an outbreak, infections, or significant interference with the employer's operations, then a reasonable less intrusive alternative (such as a vaccinate-or-test policy) may be adequate to address the risks". Arbitrator Wright in *Coca-Cola Canada Bottling* upheld the mandatory vaccination policy finding that placement of noncompliant employees on leave of absence without pay was reasonable and not a breach of the collective agreement.

81. As counsel described it in argument: Arbitrator Kaplan’s award in *Toronto District School Board* and *CUPE* decided on March 22, 2022 “followed the trajectory of the cases discussed above” in concluding that the mandatory vaccination policy was reasonable, his having reviewed the competing expert evidence led by the parties in that case. Dr. Loeb had testified on behalf of the School Board. The Arbitrator ultimately confirmed that the policy was reasonable, having reached his conclusions on the evidence, keeping in mind that Dr. Loeb had disagreed with the union’s expert on whether mandatory testing should be required. Arbitrator Kaplan was cited by Union counsel for his following remarks starting and p.28 of his Award namely:

Vaccinations are safe and effective. While RATs have their usefulness, they have serious limitations as well. I accept the evidence that a third dose, the booster – not required by the Policy – may be needed for full vaccination in the Omicron age. It is also correct, and agreed upon by both experts, that whatever the usefulness and value of RATs once was, they also become compromised in the Omicron age.

.....

... the experts... were agreed on almost everything. Where they disagree, I prefer the evidence of Dr. Loeb. I accept Dr. Loeb’s evidence that while modelling is an important epidemiological tool, it is secondary in evidentiary value to randomized clinical trial which was the evidence largely, albeit not exclusively, relied on by Dr. Loeb.

.....

Dr. Deonandan’s [the union’s expert witness] view that RATS can be an appropriate substitute for full vaccination is rejected ... As Dr. Loeb concluded, there is an absence of evidence that RATS reduce transmission in workplace or other settings. Frankly, it is not immediately apparent to me – in a process informed by the precautionary principle – why TDSD would accept RATs as an alternative to vaccination, especially in congested workplaces like schools, where the expert evidence is clear that vaccination is safe and more effective than RATs in reducing the risk of becoming infected and spreading COVID-19.

...

It was not hard for Dr. Loeb to conclude that RATs were not a very good alternative to vaccination, a conclusion that I accept based on his evidence, and on the evidence of both experts that there was no way of ensuring the integrity of the self-administered testing process. I reject the suggestion by the union that compliance in this process could be monitored to ensure compliance.

....

The scientific evidence that I have accepted establishes that a RAT regime, even when accompanied by other measures, could not achieve the same outcome as effectively. As Arbitrator Burkett in *Canada Post and CUPW* (unreported, dated November 30, 2021) concluded following his review of expert evidence called by the union and the employer [the same Dr. Loeb and Dr. Furness]

... It is clear on the evidence that the most efficacious means of accomplishing the necessary health and safety objectives is through mandatory vaccination.

82. It can be observed that the above Burkett quotation is from his decision denying the application for interim relief brought by the Union in this current National Policy Grievance matter.

83. Based on the law, and the facts in evidence, including the expert opinions, I am urged to find in the context of Canada Post's nationally organized workforce covering its numerous areas of operation required by Canadians, it has "all of the hallmarks of a reasonable mandatory vaccination policy". I should conclude on the basis of its obligations to employees under the *Canada Labour Code* and the health and safety priority set out at Article 33 of the collective agreement, that it was required to take action proactively to protect and promote workplace health and safety, being a nationally organized workplace environment where there was no issue of working remotely for bargaining unit employees, no issue of abandoning duties needing to be performed on the street or in the mail processing plants, or in the retail postal outlets. The Corporation was still rolling out its program and successfully enlisting the large majority of employees at the time the grievance was filed, and even at the point of the arbitration hearing commencing in January 2022.

84. The Corporation contends that the existence of Omicron should not be taken as altering the reasonableness of the policy. It is not a situation where the bargaining unit can stop working within the general publicly accessed environment, it having high levels of interaction with its customers and the general public as well as working together in its facilities where physical distancing is not always possible. I am urged to consider that the Corporation has experienced high levels of positive cases and employee absences, and even facility closures. The pandemic has been disruptive to its operations causing financial loss, there being much lost time from work by employees, noting the impact at Gateway and South Central. Additionally many of its commercial or governmental customers, landlords and third parties require that bargaining members attending at their premises be vaccinated. The evidence of Dr. Loeb, a leading medically trained and highly accredited

epidemiological expert on COVID-19 should be preferred, as it was by arbitrator Kaplan in the *Toronto District School Board* case, and by Arbitrator Burkett in dealing with the Union's interim relief application in this matter. I am should dismiss this National Policy grievance.

**Conclusion:**

85. I have carefully considered the numerous materials entered in evidence by consent in this matter, contained in the Parties' books of documents, which also included various opinion pieces, tables and graphs, newspaper articles, etc., not detailed in my recapitulation of the evidence but hereby recognized. As set out in this award, I have received numerous filed affidavits submitted by both Parties dealing with the real-life difficulties encountered by the Corporation and its employees due to this pandemic, including by those bargaining members who have chosen not to cooperate with the Mandatory Vaccination Practice. They have faced being placed on leave without pay where refusing or neglecting to comply, or have complied believing they were forced into cooperating against their will and personal belief system, meaning those employees who are not in a category requiring accommodation by operation of human rights legislation.

86. The well-documented consequences of the COVID-19 pandemic across the postal system was ably described through the materials and testimony, which to say it became hugely disruptive of the Corporation's operations and unquestionably impacted overall employee safety across its mail processing, collection and delivery system. The evidence from Ms. Lewis, Ms. Gomes, Mr. Deeks and Mr. Girouard is quite compelling in their description of the difficult situation presented from the outset of the pandemic. Frankly, the numbers are quite staggering, including the outbreaks suffered, two known deaths, the resulting disruption to Postal operations and the financial losses incurred, in addition to the critical safety issues arising over protecting the workforce.

87. Notably, two expert witnesses were called to testify. Their evidence stands at the forefront of the Parties' cases, having provided their reports, and defended their positions in giving testimony. Dr. Furness was enlisted on behalf of the Union and Dr. Loeb on behalf of the Corporation. Both of them had testified before Arbitrator Burkett in his dealing with the Union's failed application in late November 2021 for interim relief in the form of a cease-and-desist order. Both have testified in other COVID -19 cases, as described in evidence. In my dealing with the evidence of these two experts,

it was necessary for me to consider both where their evidence was consistent with each other, and also where there was divergence and outright disagreement. I have reviewed and set out their evidence at some length. In starting from the vantage point of their indicating some consistency with each other, such as vaccinations are considered safe, and proven to be highly effective, meaning at least until the time of Omicron's appearance with its higher transmissability rate and the impact of a waning vaccine efficacy.

88. There is no doubt that it was well understood at the time of implementation of this Mandatory Vaccination Practice that one's being fully vaccinated hugely lowered the risk of becoming infected, which unquestionably had become the principal way, other than completely isolating oneself, of limiting the transmission of the virus to another person, whether inside or outside workplace environments, and even when infected there was a reduced likelihood of there being a serious illness consequence, or passing the infection on to someone else who was vaccinated, or even to an unvaccinated person due to the lower viral load. Further it does not seem that herd immunity is currently an issue given the propensity for the Omicron variant to break through the vaccine protection, but even there causing less serious illness for those already vaccinated and reliance on a continuing lower viral load where vaccinated. That aspect would continue to have affect both for the vaccinated employee and possibly also others with whom they come into contact with, whether vaccinated or unvaccinated. The simple fact is that a low viral load is better than a high viral load.

89. Dr. Furness does not dispute that there is real significance attaching to vaccination and encourages people to take that step. Plainly put, it would seem that even by Dr. Furness's analysis, made rather clear in his earlier, rather recent, opinion delivered in the *Electrical Safety Authority* case, there were highly beneficial real-world benefits to cooperating with an employer's vaccination policy, firstly in having gained the vaccine's undeniable protection for oneself; and secondly being less likely to pass the virus on to someone else, whether it be a coworker or a member of the public which the Corporation serves; and thirdly having less likelihood to develop serious illness. I will have to say that it certainly would appear that Dr. Furness's current opinion is internally inconsistent with this past testimony in a rather fundamental way, in that he now supports a "vaccinate-or-test" approach as opposed to mandatory testing. Nevertheless, he currently steadfastly stands behind rapid antigen testing as an appropriate alternative for all those reasons discussed in his report and follow-

up testimony in this matter, focussing on of the relatively small number of employees who remain unvaccinated on a percentage comparative basis.

90. It requires me to have carefully considered the divergence in expert opinion, keeping in mind Dr. Loeb's strongly held view in favour of vaccination being crucial in dealing with the pandemic for those reasons discussed by him, including there being no firm evidential support for testing alone causing less workplace infection than a mandatory vaccination protocol for those reasons discussed in his evidence. He unquestionably considers the rapid antigen testing aspect to be a complementary endeavour but should not be used as a replacement for the crucial step of being fully vaccinated. Indeed, the evidence from these two experts is replete with what they do not currently agree on, namely; whether vaccination represents the most effective strategy to reduce and maintain reduced transmission in a Canada Post workplace setting, and amongst its employees generally; whether rapid antigen testing is only a diagnostic test rather than a reliable workplace screening tool; whether it can realistically be considered an equivalent to vaccination as a means of reducing transmission in the workplace; what would be the ideal frequency were to be preferred; the significance of early infection not yet being detectable by rapid antigen testing; the significance of there being less possibility of serious illness were one to be fully vaccinated, even with waning vaccine efficacy; and certainly the impact of the currently dominant Omicron variant. Ultimately their divergence centres on the worth of vaccinations as the principal workplace safety tool to tackle the pandemic and provide an appropriate safety margin to employees, when compared with rapid antigen testing at the door, even daily. Certainly the Corporation needs to confront the highly infectious Omicron variant given its tendency to break through vaccine protection, but I would observe that even then there is little doubt but that the resultant illness where a breakthrough occurs is likely to be less severe, less chance of hospitalization certainly, and the reduced viral load presumably means less likelihood to pass it on to someone else, or at least it will be less severe in that situation.

91. At the same time there is little doubt but that the sensitivity of rapid antigen testing seems to be somewhat suspect in confronting the Omicron virus, whether or not one supports the view that the test can most likely be applied consistently without mishap. It means the testing not always picking up the virus at an early time when one might or might not be yet infectious. A sensitivity issue is emerging. Further data is required.



92. In my reviewing the totality of evidence, I find it difficult take issue with many of the fact-based points made by the Corporation as being pertinent to my considerations, even persuasive, including: that the bargaining unit performs work involving high levels of interaction with customers who may or may not be vaccinated; that physical distancing is not always possible either in the workplace or in dealing with customers some of whom no doubt are vulnerable; that a large number of bargaining unit members, literally thousands, need to go into a wide variety of locations to perform job-related duties; that additional thousands of bargaining unit employees work within large mail processing operations; that there is no remote working or self isolation while performing assigned duties; that the numbers of cases with which the Corporation has had to deal since commencement of the pandemic has proved to be truly a daunting experience both for it and its bargaining unit members, certainly continuing subsequent to the Union filing this grievance through to the present time. Additionally there has been an increase in cases over the last few months caused by the Omicron wave, and even where there is infection from Omicron, vaccinations have provided protection in the form of a less serious illness likely resulting, and likely reduced viral load when infected.

93. There are serious operational concerns in that the overall pandemic impact has been felt both in the mail processing operations and also in the retail postal outlets' side of its operations, causing some shutdown problems, and unquestionably some significant financial loss suffered by the Corporation due to the absenteeism impact. It cannot be missed that many of the Corporation's governmental and commercial customers, require compliance with their own mandatory vaccination policies were the Corporation's employees continuing to attend their premises. Further there is no data supported evidence that testing alone is a better mitigation approach than requiring vaccination.

94. In my reviewing the expert evidence from Dr. Loeb and Dr. Furness, I will say that I have reached the same conclusion as Arbitrator Kaplan in the *Toronto District School Board* case, in dealing with opinion evidence, also Arbitrator Burkett in dealing with the Unions earlier interim relief application in this matter. I have concluded there is little doubt but that Dr. Loeb should be preferred in his analysis of the pandemic problem presented and how best to deal with it. His evidence is convincing and, in my view, preferable where his opinion on COVID-19 related issues conflicts with that of Dr. Furness, rather critically so inasmuch as I accept his opinion that there

currently is an absence of evidence that rapid antigen testing reduces transmission in the workplace or anywhere else, although recognizing that it can be a valid complementary approach. Dr. Loeb's credentials and experience, knowledge and involvement in a leadership role in understanding this virus and how best to deal with it, in my view is frankly unassailable at this point.

95. Nor do I find the Omicron variant can be taken as suggesting a decrease in the need for vaccination, keeping in mind that even with the higher prevalence of breakthrough infections, those people who are vaccinated are less likely to suffer serious illness, and remain less likely to pass the virus on to other vaccinated individuals. Even when that occurs, they are passing on a lower viral load despite the vaccine having a waning effect. I accept, as did Arbitrator Kaplan that the higher transmissibility factor for Omicron and waning vaccine efficacy suggests a booster shot might be in order, not abandoning the mandatory vaccination program altogether. At the same time, there is no doubt that an unvaccinated person is still more likely to be infected and more likely to pass it on to someone else whether that be in the workplace or somewhere else, even the possibility existing of being contagious but not yet discovered through the rapid antigen testing, or becoming contagious after testing is completed for the day, or that the testing has not been correctly applied. The issue remains of questionable testing sensitivity with respect to Omicron in its early stage. In all, I am satisfied that the best evidence suggests that abandoning mandatory vaccination requirements and moving into a testing regime has never been shown to be a better approach to protect the workplace and the Corporation's employees in its dealing with this pandemic, a critical obligation on its part. I am not persuaded that whatever approaches have recently been espoused by various governmental authorities should not be a determining factor in this matter.

96. In all, I conclude, as have numbers of other arbitrators in their 2022 issued awards, in their having considered the various workplace situations presented as described therein, which operations as I review these cases cannot be taken as facing the level of operational issues which are any worse than that faced by the Corporation, and some not nearly as serious all things considered. It has to deal in managing its Postal collection and delivery system with the entire breath of this country. I will say that the Corporation's situation in dealing with this pandemic stands out as a glaring example of it having needed to find the most effective approach. The *Purolator* situation would appear to be the most closely similar given the extent and breath of its mail delivery operations. At

the same time I find the factual analysis and conclusions reached by Arbitrator Kaplan in the very recent *Toronto District School Board* case to be informative, a case where there was competing expert evidence led by the parties and Dr. Loeb's evidence was accepted.

97. On my examination of all the circumstances of this matter, I am of the view that the Mandatory Vaccination Practice as described and implemented has been and continues to be a reasonable exercise of management rights and responsibilities under the collective agreement, and pursuant to its obligations under the *Canada Labour Code*. I do not consider that the Omicron emergence should require changing the program. Accordingly the National Policy Grievance is respectfully dismissed.

DATED at Calgary, Alberta, this <sup>th</sup> 27 day of April, 2022.



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Thomas Jolliffe, Q.C.