

IN THE MATTER OF AN ARBITRATION, PURSUANT TO THE  
*B.C. LABOUR RELATIONS CODE*, RSBC 1996 c. 244 (the “Code”)

BETWEEN:

BC HYDRO AND POWER AUTHORITY

the “Employer”

AND:

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 258

the “Union”

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**AWARD**

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Arbitrator:	Gabriel Somjen, QC
For the Employer:	Graeme McFarlane, Christopher Munroe, Andrew Nicholl and Gabrielle Berron-Styan
For the Union:	E. Murphy Fries and Kirby Smith
Dates of Hearing:	February 25 and March 1, 2, 3, 9 & 10, 2022
Date of Award:	March 21, 2022

1. This case arises from the introduction of a COVID-19 mandatory vaccination policy (the “Policy”) in October 2021 by BC Hydro and Power Authority [“BC Hydro” or “the employer”]. BC Hydro has approximately 6,600 employees. About one third of them are represented by the IBEW, Local 258 [the “union”]. As of February 2022, there were 1,744 active employees in the IBEW bargaining unit. This decision relates to that group of employees only, although the Policy applies to all BC Hydro employees.

2. The parties presented an extensive Agreed Statement of Facts which was very helpful in expediting this hearing and writing this award. Where appropriate, I will quote from the Agreed Statement of Facts. In addition, I heard from 3 witnesses, Kirsten Peck, Senior Vice President Safety and Chief Compliance Officer, Lanny Sawchuk, Director, Line Field Operations and Jennifer Cooper-Stephenson, Manager Employee Relations.

3. BC Hydro is a Crown Corporation established by statute. Its key mandate is to generate, transmit, and distribute power throughout the province. It is the primary electricity supplier in the province. Both parties agree that it is an essential service. It is subject to regulatory requirements including:

- (a) the *Workers Compensation Act* and regulations;
- (b) the provincial *Water Sustainability Act*;
- (c) the federal *Fisheries Act* and regulations;
- (d) the Mandatory Reliability Standards established by the BC Utilities Commission under the Utilities Commission Act and regulations;
- (e) requirements under certain treaties like the Columbia River Treaty; and
- (f) agreements with First Nations.

4. This case is very important to both parties. From the employer's point of view, the Policy is about maintaining a safe workplace for its employees as well as protecting the safety of customers, contractors and other persons with whom BC Hydro employees come into contact. For the union, and particularly the 44 IBEW members who have not been vaccinated pursuant to the Policy, it involves not only health and safety issues but the livelihood of those employees.

5. The collective agreement between these parties does not include any provisions about vaccinations. Prior to introduction of the Policy, the employer did not require bargaining unit employees to obtain any kind of vaccination.

6. The work of IBEW employees at BC Hydro is set out below:
11. Employees in the bargaining unit represented by the Union ("IBEW Employees") perform critical work necessary to deliver electricity to British Columbia.
  12. Most of the IBEW Employees are ticketed Red Seal Trades and are employed in the classifications of: Power Line Technicians ("PLT"), Electricians, Mechanics, Vehicle tradespersons, and Communications Protection and Control Technologists ("CPC Technologist") engaged in the following types of work:
    - (a) installing, operating, maintaining and upgrading generating facilities, electrical substations, and control rooms;
    - (b) installing, operating, maintaining and upgrading transmission and distribution lines, underground cables, electrical meters, telecommunications systems and similar equipment; and
    - (c) providing vehicle and materials support services to field employee groups.
  13. Approximately 100 IBEW employees are also employed as General Tradespersons.
  14. As well, approximately 140 IBEW Employees are employed as Field Storekeepers.
  15. Approximately 50 IBEW employees are employed in the classification of Trades Training Instructors. They provide classroom-based and field-based electrical safety training.
  16. Some IBEW employees are employed as Safety Advocates respond to on-the-spot safety requests for rule and procedural clarification.
  17. The vast majority of IBEW Employees cannot work from home.
  18. IBEW Employees work in all areas of the province in six primary departments: (1) Line Field Operations, (2) Stations Field Operations, (3) Construction Services, (4) Supply Chain & Procurement, (5) Learning & Development, and (6) Transmission & Distribution System Operations.
7. A significant number of the IBEW members perform work "in the field". Some of them work in an indoor closed environment. For example, there are the transmission and distribution system operators who staff the two control rooms that are the nerve centres for the entire BC Hydro operation.
8. Even the workers in the IBEW bargaining unit who generally work outside will sometimes work with two or more in a crew and sometimes in a "bucket", or in conjunction with contractors. In some circumstances, IBEW members work in remote places where they live in residential camps sharing accommodation and meals and recreate together in proximity [for example, Bridge River and Mica].

9. BC Hydro has many safety protocols and practices in place because of the nature of its business and the work of its employees.

59. The work done by IBEW Employees involves many potential hazards.

60. BC Hydro has developed safe work procedures to minimize the risks posed by these hazards.

61. BC Hydro developed these procedures in accordance with the Safety Practice Regulations (SPR) and to be compliant with WorkSafeBC's Occupational Health and Safety Regulations, which further define the legal expectations for the identification and control of occupational health and safety risks.

62. Many work procedures require "minimum crew complements". Some work procedures require IBEW Employees to work in close proximity. For example:

- (a) Two people may have to work together in an elevated "bucket" in order to service a transmission or distribution line; and
- (b) Two or more people may have to work closely underground; and
- © Two or more people may have to work on a piece of equipment in a substation or generating station that requires them to be in close proximity.

63. Some IBEW Employees work alongside contractors and some interact with members of the public.

## **COVID-19**

10. To reduce the risk of illness among its employees, contractors, customers and others with whom BC Hydro's employees come in contact, BC Hydro took several mitigation measures. Some of those are set out in paragraph 72 of the Agreed Statement of Facts:

72. BC Hydro has implemented a variety of health and safety measures throughout the pandemic to reduce the risk of transmission of the COVID-19 virus. These include:

- (a) Closing gyms and shared spaces in offices early in the pandemic;
- (b) Requiring employees to work from home, where possible;
- (c) Dispatching IBEW Employees directly from home to a job site early in the pandemic;
- (d) Supplying and requiring masks when travelling in shared vehicles and when working near others, unless using them presents a safety hazard (see below);
- (e) Requiring physical distancing (generally 2 metres or 6 feet) between workers when possible and where it does not present a safety hazard;
- (f) Implementing a "shelter in place" plan for control room personnel for a period of 7 weeks from March 25 until May 13, 2020, during which time staff lived in RVs on site in two rotations for 10 day periods;
- (g) Encouraging employees to travel individually in separate vehicles to job sites, when possible;

- (h) At the start of the pandemic and into 2021 use of “pods” for field work crews;
- (i) Requiring any employee with symptoms or who feels unwell to remain at home;
- (j) Enhanced sanitation practices in both field offices and on work sites, including providing single-use (disposable) cleaning supplies (e.g. disinfectant cleaning wipes)
- (k) Hygiene protocols and provision of hand sanitizers and handwashing stations;
- (l) Wiping down shared tools and equipment, including vehicles, prior to and after each use;
- (m) Deferring capital projects and maintenance to limit the numbers of workers at high density sites, particularly during the start of the pandemic;
- (n) Installing physical barriers and limiting numbers in large elevators that provide access to powerhouses located hundreds of metres below grade;
- (o) Making modifications to HVAC systems to maximize fresh air supply and increase filtration efficiency;
- (p) Building occupancy limits per floor for major buildings;
- (q) Largest buildings being closed to the public, including customers and family members;
- (r) Carrying out crew safety meetings, pre-job tailboards and similar gatherings required for safety and compliance either in outside areas or with some attendees participating by phone or virtually
- (s) Shifting training to virtual where possible and limiting in person training group size;
- (t) Strict limits on discretionary travel of non-front line workers to sites; and
- (u) Modification of break and shift start times in some cases to reduce the number of people in an area.

11. Some of these safety measures were met with concerns by some employees in the IBEW bargaining unit. For example, the use of “pods” received some criticism because it affected the equitable distribution of overtime. The use of staggered start times also received criticism from some IBEW employees.

12. None of these measures eliminated the COVID-19 virus among BC Hydro employees, although they were somewhat effective.

87. BC Hydro has tracked actual and suspected cases of COVID-19 throughout the pandemic. Where positive cases were reported to BC Hydro, BC Hydro conducted contact tracing to mitigate possible transmission.

88. As of January 18, 2022, BC Hydro has tracked more than 3505 suspected or confirmed cases of COVID-19 in its employee workforce.

97. With respect to IBEW Employees specifically:

- (a) In Year 1 (February 20, 2020 to February 28, 2021), 40 IBEW employees tested positive (of 100 total employees who tested positive).
- (b) For the period March 1, 2021 to October 6, 2021, 38 IBEW employees tested positive (of 116 total employees who tested positive in this period).
- (c) In year 2 (March 1, 2021 to January 18, 2022), 129 IBEW employees tested positive (of 430 total employees who tested positive).

- (d) Between January 19, 2022 and February 9, 2022, 52 IBEW employees tested positive (of 195 total employees who tested positive).
98. BC Hydro has had three workplace outbreaks of COVID-19 since the start of the pandemic:
- (a) In April 2021, Site C had an outbreak;
  - (b) In August 2021, Site C had a major outbreak amongst contractors; and
  - (c) In December 2020, there were 24 positive test results for COVID-19 amongst the Surrey Construction Services business group and 11 of these Construction Services employees who worked together went off work due to COVID-19 and received wage loss benefits from WorkSafeBC.

### **COVID-19 Vaccination**

101. Vaccines first became available in British Columbia in mid-December 2020 and were available to all adults during the summer of 2021.
102. Public health officials have repeatedly stated that the COVID-19 vaccines available in Canada are safe and effective.
103. Since December 2020, Dr. Bonnie Henry has been consistent in recommending that every eligible person in British Columbia should be vaccinated and that vaccines are the most effective protection available against COVID-19.
68. According to the Government of Canada, the virus is most frequently transmitted when people are in close contact with others who are infected with the virus (either with or without symptoms) and that most transmission occurs indoors.
13. In March 2020, the Provincial Government declared a state of emergency due to COVID-19 which had become a pandemic. COVID-19 is known to be commonly spread through contact with respiratory droplets of an infected person.
14. The BC Centre for Disease Control first recommends getting immunized with a COVID-19 vaccine to reduce transmission of COVID-19 along with other measures such as wearing masks, staying at home if you are sick and avoiding crowded areas.
15. Public health orders and protocols have varied since the beginning of the pandemic; however, since the widescale availability of COVID-19 vaccinations, the Provincial Health Officer, Dr. Henry, has made recommendations with respect to protection from this illness including:
105. Dr. Henry has stated the following about vaccination and COVID-19 testing in the Preamble of official Public Health Orders, including the November 12, 2021 Order “Variance of Gatherings and Events & Food and Liquor Services Premises Orders to Suspend Reconsideration re Proof of Vaccination”:

C. Vaccination is safe, highly effective, and the single most important preventive measure a person can take to protect themselves, their families, and other persons with whom they come into contact from infection, severe illness and possible death from COVID-19. In particular:

- a. the vaccines available in British Columbia are highly effective, providing strong protection across all eligible age groups against infection and especially against severe illness;
- b. most British Columbians have strong and durable protection from SARS-CoV-2 resulting from the extended interval between dose one and dose two that is being utilized in British Columbia;
- c. a full course of vaccine provides more effective and durable protection against infection and severe illness than natural immunity from prior COVID-19 infection alone, or natural immunity in combination with a single-dose of vaccine; and
- d. a full course of vaccine provides highly effective and durable protection from infection and in particular from severe illness resulting in hospitalization or death from the Delta variant of SARS-CoV-2, with illness being mostly milder in vaccinated people who become infected than in unvaccinated people.

E. Communities with low vaccination rates have experienced rapid spread of SARS-CoV-2, causing serious illness and increases in hospitalizations and intensive care admissions, primarily in unvaccinated people. By contrast, communities with high vaccination rates have seen corresponding lower transmission, and case rates.

O. Routine COVID-19 testing of asymptomatic people is not recommended in BC and PCR testing capacity is reserved for people who may be ill with COVID-19 to promote public health case identification, follow up and control measures. Asymptomatic testing increases the likelihood of generating false positive tests, which can unnecessarily consume public health resources in following up false positive tests. Similarly, rapid testing, which is followed up with confirmatory PCR testing for positive tests, is reserved for specific settings in which additional layers of protection are needed to protect people at higher risk of serious outcomes of COVID-19, such as in long-term care and assisted living facilities, or in remote communities where obtaining results of PCR testing may be delayed.

123. Recent data shows that vaccinated individuals who contract COVID-19 are significantly less likely to require hospitalization for serious illness than unvaccinated individuals and have shorter required self-isolation periods.

124. In a press conference on January 14, 2022, the Provincial Health Officer stated that unvaccinated people are:

- (a) 12 times more likely to require hospitalization due to COVID-19 compared to people who are vaccinated in the same age group;
- (b) 27 times more likely to require intensive care, and
- (c) 40 times more at risk of death from COVID-19. ...

126. On January 21, 2022, Dr. Henry urged vaccination as the “number one most important” step in preventing transmission and stated that contact tracing is no

longer “an effective intervention” in light of the Omicron variant. Public health officials have identified five “waves” of COVID-19 driven by variants. Omicron has been the primary variant in British Columbia since December 2021. It is significantly more transmissible than Delta and has led to the highest case counts recorded during the pandemic. ...

### **BC Hydro’s COVID-19 Vaccination Policy**

16. Initially, BC Hydro considered a mandatory vaccination policy but rejected the idea. However, later in 2021, some BC Hydro employees expressed an interest in mandatory vaccination so they would be protected from infection by coworkers. In addition, some third parties began requesting only vaccinated BC Hydro employees attend their premises.

112. In September and October 2021, some BC Hydro customers or partners began to request that only vaccinated staff enter their premises or community. For example:

- (a) Helicopter operators that shuttle IBEW Employees to remote work sites and provide operational support for work on the transmission line system would only carry vaccinated passengers. Some PLTs travel regularly by helicopter to work on high voltage transmission lines (approximately 55 employees). CPC Technicians, Mechanics, and Electricians occasionally travel by helicopter. Only a small number of IBEW Employees travel by helicopter on any given day.
- (b) Some customers like St. Paul’s Hospital, some construction sites, some hotels, long-term care facilities, BC Place, some downtown office buildings, and YVR Airport;
- (c) Kwadacha and Gitga’at First Nations and Coldwater Indian Band to which BC Hydro Employees provide services and near/on which BC Hydro Employees perform work.
- ...
- (d) In addition, Vaccines were mandated at Tsay Keh Dene, Kwadacha, Nuxalk, Gitga’at, Heiltsuk and Haida Gwaii.

114. Throughout the Pandemic, Industrial Camps were specifically identified by public health authorities as an area of concern, both for the risk of potential outbreaks as well as the strain such outbreaks could put on public health officials to respond to cases, clusters and outbreaks at remote camps.

17. Site C was of particular concern, although no IBEW employees currently work there.

117. On October 1, 2021, the Provincial Health Officer issued the following Statement on “COVID-19 Vaccination of Industrial Project Workers”:

Based on recent experiences of working with industrial projects and camps to manage cases, clusters, and outbreaks of COVID-19, I cannot overemphasize the value of full vaccination of all workers as a control measure, particularly in



settings such as the industrial camps, where many workers rotate through and live in group accommodations.

COVID-19 vaccination has been clearly shown to reduce an individual's risk of contracting the virus.

In the event people become infected, the vaccine prevents serious illness that can result in hospitalization, intensive care unit admission and death due to COVID-19.

In addition, if infected, being vaccinated shortens the period of infectivity, thereby reducing risk of transmission to others.

Reducing transmission in workplaces and communities is essential for protecting our health care system by reducing the number of people who become seriously ill and need hospitalization and intensive care admissions.

Vaccination also protects the workforce and prevents exposed workers from having to be isolated and prevents potential stoppage of work due to cluster or outbreaks.

I strongly recommend that all workers in industrial projects, especially including those living in industrial camps, be fully vaccinated to protect against COVID-19 consequent to community exposure, workforce mobility risks and congregate setting transmission.

118. On October 5, 2021, the Provincial Health Officer stated publicly that in her view BC Hydro should mandate vaccination at Site C as a way of protecting worker health and safety. Health Minister Adrian Dix stated that he encouraged leaders in all parts of the business sector to encourage vaccination efforts.

119. On October 5, 2021 the BC Government announced a plan to mandate vaccines for the public service effective November 22, 2021.

120. On October 5, 2021, the Employer notified all employees that it was "closely examining the issue of mandatory vaccines and are considering this latest update carefully", referring to the vaccine mandate for B.C. public service employees. The Employer wrote that it had not yet made any decisions about implementing a vaccine mandate for its employees, but would have more information to share in the coming days.

18. BC Hydro's senior management considered what to do next. They knew they would be making what the CEO described as the most difficult decision of their careers.

19. In the end, they created the Policy on October 7, 2021. It applies to all employees and is set out in full.

## POLICY

The health and safety of our employees, our contractors and our customers is a priority for BC Hydro, and one of our core values. BC Hydro is committed to taking precautions to ensure the continued safety of its workers and workplaces and to minimize the risk of COVID-19 transmission. The purpose of this policy is to ensure that all employees who can be vaccinated against COVID-19 are vaccinated in accordance with BC Centre for Disease Control guidance. Effective November 22, 2021 all BC Hydro employees are required to have at least one dose of a COVID-19 vaccine approved by Health Canada. All BC Hydro employees must be fully vaccinated against COVID-19 before January 10, 2022.

Fully vaccinated is defined as having received a complete vaccine series of a COVID-19 vaccine approved by Health Canada.

### **The COVID-19 Pandemic**

The on-going spread of COVID-19 and variants of COVID-19 pose a threat to the health and safety of BC Hydro employees and British Columbians generally. The presence of the Delta variant has increased the risk of transmission and the consequences of contracting the virus. Vaccination continues to be a safe and effective control measure. Information and guidance from the BC Centre for Disease Control confirms that vaccination offers the best protection against severe illness, hospitalization and death, and it reduces the risk of transmitting the virus to others. It is imperative that BC Hydro employees are fully vaccinated to protect themselves and each other from the virus.

This policy is an important step that BC Hydro can take to help control the transmission of COVID-19 in its workplaces and among its employees, contractors and its communities.

## APPLYING THE POLICY

This Policy applies to all employees.

Employees on an approved leave of absence as at November 22, 2021 will be required to comply with this policy prior to returning to work from leave. An approved leave of absence includes maternity leave, parental leave, sick leave, long-term disability leave and any other approved leave of absence pursuant a collective agreement, the BC *Employment Standards Act* or BC Hydro policy.

Employees hired on or after November 22, 2021 are required to be fully vaccinated against COVID-19 as a condition of employment with BC Hydro.

### **Proof of vaccination is required**

Employees must have at least one dose of a COVID-19 vaccine approved by Health Canada and show or be prepared to show proof of vaccination to BC Hydro or its representative by November 22, 2021. Employees must show or be prepared to show proof of full vaccination to BC Hydro or its representative before January 10, 2022. Acceptable proof of vaccination is the BC Vaccine Card or its equivalent if issued by another province or country as proof of vaccination.

## **Support for Vaccination**

BC Hydro employees and contractors are entitled to up to three (3) hours of paid leave to be vaccinated against COVID-19 (for each dose) pursuant to the BC *Employment Standards Act*. Employees should notify their manager if they require time away from work to obtain a COVID-19 vaccine approved by Health Canada.

## **Accommodation**

Employees who are unable to receive a COVID-19 vaccine for a reason related to a protected ground in the BC *Human Rights Code* may request a workplace accommodation.

BC Hydro will not consider workplace accommodation requests based on personal preference, opinion, philosophy, a belief or opinion about the legality of BC Hydro's vaccination policy, or a personal belief about COVID-19 or vaccination.

Requests for medical accommodation will be considered and assessed by Recovery Services in consultation with Employee Relations and the employee's union (for bargaining unit employees). All requests for accommodation based on other protected grounds will be considered and assessed by Employee Relations.

Employees requesting accommodation will be required to cooperate in the accommodation process by providing sufficient objective information for BC Hydro to understand and assess the need for accommodation. BC Hydro may request further information if it is needed to verify the need for a workplace accommodation and to assess reasonable accommodation options.

## **Privacy**

BC Hydro will maintain records of employees' vaccination status. BC Hydro or its representative may review proof of vaccination documentation as needed to confirm employees are fully vaccinated. BC Hydro will not retain copies of employees' proof of vaccination, unless required by law.

BC Hydro will collect and use personal information of employees in the administration of this policy. Information will be collected and used in accordance with the BC *Freedom of Information and Protection of Privacy Act*.

## **Consequences of Non-Compliance with this Policy**

Employees who fail to get their first dose of a COVID-19 vaccine approved by Health Canada or be granted a workplace accommodation by November 22, 2021 will be placed on unpaid leave of absence effective November 23, 2021 until such time as they can provide proof of vaccination which confirms they have received their first dose.

Employees who refuse to disclose their COVID-19 vaccination status or refuse to provide proof of vaccination, will be placed on unpaid leave of absence effective November 23, 2021 until such time as they show proof of vaccination.

Employees who fail to get fully vaccinated or be granted a workplace accommodation before January 10, 2022 will be placed on unpaid leave of absence effective January

10, 2022 until such time as they can provide proof of vaccination which confirms they are fully vaccinated.

Employees placed on unpaid leave of absence will not be permitted to access BC Hydro facilities and will not be permitted to conduct BC Hydro business.

Employees placed on unpaid leave of absence will be responsible for the costs of their health and welfare benefits (both the employee and the employer share) if their absence continues beyond one full pay period. Benefits coverage will be terminated if payment of benefit costs is not made. Employees on unpaid leave of absence will not accrue pension during this time but may be eligible to buy-back service for the period of leave within one year of their return to work with BC Hydro or before their employment end date.

BC Hydro will regularly review the status of all employees who are placed on unpaid leave of absence pursuant to this policy and who do not take reasonable steps to become vaccinated. Those employees who remain unvaccinated may be subject to discipline up to and including termination of their employment.

Employees who are dishonest about their vaccination status or provide falsified proof of vaccination may be subject to discipline up to and including termination of their employment.

#### **Effective Date and Duration**

This Policy is effective October 21, 2021.

BC Hydro will review this policy as needed to ensure that it continues to support the health and safety of our employees, our contractors and our customers.

138. On October 19, 2021, BC Hydro had a bi-weekly call with the Union during which the Union and BC Hydro discussed the vaccination policy and, in particular, the timeline for employees to become “fully vaccinated”. The Union expressed a concern that there was insufficient time to become “fully vaccinated” by November 22, and that contractors had a longer time to do so.

139. On October 20, 2021, BC Hydro sent a draft copy of the Policy to the Union. Later that day, BC Hydro sent the Union an email attaching a revised Policy and confirmed that, in response to the Union’s concerns, employees would only be required to have a first dose by November 22 and be fully vaccinated by January 10, 2022.

20. On November 16, 2021 the union filed a grievance which led to this arbitration.

149. Employees who were not fully or partially vaccinated, or refused to provide proof of vaccination, were placed on an unpaid leave of absence on November 23, 2021. Additional employees who refused to become fully vaccinated, or refused to provide proof of vaccination, were placed on an unpaid leave of absence on or around January 10, 2022.

151. To date, no IBEW Employees have been terminated for non-compliance with the Policy.

152. There are approximately 44 IBEW Employees in the Union's bargaining unit on unpaid leave under the Policy as at the date of this Agreed Statement of Facts. The rest either have an approved accommodation, are fully vaccinated, or are partially vaccinated but committed to becoming fully vaccinated at the earliest opportunity.

### **Issues**

21. The issues to be determined in this case are: Is the Policy reasonable? If the Policy is reasonable, is the portion of the Policy relating to the discipline reasonable?

### **Analysis**

22. The Policy was unilaterally implemented by the employer and, therefore, must meet the requirements set out in numerous cases particularly: *KVP Co. v. Lumber & Sawmill Workers' Union, Local 2537 (Veronneau Grievance)*, [1965] O.L.A.A. No. 2 (Robinson). Both parties agree that the only aspect of the employer's policy that may be a violation of the principles set out in *KVP* is the requirement that the policy be "reasonable".

23. Reasonableness in the context of this case requires an important balancing between the interests of the 44 affected employees who have not complied with the requirement to be fully vaccinated against the interests of the employer and, in this case, also the interests of fellow employees, contractors, customers and others with whom unvaccinated employees may be in contact.

24. BC Hydro also has a high responsibility to the public as the primary provider of electrical power in the province.

25. Employer policies may have different degrees of effect on employees. In this case the effect on the 44 unvaccinated employees is very significant. To be vaccinated, an employee must allow a significant intrusion on their privacy and imposition on their freedom to regulate medical treatments and injections into their body.

26. While both the employer and the union agree that BC Hydro employees should be encouraged to be fully vaccinated in their own interests and the interests of others, some employees have chosen not to take that step. I did not hear much evidence about their reasons but their interests, whatever they are, must be respected to the extent that the required vaccination under the Policy is a significant intrusion on the employees' bodily integrity and privacy.

27. BC Hydro has several interests it seeks to protect with this Policy which must be balanced against the significant interests of the 44 employees.

28. BC Hydro is required to maintain a safe and healthy workforce so that it can carry out its significant obligations as an essential service provider of power to the residents and businesses of the province. BC Hydro must also protect the interests of their other employees who must be kept safe in the workplace, as well as contractors, customers and other persons who come into contact with BC Hydro employees. The *Workers Compensation Act* [RSBC 2019] c.1 states:

21(1) Every employer must

(a) ensure the health and safety of

(i) all workers working for that employer, and

(ii) any other workers present at a workplace at which that employer's work is being carried out, and

(b) comply with the OHS provisions, the regulations and any applicable orders.

Employees also have a duty under the *Workers Compensation Act* to protect their health and safety as well as that of other workers (S.22).

29. In this case these interests diverge. My role is to determine whether the Policy is reasonable in all the circumstances of this case, balancing these interests.

30. Both parties relied on some recent cases where mandatory COVID-19 vaccination was in issue. Two of those cases came to opposite conclusions and are instructive for this case.

31. The union particularly relies on *Electrical Safety Authority v. Power Workers' Union (COVID-19 Vaccination Policy Grievance)*, [2022] O.L.A.A. No. 22 (Stout) and the employer relies on *Power Workers' Union v Elexicon Energy Inc. (COVID-19 Vaccination Policy)*, 2022 CanLII 7228 (ON LA).

32. I will refer to these recent COVID-19 vaccination cases. They rely largely on the same principles but in the *ESA* case the policy was significantly restricted; in the *Elexicon* case the policy was generally found to be reasonable, with 2 exceptions (employees who could work remotely and outside workers who could be largely insulated from coworkers, were exempted from the mandatory vaccination requirement).

33. These cases are quite fact specific. They turn on the role of the employer and the work circumstances of the employees, among other factors. Elexicon is a local energy distributor providing electrical transmission services to some smaller Ontario

communities. Like BC Hydro, it is an essential service. This factor was important to that decision. ESA is a government agency which regulates and promotes electrical safety in Ontario. While important, it is not an essential service. Many of its employees can work remotely.

34. To date the only BC case argued on mandatory COVID-19 vaccination is *CKF Inc. and Teamsters Canada, Local 213 (COVID Testing)*, 2022 CarswellBC 198 (Saunders) decided on January 28, 2022. While it is instructive, it dealt with whether testing of employees who declined vaccination was reasonable. Arbitrator Saunders found that COVID-19 testing as an alternative to vaccination was reasonable. *CKF* is also an essential service provider of packaging products for the food industry.

35. I believe the present case is the first in BC to consider a mandatory COVID-19 vaccination policy that does not provide a testing alternative to vaccination.

36. These policies respond to a rare and unique pandemic and may be subject to change, just as the pandemic changes and public health guidance changes. The dynamic nature of the pandemic, public health guidance and these types of policies was recognized in *Elexicon*:

4. The enormous change in circumstances since the policy was introduced three months ago, with the subsequent new rapid spread of the COVID-19 virus, the large increase in the number of cases including at Elexicon, new lockdowns, reimposed public health restrictions, dramatically increased hospitalizations, the closing of schools and business again after a lengthy period of being open, and new measures introduced by Elexicon itself to address the spread of Omicron, demonstrates very clearly that what constitutes a reasonable mandatory vaccination policy in the course of a pandemic is contextual and highly dynamic. In such an environment both the overall circumstances in the community and the circumstances of the particular employer, take on great significance, while precedents decided in a completely different context, even as recently as November 2021, necessarily become less relevant than they might otherwise be.

Even as this hearing progressed, public health restrictions in BC have been amended.

### **Arguments**

37. The union argued that the employer did not need to take the step of requiring vaccination because the measures it had taken were effective and the reason it decided to impose the Policy was largely because the Provincial government imposed one on October 5, 2021.

38. The union argued that there were less intrusive measures the employer could have taken instead of implementing the Policy. Prior to the public service mandate announcement on October 5, 2021, BC Hydro had done little to learn about the vaccination status of its employees and did not even conduct a survey among bargaining unit employees to determine how much of an issue vaccination was. Had the employer inquired it would have found a large number of its employees were vaccinated. The union argues that less intrusive measures, such as rapid antigen testing among the bargaining unit or other mitigating measures should have been considered and attempted in combination with existing measures to provide a less intrusive solution to the concerns of the employer regarding COVID-19. The union argues that because less intrusive measures were available and not attempted by the employer, the Policy is an unjustified intrusion on the medical privacy of these employees and an unreasonable exercise of management rights.

39. Alternatively, the union argues that the threat of discipline or termination under the Policy makes it much more coercive and intrusive than if unvaccinated employees were only placed on an unpaid administrative leave until the pandemic had subsided. In the alternative, the union argues that the discipline and termination portion of the Policy renders it unreasonable, and that portion of the Policy should be struck down.

40. The employer argued that there were valid and significant reasons for implementing the Policy. Current mitigation measures were not sufficient. Less intrusive measures like rapid antigen tests were not as effective as vaccination.

41. In addition to the health and safety obligations of BC Hydro, it has a duty as an essential service provider to supply and maintain power to British Columbians. It must have a healthy, safe, and adequate workforce to meet that mandate.

### **Employees' Interests**

42. There is no provision in the collective agreement or any statute requiring mandatory vaccination. Nor was it a condition of employment.

43. I agree with the union's proposition that privacy of the person and the right to make free choices for oneself about one's health and medical treatment is an important right



[see for example *Peace Country Health v. United Nurses of Alberta*, [2007] A.G.A.A. No. 17 (Sims)].

44. This was also emphasized in *ESA*:

63. I agree with the PWU that the individual rights of employees at issue in this matter are significant. An individual's right to privacy, including the right to protecting their personal medical information is recognized in the common law (see *Jones v. Tsige* (2012), 108 O.R. (3d) 241 (C.A.)), and in legislation such as the *Personal Health Information Protection Act*, 2004.

64. The law also recognizes an individual's right to make decisions about their bodily integrity, including the right to make decisions regarding medical treatment, which would include receiving a vaccination. In *Carter v. Canada (Attorney General)* [2015] 1 S.C.R. 331, the Supreme Court of Canada indicated the following with respect to an individual's right to make medical decisions:

The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are -- and should be -- free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., *Ciarlariello v. Schacter*, 1993 CanLII 138 (SCC), [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 1990 CanLII 6868 (ON CA), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de Québec* (1992), 1992 CanLII 8511 (QC CS), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).

45. I also agree with the union's submission that this Policy not only requires vaccination against COVID-19 but the alternative also places employees on unpaid leave of absence which is a significant burden on the employee. See *Elexicon*:

92. Whatever may constitute irreparable harm in an application for injunctive or interim relief, in the context of an assessment of the reasonableness of a mandatory vaccination policy, it would be inaccurate and disrespectful to the legitimate interests of employees in maintaining their income and their employment in my view, to ignore the genuinely coercive nature of a policy which threatens the loss of income and possible termination of employment if it is not complied with. Employees everywhere rely on their employment whatever their skill levels, but it must also be recognized that in an industry like electrical power transmission there are skilled trades and other occupations and professions where the employees may not easily find another

employer in the same geographic area to work for. Even if they could do so, they would have to give up their seniority and other benefits of long service which they earned in the course of their employment. The coercive impact of the threat of loss of income, benefits, and employment and the impact on stability and careers is very real. In my view, of course employees have a choice, but just saying that the choices are hard is insufficient when it comes to determining the reasonableness of the policy. In my view, arbitrators should take into account in the balancing exercise the deep dilemma of employees who strongly do not wish to be vaccinated whatever their motives, and who may have few or no other realistic choices to work elsewhere or who will have to give up a significant amount of earned benefits and stability if they choose not to get vaccinated. Just because there are hard choices, as opposed to no choice at all, does not make the policy not coercive, or render it more reasonable. Of course, the policy may be reasonable notwithstanding the potential consequences to the individual employees, but in my view, there is little legitimacy in a decision that finds the policy to be reasonable while denying the lived reality of employees faced with the coercive impact of these policies.

46. To justify such a significant intrusion on an employee's privacy and integrity the employer should be able to demonstrate that mandatory vaccination was reasonably necessary to counterbalance the employee's interests. The union argues that the employer has failed to do so. The union concedes that containing the spread of COVID-19 is a legitimate employer objective but says that in this case mandatory vaccination was not necessary or reasonable.

### **Was There a Need for Further Measures?**

47. The union argues that the vaccination rate among bargaining unit employees was already likely high at the time the employer introduced the Policy. The union also argues that existing health and safety measures that BC Hydro took were already successful and there was low workplace transmission.

48. With that aspect of the union's argument, I disagree. The employer tracked positive and suspected positive cases in the workplace over time and concluded that about 50% of BC Hydro employees fell into that category. That is a rather rough estimate of the nature of the problem that BC Hydro was facing.

49. However, there were more accurate figures with respect to the IBEW bargaining unit in which 40 employees tested positive in the first year of COVID-19 and 38 employees tested positive between March 1 and October 6, 2021. However, 229 IBEW employees tested positive from March 1, 2021 until January 18, 2022 and 52 employees tested positive in the short period between January 19 and February 9, 2022.

50. These latter numbers may reflect the advent of the Omicron variant which is more transmissible than the previously dominant Delta variant. Taking these together, over 11% of the IBEW bargaining unit tested positive. That suggests a significant degree of infection among these employees, even after the Policy was implemented.

51. In addition, the employer experienced two significant COVID-19 outbreaks at Site C [there are no IBEW employees working there] and a third outbreak in its Surrey Construction Services business group involving several employees who received Worker's Compensation benefits as a result of this outbreak.

52. There were other examples of small groups of employees experiencing COVID-19 or requiring isolation. One contractor working on a BC Hydro project died from COVID-19. Two spouses of BC Hydro employees died of COVID-19. Some BC Hydro employees required hospitalization and some experienced "Long COVID".

53. All of this suggests that, notwithstanding the significant mitigating measures that BC Hydro took, even after the Policy was in place, COVID-19 was affecting its employees, contractors and related persons.

54. I agree with the employer that it should not have to wait until the negative consequences of COVID-19 are felt before implementing an appropriate policy to counteract the virus (see *Elexicon*):

101. What arbitrators should do when faced with the lack of studies proving a scientific relationship between cause and effect is addressed by the precautionary principle as stated above by Justices Campbell and Morgan. When there is no scientific certainty as to cause and effect, the precautionary principle applies generally to prevent unnecessary illness and death. As they said: "The entire point is to take precautions against the as yet unknown"

A precautionary approach to the pandemic is justifiable, but in this case, I also conclude that BC Hydro was experiencing significant problems with COVID-19.

55. The union says that BC Hydro decided on the Policy largely because the Province implemented a mandatory vaccination policy for its employees on October 5. That is not sufficient reason for BC Hydro to implement one.

56. I agree that merely to align with the Province's policy would not in itself justify BC Hydro doing the same. However, the evidence of Kirsten Peck shows that this was not the sole impetus for implementing the Policy.

57. Aligning with the Province's policy was indeed a factor but there were other reasons, including:

- Vaccines were more available to persons over 18 by summer of 2021;
- Some BC Hydro employees were asking for assurance that other employees would be vaccinated, for their safety;
- BC Hydro had been asked to implement a vaccine mandate for Site C;
- Some third parties such as helicopter operators and First Nations required vaccination for access to their services or lands;
- On October 5, 2021, Dr. Bonnie Henry the Provincial Health Officer suggested that BC Hydro consider a vaccine mandate;
- The Delta variant had become a concern in BC;
- A vaccine mandate was implemented for BC health care workers in September 2021;
- Worksafe BC had adopted a vaccination mandate.
- BC Hydro felt that vaccination was the most effective tool in mitigating the pandemic risks and would best allow it to respond to service threats such as storms and floods.
- BC Hydro was planning to bring back employees who had been working remotely during the pandemic.

58. These were some of the factors that went into the decision to adopt the Policy.

### **Alternatives to Mandatory Vaccination**

59. The union also argues that alternative measures such as rapid antigen testing could have been put into place to avoid the mandatory vaccination requirement.

60. I agree with the union that if appropriate alternative measures were available to BC Hydro that would accomplish the same health and safety goals as the Policy, then less intrusive measures may have been appropriate. However, in this case it is uncontroverted that the best measure for preventing transmission, reducing the risk of infection, reducing the severity of the illness and reducing the risk of hospitalization and even death, is vaccination.

61. In the Agreed Statement of Facts it is clear that the Provincial Health Officer recommended vaccination as the most effective tool for accomplishing these goals. While rapid antigen testing may be helpful as an adjunct to vaccination it is not an equivalent alternative. Rapid testing does not prevent an employee from becoming infected. It does not reduce the transmissibility of the virus and it does not reduce the severity of illness if an employee becomes infected. Rapid testing can be helpful in determining whether a person has COVID-19. A person with COVID-19 and persons they have been in contact with can isolate, but it does not accomplish the same high-value results that vaccination does.

62. Rapid antigen testing, particularly during the time of the Omicron variant's ascendancy, has proven to be unreliable in determining whether an asymptomatic person has COVID-19. A positive test will show that the person likely has COVID-19 but a negative test may not be accurate until the virus has achieved a certain level which may be two or three days past the time of infection. For these reasons, rapid antigen testing cannot be considered as equivalent to mandatory vaccination.

63. This was also the conclusion of arbitrator Mitchell in *Elexicon*:

108. It is also my view that the change in circumstances with Omicron changed the effectiveness and reliability of testing as compared to the situation with testing in the *ESA* case. In that case, the arbitrator found there was no evidence of difficulty posed by the voluntary vaccination and compulsory testing regime, but now the circumstances surrounding vaccination and testing have both changed. Most importantly the two dose vaccinations cannot be relied upon to the same degree to ward off Omicron as they were to protect against Delta and a third booster is generally required. Rapid antigen testing has shown to be potentially more problematic in the reliability of negative tests of Omicron than was the situation previously. What is reported above in the Evidence Briefing of Public Health Ontario was also experienced by Elexicon itself and many employees who had negative antigen tests had positive PCR tests. Further, Employees no longer have public health PCR testing available to them at a time when company PCR tests may not be available quickly. Paying for private PCR testing if the testing provided by Elexicon is not available quickly, may not be an option for many employees as those costs are not insignificant. A less available and less reliable testing environment makes the alternative arguments to compulsory vaccination less convincing than they were to Arbitrator Stout in the *ESA* case.

## **Outside Work**

64. The union argues that the employees in this bargaining unit often work outside and can wear masks and exercise distancing and other mitigating measures; therefore, they should not be required to vaccinate.

65. However, there are certain characteristics of the IBEW bargaining unit that make these employees and their coworkers more susceptible to COVID-19 than perhaps some other groups such as workers who can safely work at home with little contact with other employees, contractors and the public.

66. These factors distinguish the IBEW employees from those in *ESA* who could generally work from home.

67. Most of the employees in the IBEW bargaining unit are not able to regularly work from home and none of the 44 are able to do so. The following characteristics of the IBEW bargaining unit are of importance and distinguish their work from the employees in *ESA* and even from the employees of *Elexicon*.

- Some work in camp settings like Bridge River and Mica where they may share accommodation with other employees and contractors and may take their meals and recreate together with these other employees and contractors. Industrial camp situations have been specifically targeted as high risk by the Chief Provincial Health Officer. The experience at Site C where there have been two significant outbreaks confirms that camp settings are particularly risky.
- Although many employees in the IBEW bargaining unit work outside, they sometimes will travel to their work settings in a vehicle with one or more other employees. These trips may be of considerable distance and expose their fellow employees to the possibility of infection.
- Some IBEW members work in close indoor settings such as Generation Systems operations and the 2 control centres. In this close work environment transmission is more likely than in an outdoor environment.
- IBEW employees will often have to work close to other employees even though they may be outside. For example, two employees may work together in a bucket which is only about 2' x 4'. Masks cannot always be worn in these circumstances, for safety reasons.

- IBEW employees will sometimes have to work in close underground spaces, working together, and are sometimes not able to wear masks.
- IBEW employees sometimes come in contact with contractors in various locations as well as customers and other members of the public.

68. Because of these characteristics of employees in this bargaining unit, vaccination is the most effective method of mitigating the risks of COVID-19. All the other mitigating measures that BC Hydro introduced may have some positive effect, but none are as effective as vaccination.

### **Conclusion**

69. Having considered the interests of the 44 employees, BC Hydro, its employees, customers, contractors and the public, I conclude that the Policy is reasonable. The interests that led to the Policy outweigh the significant intrusion on the interests of the 44 employees. This result is consistent with the decision in *Elexicon* where a similar conclusion was reached:

94. I should add that if I am wrong that in weighing the interests of the employees, a lack of objectively reasonable grounds for the refusal is a proper factor to consider, but only the employee interest per se in bodily integrity and privacy can be taken into account, I would not decide this case differently. As will be clear below, I consider the risks to the health and safety of other employees in the workplace to be sufficiently important to justify the policy. I also find that the necessity of maintaining critical electrical supply and infrastructure with a workforce sufficient to carry out Elexicon's essential responsibilities weighs heavily in favour of compulsory vaccination in the particular circumstances of this case.

70. This case is similar to the *Elexicon* decision for various reasons but particularly because BC Hydro is an essential service provider and the employees in the bargaining unit cannot generally work remotely, with little contact with others as was the case in *ESA*.

These same distinctions from the *ESA* case were also noted in the *Elexicon* case:

105. Another important factor that justifies a mandatory vaccination rule as reasonable in these particular circumstances is the fact that Elexicon is providing a critical essential service and it must take steps to ensure it can provide that service during a pandemic when there are real threats to the health and availability of its workforce.

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109. Another difference with the *ESA* case is that there most of the employees worked remotely and then did their inspections, if necessary, in the field and did not work inside with other employees. Here a significant number of employees are working inside with each other because some cannot do their jobs entirely or even primarily at home.

71. I note that in *Ellexicon*, some employees were removed from the application of the policy if they were able to work safely without vaccination by working from home, or if outside workers could be insulated from contact with other workers.

72. This nuanced approach to the application of the policy in that case was appropriate because of the working conditions of those employees. For this IBEW group of employees the evidence does not support those types of “carve outs” from the application of the Policy, nor did the parties seek such an approach.

### **Discipline**

73. There is one exception to my conclusion that the Policy is reasonable.

74. The union argues that the discipline aspect of the Policy is coercive and should render the Policy unreasonable.

75. I agree that the possibility of discipline may be more coercive than only the consequence of being on unpaid leave. However, I do not conclude that this aspect of the Policy should render the entire Policy unreasonable.

76. However, the union’s alternative argument, that the discipline aspect of the Policy is unreasonable and should be severed from it, has some merit.

77. Since I have upheld the Policy as reasonable, what does the possibility of discipline add to resolving the employer’s health and safety concerns?

78. The employer argues that to comply with the criteria set out in the *KVP* case, employees who may be subject to discipline must be made aware of that possibility. I agree that is true, if the employer intends to discipline for failure to comply with the Policy. However, that begs the question whether discipline in the unusual circumstances here is reasonable for the employer to achieve its health and safety goals.

79. The 44 employees who have chosen not to be vaccinated have been placed on unpaid leave. They are not presenting any health or safety issues for BC Hydro, its employees, contractors, etc. Nor are they being paid.



80. Just as BC Hydro's decision to impose the Policy was a difficult one, these employees have made the difficult decision not to be vaccinated, resulting in the loss of their income.

81. When the employees made this decision, BC Hydro placed them on unpaid leave but did not discipline them. Nor was the unpaid leave considered discipline by BC Hydro. In their written argument the employer states:

133. BC Hydro's objective in implementing the Policy was to ensure the safest workplace possible through vaccination of all employees, not to fire employees for non-compliance.

82. The sentence in the Policy that contemplates future discipline for continuing with the decision to refuse vaccination, places the employee in jeopardy for the same conduct for which the employer chose not to impose discipline. That is unfair and unreasonable in these circumstances. The employer has achieved its health and safety goal of having only vaccinated employees working in this bargaining unit. The addition of potential discipline at this time will not enhance that goal but will further impinge on the employees.

83. There is another aspect to this case which makes discipline less justifiable than it might be for breach of other types of employer policies.

84. As the Policy itself suggests, it will be reviewed to ensure it meets the health and safety purposes of the Policy. The pandemic changes. Public Health policies and orders change. I expect the Policy may also change, depending on these factors.

85. If the pandemic subsides, there is the possibility that the Policy may be amended in a way that would allow these employees to return to productive work. Also, the current collective agreement expires on March 31, 2022, a few days from now.

86. For these reasons, I conclude that the sentence referring to discipline for continuing to be unvaccinated is unreasonable at present and should be struck from the Policy.

87. The employer may still consider discipline in cases where an employee's conduct warrants it, other than remaining unvaccinated.

88. I recognize that some other cases have upheld the possibility of discipline in similar cases to be reasonable. For example, in *Chartwell Housing REIT v. Healthcare, Office and Professional Employees Union, Local 2220, UBCJA (Mandatory Vaccination Policy Grievance)*, [2022] O.L.L.A.A. No. 53 (Misra) the arbitrator found the discipline portion of a mandatory vaccination policy to be unreasonable in the circumstances of that case.

235. I note again that this policy does not, as do some, suggest that non-compliant employees will be put off work on an unpaid leave of absence, and may be subject to discipline up to and including discharge. This policy says they will be placed on an unpaid leave or may have their employment terminated. Thus, what this Employer is seeking to do is to (as noted from its submissions) simply terminate employees for non-compliance with their mandatory vaccination policy without having to go through the step of the unpaid leave of absence as it has written both options into its policy.

However, she went on to say:

243. Despite my findings above, it is important to state that this decision should not be taken by those employees who choose not to get fully vaccinated as indicating that the Employer would never be able to terminate their employment for noncompliance with the policy in question, or indeed any reasonable policy. It is only the automatic application of this policy as it respects discharge that has been found to be unreasonable. Employees must understand that even if their Union and the Employer are unable to reach agreement pursuant to Art. 18.5, the Employer continues to have its Management Right under the collective agreement to terminate an employee for just cause. Hence, employees who remain non-compliant with the policy should not think that they are protected forever from the possibility of being dismissed, as the Employer may at some point do so if it feels it can establish that it has just cause for termination of any particular employee. No employer has to leave a non-compliant employee on a leave of absence indefinitely. At some point, and subject to the Employer warning employees of the possibility of termination, and having considered other factors, it will likely have just cause to terminate the employment of such an employee.

89. In the *CKF* case, the arbitrator was not asked to determine whether discipline would be appropriate for employees who declined vaccination. However, he did note varying practises on this point:

129 The Policy, first and foremost, is a vaccine mandate, and while it is not one under which failure or refusal to vaccinate in and of itself leads to an unpaid leave, or the termination of one's employment, there are other similar policies elsewhere that do. It bears observation that the Federal government, for instance, has implemented a vaccine mandate for core government employees in the Federal civil service. Such policies essentially dictate, "vaccinate, or you don't have a job" and have done so for all employees, regardless of whether they work in close proximity to others, or remotely from a home office. Many local and provincial governments have followed suit, and a similar policy has been applied to healthcare employees here in BC and in other provinces.

130 Accordingly, the Employer is correct in its observation that it has adopted a comparatively measured approach. Only unvaccinated employees who choose not to test are indefinitely held out of service, yet with no negative consequence to service related or seniority related entitlements under the Collective Agreement.

At para 130 he notes the different consequences between being held out of service and termination. For a policy such as this to be considered reasonable, the consequences of

declining vaccination should be taken into account. In the unique circumstances of this pandemic and the (hopefully) temporary nature of the responses to it, as well as the strict Policy here, with no alternative to vaccination and the employer's statements regarding their intent at the time the Policy was introduced, I am of the view that the disciplinary element of the Policy is not reasonable at this time.

90. The employer, at some time in the future, may have reason to terminate an unvaccinated employee for non-culpable reasons. The union recognized this possibility when it said in their written argument at paragraph 169: "This is not a policy that merely contemplates a non-culpable termination due to frustration of the employment contract." Of course, a termination may be challenged and subject to review by another arbitrator.

91. These various factors lead me to conclude that, at this time, the Policy should not include discipline for declining vaccination. In a potential future version of the Policy that considers the experience with the Policy over time, the state of the pandemic and other appropriate factors such as the current number of employees who remain unvaccinated, the employer may consider introducing a provision to deal with the status of unvaccinated employees. As circumstances currently stand, the disciplinary sentence in the Policy is unnecessary to achieve the employer's health and safety goals and is unreasonable.

92. In summary, I conclude that the Policy is reasonable, except for the discipline sentence referred to above. The grievance is allowed in part with respect to that sentence and denied with respect to the remainder of the Policy.

93. I will remain seized in case there is a need to assist with the implementation or application of this award.

Dated at Vancouver, British Columbia, this 21st day of March 2022.

*"Gabriel Somjen"*

Gabriel Somjen, QC  
Arbitrator