IN THE MATTER OF AN ARBITRATION PURSUANT TO
THE *LABOUR RELATIONS CODE*, R.S.B.C. 1996 c. 244

BETWEEN:

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CITY OF RICHMOND

(the "Employer" or the "City")

AND:

INTERNATIONAL ASSOCIATION OF PROFESSIONAL FIREFIGHTERS, LOCAL 1286

("IAFF")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCALS 718 AND 394
(collectively, "CUPE")

Covid-19 Vaccination Policy Grievance – Interim Application

INTERIM AWARD

ARBITRATOR: Randall J Noonan

APPEARANCES: Kacey Krenn and Jacob Baziuk, for the Employer

Carolyn Janusz and Daniel Mare, for IAFF

Tamara Ramusovic and Scott Garoupa, for CUPE

HEARING DATE: December 22, 2021

DATE OF AWARD January 12, 2022

## I. INTRODUCTION

1. The City of Richmond employs approximately 2,100 employees, 253 of whom are members of IAFF, 1,168 members of CUPE Local 718, and 457 members of CUPE Local 394.

2. IAFF represents firefighters employed by Richmond Fire and Rescue (a department of the Employer). Its members include suppression firefighters, fire prevention officers, community relations personnel, and emergency vehicle technicians. CUPE Local 718 represents the "inside" workers of the City who provide services at City Hall, the aquatics centre, ice arenas, and community centres. CUPE Local 394 represents the "outside" workers, most of whom work in outdoor environments such as the works yard, the recycling depot, city roads, and city parks.

3. On October 25, 2021, the City adopted "Covid-19 Vaccination Policy 6017" (the "Policy"), the stated purpose of which was "to ensure a safe working environment for all employees, and the public who access the City's public facilities."

4. The Policy applies "to all active full-time, part-time, auxiliary City employees and contractors who provide a service on behalf of the City, including Council…". Its term is indefinite, and the City reserves the right to amend the Policy to meet changing Provincial or Federal guidelines related to the Covid-19 pandemic.

5. The Policy requires all employees to provide proof of vaccination against Covid-19 and to complete any subsequent doses and/or boosters as required by the health authority. That proof was required to be provided by December 20, 2021. Any employees who had not provided vaccination proof by that date were to be placed on unpaid leave of absence as of December 21 until they prove that their vaccination status has changed. Under the Policy, employees are permitted to access any unused vacation time, as well as their 2022 vacation allotments, to mitigate the effects of being on unpaid leave.

6. The Policy provides for exemptions for employees with "bona fide exemptions," which specifically does not include personal preference. Employees with bona fide exemptions are to be accommodated with alternate work arrangements.

7. The three Unions who are parties to this case (IAFF, Local 1286; CUPE Local 718 and CUPE Local 394 – collectively, the "Unions") each filed grievances in relation to the Policy. The parties have agreed that those grievances will be joined. The grievances have been referred to arbitration and are scheduled to be heard on March 21-24, 2022.

8. The Unions have applied for an interim order staying the application of the Policy until after the grievances pending the outcome of the arbitration procedure. As an alternative, they ask for an Order exempting certain groups of employees from the requirements of the Policy. For example, CUPE asks for an interim order suspending the application of the Policy for members who do not interact with the public and those who work from home 50% or more of their working hours. As well, the Unions all indicated that they would not oppose an alteration to the Policy which would allow for a testing procedure as an alternative to vaccination. The Employer opposes the Unions' applications and asks that I not interfere with the timeline or substance of the Policy.

9. The issue before me, then, does not relate to the merits of the grievance, but only to whether to order the Employer to stay the implementation of the Policy or to somewhat alter the Policy between the time of this award and when the case is determined through the arbitration process.

10. The hearing of the interim applications took place on December 22, 2021, by way of Zoom video conference. The parties submitted extensive evidence by way of Statutory Declarations, which were exchanged among the parties and provided to me in advance of the hearing. Although offered the opportunity, none of the parties chose to cross-examine any of the witnesses on their Statutory Declarations. The facts as sworn in the various Statutory Declarations are therefore unchallenged. There was no *viva voce* evidence proffered by any party.

11. The hearing proceeded by way of argument with each party having strict time limitations to ensure that the arguments would be completed during the hearing day.

## II. FACTS

12. Serena Lusk, the Deputy Chief Administrative Officer and General Manager, Community Services Division of the City of Richmond, provided a Statutory Declaration for the Employer.

13. She noted that prior to the issuance of the Policy, the City implemented Covid-19 related safety procedures that were more restrictive than required by public health authorities. For example, the City issued a mask mandate for indoor facilities before that requirement was issued by Provincial Health Officer.

14. In relation to the employees of the City, there have been 27 Covid related "workplace exposure events" and one known case of workplace transmission involving two

employees. What the "workplace exposure events" were was not explained in the Statutory Declaration.

15. Many of the City's employees interact with the public. For example, firefighters interact with the public when responding to calls. In April of 2021, Vancouver Coastal Health Authority gave priority access to Covid-19 vaccines to first responders in response to advocacy from those groups.

16. In September 2021, Ms. Lusk recommended a vaccination policy to City Council. That recommendation included an alternative to mandatory vaccination that required education and regular testing.

17. Hardeep Bains, the City's Manager of Human Resources met with each union in September of 2021 to provide a "high level overview" of elements of the vaccine policy.

18. Subsequent to those events, both the Provincial and Federal governments issued mandatory vaccine policies that do not include a testing option. After reviewing those policies and reviewing the efficacy of rapid testing, the City concluded that testing was not an effective option compared to vaccination. A concern is that testing is reactive rather than proactive and that a testing option increases the risk that asymptomatic individuals may infect other employees or members of the public.

19. Employees placed on unpaid leave as a result of the Policy will be eligible to maintain their extended benefits upon paying the premiums for those benefits. This is the same as for any employees on an unpaid leave for any reason.

20. Ms. Lusk attached exhibits to her Statutory Declaration which showed that individuals who are not vaccinated are at considerably greater risk of both contracting Covid-19 and becoming hospitalized or put into intensive care than are vaccinated individuals.

21. As of December 21, 2021 (the day of the hearing of this application), 97.8% of regular employees have provided proof of vaccination. There are 39 regular employees, including nine firefighters, who have not done so.

22. Jim Dickson is the President of IAFF, Local 1286.

23. In his Statutory Declaration, Mr. Dickson stated that there are some members of his local who have minimal interaction with the public. For example, there are two emergency vehicle technicians who do not interact with the public and only deal with employees or management while wearing masks and practicing social distancing. Two community

relations personnel worked remotely at the start of the pandemic and throughout 2021 worked from Hall 1 in compliance with the Employer's required Covid-19 safety protocols without any transmission of Covid-19.

24. Mr. Dickson states that workplace transmission of Covid-19 has effectively been prevented by extensive City protocols. Those include:

    - Limiting public access to firehalls
    - Enhanced cleaning requirements
    - Meal preparation and consumption protocols
    - Mask guidelines and mandatory mask wearing inside any City facility
    - Protocols regarding long term care facilities
    - Shift change protocols
    - Protocols dealing with emergency situations such as CPR treatments
    - Protocols for interacting with the public including wearing N-95 masks, protective eye wear, gloves, Tyvek suits and booties – similar to low-level Hazmat calls, and wearing turnout gear when attending fires and responding to motor vehicle accidents

25. Mr. Dickson points out that other fire departments around the province allow for a testing option to mandatory vaccination, while some departments have no Covid-19 vaccination policies at all.

26. He says that testing kits are now available at a low cost.

27. Mr. Dickson says that the IAFF supports instituting a rapid testing program to be in place from the date of this award until the determination of the merits of the Unions' grievances, and that any costs associated with such testing should be borne by individuals so that there would be no added cost to the Employer.

28. He deposes that the Policy is forcing some members of his Local to choose between getting a vaccine that they do not want and giving up on their careers as firefighters. He says that any firefighters forced to leave employment with the City of Richmond and who subsequently obtain employment with different fire departments, would be treated as new hires with no transporting of seniority, officer status, sick bank or vacation entitlement.

29. The IAFF also produced Statutory Declarations of six firefighters who deposed as to the effects the Policy is having and will have on them if there is no order to stay the implementation of the Policy:

- Two of them expressed concern over their pre-existing medical conditions. They say that the long-term effects of a vaccination on those medical conditions are unknown at this time and that getting vaccinated in those circumstances will lead to anxiety and depression. They have asked their doctors to provide letters for medical exemptions for them, but their doctors have not agreed to do so.

- Two of the affiants are the sole wage earners in their families after their spouses lost jobs in the medical sector for refusing to disclose their vaccination status.

- Several deposed that no one who loses their job or is placed on leave without pay as a result of refusing to comply with a Covid-19 policy is eligible for Employment Insurance.

- Several of the affiants testified that they have agreements or understandings with their spouses that they will not be vaccinated and that they are being placed in a position to either keep their family promises, and thus maintain healthy familial relationships, or to keep income coming in by getting vaccinated contrary to the promises they made in their relationships.

- Several testified that they will not be able to afford to maintain health benefits as they will not be able to pay the full cost of the premiums, which are normally 90% paid by the Employer.

- Several said that if the Policy is not stayed, they will have to list their homes for sale and move out of the Lower Mainland to seek less expensive housing elsewhere. If that happens, they will not be in a position to return to employment with the Employer if it is subsequently determined that the Policy is not proper.

- Several also testified that being placed on leave without pay will affect their abilities to pay for important medical treatments and tests that are not covered by their extended health benefits.

- Several testified that being placed on leave without pay will have detrimental effects on their children. Two had children in treatments for mental health conditions that they will not be able to continue in the face of loss of income. Several were concerned that their children will not be able to continue in the same schools and will lose important friendships. One has a child who will be graduating at the end of the school year but will not be able to graduate with her friends because they will have to move to a less expensive community.

- One of the firefighters is next on the seniority list for an important promotion that is due to occur in January or February 2022 which may be lost if they are placed on leave without pay. Another is a female firefighter who says she has worked very hard in a male-dominated profession to be promoted and will likely lose her promotion chances if she is placed on leave.

30. Dal Benning, the President of CUPE Local 718, submitted a Statutory Declaration on behalf of both CUPE locals.

31. Mr. Benning deposed that Covid-19 risk assessments had been made of worksites where CUPE members work throughout the City and they were all found to be either low or moderate risk – none were found to be high risk sites.

32. He said that in March 2020, the City undertook several initiatives to deal with the spread of Covid-19 and that those initiatives, which included enhanced cleaning, improved ventilation systems, partitions between workstations, and allowing workers to work from home (among others), have been effective in preventing outbreaks. He said there was only one internal transmission case of which he was aware.

33. Mr. Benning notes that other municipalities have provided alternatives for employees who are not vaccinated by choice, for example, testing, specific risk assessment for each job with workers only being laid off if their particular program cannot be delivered safely with mask wearing.

34. Several CUPE members have advised Mr. Benning that if the Policy is not stayed, they will suffer considerable personal losses. Their marital relationships will suffer, one will retire instead of being vaccinated, and some members will not be able to afford to pay for medications needed for members of their families.

35. An affidavit was filed on behalf of CUPE which said that CUPE's K-12 Presidents' Council, the British Columbia Teachers' Federation, and the British Columbia Public School Employers' Association have recently agreed to recommend a document to school boards and school employee unions throughout the province dealing with Covid-19 vaccination policies. Among other things, that document sets out the following:

    - Public Health officials have been clear that vaccines are the most effective way to reduce the risk of Covid-19 transmission in schools and communities.

    - Vaccines used in BC are highly effective against Covid-19, including among variants of concern.

- Most COVID -19 cases, hospitalizations, and deaths are now among unvaccinated adults.

- Unvaccinated individuals are nine times more likely to become a Covid-19 case and 40 times more likely to be hospitalized or die.

- The most effective means to protect students from Covid-19 is for adults in their community, including their school community, to be vaccinated.

- Notwithstanding these recitals, the document calls for employees who are not fully vaccinated to be offered a rapid testing alternative.



## III. ARGUMENTS

### CUPE Arguments

36. In its underlying grievance, CUPE challenges the reasonableness of the Policy. At the hearing of the merits, CUPE will argue that the Policy is unreasonable because it is not the most minimally intrusive means to achieve the Employer's goals. It will argue that there are less intrusive ways that are and can be effective in preventing Covid-19 outbreaks. At the hearing, CUPE expects it will highlight available alternatives to vaccination, including the regular use of rapid tests for screening unvaccinated employees.

37. If the application to stay the implementation of the Policy is successful, CUPE says that it will not object to the Employer's introduction of a rapid testing requirement for its unvaccinated members who attend the Employer's workplace during the interim period. For the purposes of this application only, CUPE would accept that the cost of such testing would be at the individual employees' own time and expense.

38. CUPE points out that the interim application does not require me to address the reasonableness of the Policy, but rather asks me to preserve the status quo ante (that is, as it was before the Policy came into effect on December 21, 2021).

39. CUPE argues that the safety measures and protocols in place prior to the vaccination policy have proven largely effective in preventing the spread of Covid-19 in the workplace. It says this is confirmed by the statistics provided by the Employer; that is, that since the beginning of the pandemic, there have been only 27 exposures amongst 2000 employees, at rate of just over 1%, and only one known case of transmission in the

workplace. Therefore, CUPE submits, the Policy is addressing a problem that largely does not exist in relation to the Unions' members and is doing so in the most intrusive manner possible.

40. CUPE argues that the City does not require members of the public to be fully vaccinated to use some of its facilities. It questions the requirement for its members to be fully vaccinated in those circumstances.

41. It argues that the Employer implemented the Policy before it made any efforts to ascertain the vaccination levels of its employees and the actual risks associated from unvaccinated employees, including the location of their work, and the kind of work in which they are engaged.

42. CUPE has heard from several of its members about the impact of the Policy on them. Those impacts described include:

- A member who has worked from home since the start of the pandemic who fears having to choose between not being able to pay their mortgage and general financial ruin on the one hand, and having to get vaccinated against their wishes on the other.

- A member who expresses concern about the impact of the loss of income on their housing needs, their ability to buy food, and the effect of those things on their PTSD symptoms. That member also expressed that the loss of benefits will impact them and their husband's medical needs, including treatment of chronic pain, dental work, prescription glasses or other prescriptions.

- Another member who is the sole income provider their household feels forced to get vaccinated in order to provide for their son. That member expresses that having to choose between financial ruin and the anguish that will be caused about the effect of vaccination will impact their own existing medical condition.

- A member feels forced to get vaccinated in order to support their small child.

- A member who feels coerced into treatment.

- A member who identifies loss of connection with co-workers and community, and loss of fulfillment, among other impacts.

43. CUPE argues that there is a strong privacy impact of the Policy. That is, those who do not comply with the Policy "will have their vaccination status broadcast to the entire workplace" when they do not return to work.

44. CUPE points out that under their collective agreements, the Employer pays 90% of the cost of benefits and that loss of that Employer payment is a significant loss for its members who do not comply with the Policy.

45. CUPE cites *RJR MacDonald* v. *Canada (Attorney General),* [1994] S.C.R. 311, as the key case setting out the tests that must be satisfied for a court to issue an injunction. The tests cited are:

    - There must be a serious case to be tried;
    - The applicant would suffer irreparable harm if the application were refused; and
    - The applicant would suffer greater harm if the application were refused than would the respondent if it were granted pending a decision on the merits [balance of convenience].

46. CUPE says that the last two tests have been conjoined in British Columbia, and that proof of irreparable harm is not required but rather doubt as to the adequacy of damages as a remedy may support an injunction. It also says that the decision as to whether to grant an interlocutory injunction is not formulaic. The fundamental question in each case is whether the granting of the injunction is just and reasonable in all the circumstances of the case. (*British Columbia (Attorney General) v. Wale,* [1986] B.C.J. No. 1395, aff'd [1991] 1 S.C.R. 62; and *Expert Travel Financial Security (E.T.F.S.) Inc.* v. *BMS Harris & Dixon Insurance Brokers Ltd,,* 2005 [BCCA] 5

47. CUPE cites *Canada Post Corp. v. Canadian Union of Postal Workers (National Policy Grievance N00-12-00003),* [2013] C.L.A.D. No. 56 (Swan), for the proposition that the irreparable harm test may be met if only some members of the bargaining unit will suffer irreparable harm even though others will suffer no harm.

48. CUPE contends that there is an extensive body of arbitral law that acknowledges that intrusions on employee privacy rights over their medical information, including for legitimate health and safety purposes, must be done only as reasonably necessary and by way of minimally intrusive measures. It says that a person's privacy and bodily integrity rights cannot be adequately remedied after the fact following a hearing on the merits.

**IAFF Argument**

49. IAFF seeks an order that the implementation of the Policy be stayed with a condition that the Employer could apply to implement it if there is an outbreak of infections. It submits that the Policy is unreasonable in the absence of significant workplace infection rates.

50. IAFF contends that the current data shows that current vaccines have limited effectiveness in relation to the spread of the Omicron variant of Covid-19.

51. IAFF urges me to consider that the law relating to "irreparable harm" is different in British Columbia from Ontario, and that Ontario cases dealing with that concept cannot be reconciled with those from British Columbia.

52. IAFF says that it is in a different position from other unions because of Article 30 of its collective agreement with the Employer. Article 30 is headed "Grievance Procedure" and contains timelines of the grievance procedure with arbitration being the final step. The opening of the Article is:

> Should any difference arise between either party to this Agreement concerning its interpretation, application, operation or alleged violation thereof, there shall be no stoppage of work *or change of operation or personnel* on account of such difference, and it shall be subject of collective bargaining between the Union and the City and be finally and conclusively settled under an by the following procedure…..(emphasis added) – (the steps of the grievance procedure are then set out in the remainder of the Article)

53. IAFF submits that this clause is effectively a status quo ante clause, that is, it requires the Employer to return to the status quo prior to its enactment of the Policy. The IAFF argues that the effect of the clause is to prevent the Employer from implementing the Policy if the IAFF can show that the Policy will cause irreparable harm to some of its members. If it does, IAFF submits that the clause does not allow for a balance of convenience test. (I note that on its face, the clause does not require the proof of irreparable harm, but I assume that the IAFF submission on this point is based on the interpretation of a similar clause by Arbitrator Munroe in *Delta (Corporation) and Delta Firefighters Association Local 1763)(Application for an Interim Order),* [1997] CarswellBC 3975, discussed later in this decision).

**Employer Argument**

54. The Employer also cites *RJR MacDonald* v. *Canada (Attorney General)* as the leading case in Canada dealing with injunctive relief. In that case, the Supreme Court of Canada adopted the three-stage test to be applied by courts when considering an application for a stay or other form of interlocutory injunction:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

55. In referring to the tests set out in *RJR MacDonald*, the Employer does not dispute that there is a serious case to be decided at the hearing of the grievances on their merits.

56. On the second test, however, the Employer disputes that any Union members have suffered or will suffer irreparable harm as that term is understood in an employment context. It says that employment consequences such as lost wages are not "irreparable harm" as contemplated by *R.J.R. MacDonald.* In short, it argues that lost wages are compensable and that other losses of the types set out by the affiants in this case are considered to be speculative and remote and are not taken into account when considering irreparable harm.

57. On the other hand, the Employer submits that the Policy was adopted for the primary purpose of ensuring the health and safety of all employees and members of the public with whom they interact. The risk of severe illness or death which may occur if the Policy is prevented from taking effect is irreparable harm.

58. The Employer says that the Policy does not require employees to get vaccinated against their will. Rather, it says, the decision to get vaccinated or not rests with the individual employee. However, that decision by the employee must be made taking into account the consequences of not being vaccinated, one of which is that they will be placed on unpaid leave of absence.

59. The Employer argues that the efficacy of the Policy would be affected if the Union's request to exempt certain individuals or groups of individuals from the application of the Policy.

60. In relation to privacy rights, the Employer disputes the Unions' assertions that the Policy effectively requires the disclosure of private medical information to the work community; that is, that an employee's non-vaccination status will effectively be disclosed when the employee is placed on unpaid leave of absence. It argues that, at the most, being placed on leave will only indicate an unwillingness to show proof of vaccination, which could be based on principled reasons not related to actual vaccination status such as exhibiting solidarity with the position that one's status should not have to be disclosed to the Employer.

61. In the alternative, the Employer argues that even if being placed on leave would reveal vaccination status, the privacy concerns are outweighed by the risk of bodily harm and or death if transmission cases occur in the workplace and that, therefore, the application for the stay of the application of the Policy should not be granted on that basis.

62. In relation to the Unions' position that the Policy should provide an alternative to mandatory vaccination such as testing, the Employer submits that that is a question that goes to the merits of the case and should play no part in the analysis relating to the application for an interim order for a stay of the Policy.

63. In short, the Employer argues that the appropriate test in applications of this nature is "balance of convenience," and that that balance lies with the Employer in this case, not with the Unions. It says that the harm alleged by the Unions cannot reasonably compare to the Employer's compelling interest to protect its employees and the public from severe illness or death.

64. The Employer cites a number of cases that have dealt with the issue of mandatory Covid-19 vaccination policies. In particular, it cites five recent cases: *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, [2021] O.J. No. 6531 (Ont. Superior Ct.); *David Lavergne-Poitras – and – The Attorney General of Canada (Minister of Public Service and Procurements) and PMG Technologies Inc.*, [2021] F.C. 1232; *Canada Post Corporation – and – Canadian Union of Postal Workers*, (unreported)(Ont. Arbitration)(Kevin Burkett, November 30, 2021); *Wojdan et al v. Attorney General of Canada*, [2021] F.C. 1341; *Insurance Corporation of British Columbia and British Columbia Hydro and Power Authority and Powertech Labs Inc. – and – Canadian Office and Professional Employees' Union, Local 78*, [2021] B.C.L.R.B. 181.

## IV. ANALYSIS

### Jurisdiction

65. Section 92(1)(c) of the *Labour Relations Code*, R.S.B.C. c. 244 provides the statutory authority for an arbitrator to "determine prehearing matters and issue prehearing orders." That provision includes the power to issue interim orders: *White Spot Ltd. (Re)*, [1994] B.C.L.R.B.D. No. 181; *Accenture Business Services for Utilities v. Canadian Office and Professional Employees' Union, Local 378,* [2008] B.C.C.A.A.A. No. 115 (Taylor); *Communications, Energy & Paperworkers' Union of Canada, Local 2000 v. Pacific Press (Relke Grievance)*, [2000] B.C.C.A.A.A. No. 121.

66. By their nature, applications for interlocutory stays are cursory in the sense that there is no full exploration of the merits of the issue in dispute. That is left for the arbitration itself. I agree with the comments of Arbitrator Steeves (as he then was) in *Otis Canada Inc. v. International Union of Elevator Constructors, Local 82 (Telematics Grievance)*, [2010] B.C.A.A.A. No. 28 at para. 21:

> **21** Applications for interim relief are typically done on an expedited basis as is the case here. Of necessity findings of fact are made without the rigour of a full examination of the evidence. For example, in a non-labour context, the Supreme Court of Canada has directed that applications for interim relief are to be determined on the basis of "common sense" and "an extremely limited review of the case on the merits" and a "prolonged examination of the merits is generally not necessary or advisable" (*R.J.R. MacDonald vs. Canada* (A.G.), *[1994] S.C.J. No. 17*, paragraphs 50 and 78). A full examination of the evidence will take place at a later date and after there is a full hearing on the merits of the grievance. In the meantime, pending a final resolution of the issues in this grievance, if an interim application is successful it is not a remedy but a judgment about the merits of balancing the harm to preserve the *status quo* or not (*CEP, Local 2000 v. Pacific Press (Relke)*, *[2000] B.C.C.A.A.A. No. 121* (Dorsey), paragraph 27).

### Tests To Be Applied

67. As set out earlier, *RJR MacDonald* established a three-prong test for courts to use in determining whether to grant injunctive relief: there must be a serious issue to be tried; there must be a determination as to whether the applicant would suffer irreparable harm if

the injunction is not granted; and an assessment must be made as to which party would suffer greater harm from granting or refusing to grant the injunction.

68. In *Accenture Business Services,* Arbitrator Taylor discussed the approach taken by British Columbia arbitrators in deciding applications for interim orders:

> **30** Arbitrators in British Columbia generally consider, in deciding applications for interim orders, the balance of convenience and interests of the parties. In so doing, four main principles are generally considered although Arbitrator Dorsey in *Pacific Press, supra*, said:
>
> > Arbitrators have a broad scope of remedial and procedural authority. In their role under the collective agreement and Labour Relations Code they do look beyond the terms of the collective agreement in fulfilling their responsibilities. In exercising the statutory authority to make prehearing, interim orders there may be factors beyond those chosen by the Board [referring to the decision in RBA Canada Inc., [1997] B.C.L.R.B.D. No. 31, BCLRB No. B31/97] for its purposes that should be considered by arbitrators. Some of the factors chosen by the Board may not be appropriate in the manner in which they have been formulated by the Board. It is too early in the evolution of this jurisdiction for arbitrators to preclude consideration of any factors or unquestioningly adopt every factor the Board has formulated for its purposes. (para. 28)
>
> **31** The four factors generally considered are:
>
> (a) An adequate remedy would be unavailable at the final hearing without an interim order;
>
> (b) The claim must not be frivolous or vexatious usually be based on a *prima facie* case;
>
> (c) An interim order must not penalize the respondent in a manner which will prevent redress if the application fails on its merits;
>
> (d)The interim order must be consistent with the purposes and objects of the *Code*.

*Les Reichelt Trucking Ltd. and Kelly Douglas & Co. Ltd.* [1993] B.C.L.R.B.D. No. 433; *White Spot Limited*, BCLRB No. B182/94; *Luscar Ltd. (Line Creek Mine) and I.U.O.E. Local 115* (2001), 95 L.A.C. (4th) 283 (Kinzie)

**33** In *Pacific Press, supra*, Arbitrator Dorsey made the following comments with respect to the approach to be taken in interim order applications:

> 26. The overall approach to be taken is one of balancing the harm in the labour relations context of arbitrating under a collective agreement and accepting that an interim order can prevent labour relations harm, not necessarily irreparable or some other unspecific degree of harm. Delay is an important factor in assessing harm. It is still an open question whether an arbitrator should take the approach the Board does and require that an adequate remedy would not be available to the applicant without an interim order.
>
> 27. An interim order is not a remedy. There is no finding of a contravention of the collective agreement. The nature of the interim intervention should not pre-empt either party from maintaining its position with respect to the grievance. Early, interim intervention should assess the likely merits of the grievance and the context in which it arises in the ongoing union and employer relationship under the collective agreement. Obviously, a frivolous grievance does not create a situation where there is any balance of harm in favour of the grieving party. The balance of harm should favour granting the application for specific labour relations purposes. This does not preclude the interests of a party to the collective agreement or a person bound by the collective agreement and, perhaps, a public interest from tipping the balance in favour of making an interim order ...

69. The tests set out above in *Accenture Business* appear to be an adaptation of the Supreme Court of Canada's tests in *RJR MacDonald* to fit within a labour relations context and to be consistent with the purposes and objects of the *Labour Relations Code*. The tests are very similar in nature and application. I am also mindful of the comments set out in Sharpe, Injunctions and Specific Performance (1983), paras. 186-89 and adopted by the

B.C. Court of Appeal in *Attorney General of British Columbia, v. Wale et al* (1986), 9 B.C.L.R. (2d) 333 at para. 51:

> The checklist of factors which the courts have developed - relative strength of the case, irreparable harm, and balance of convenience - should not be employed as a series of independent hurdles. It should be seen in the nature of evidence relative to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.

Before referring to those comments of Professor Sharpe, MacLachlin JA (as she then was), said:

> **51** Having set out the usual procedure to be followed in determining whether to grant an interlocutory injunction, it is important to emphasize that the judge must not allow himself to become the prisoner of a formula. The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case.

In short, then, the application of the tests set out is not to be done in a formulistic manner – as Arbitrator Steeves put it, there is an element of "common sense" in the determination of whether to grant the interim order.

**Other Cases That Have Dealt With Covid-19 Mandatory Vaccination Policies**

70. On November 19, 2021, the British Columbia Labour Relations Board issued its decision in *Insurance Corporation of British Columbia and British Columbia Hydro and Power Authority and Powertech Labs Inc. -and – Canadian Office and Professional Employees' Union, Local 378,* [2021] B.C.L.R.B. 181 ("*ICBC")*. In that case, the union brought an application to the Board to stay the implementation of Covid-19 vaccination policies of the employers. The union claimed that the employers had breached s. 54 of the *Labour Relations Code* by not meeting with the union to discuss an adjustment plan prior to the implementation of the policies. The Board determined that its jurisdiction to grant interim orders is exercised only in rare and exceptional circumstances. It said that the tests for granting interim relief were set out in *RBA Canada Inc.,* BCLRB Letter Decision B31/97:

> 1. Whether an adequate remedy would be unavailable to the applicant at the final hearing without an interim order;

2. The existence of a strong link between the alleged breach of the Code, the consequences of the breach and the interim relief sought;

3. The claim must not be frivolous or vexatious and must usually be based on a prima facie case;

4. An interim order must not penalize the respondent in a manner which will prevent redress if the application fails on its merits; and

5. An interim order must be consistent with the purposes and objects of the Code. The discretion to grant an interim order will not be exercised absent a critical labour relations purpose or if granting the interim order would grant the entire remedy sought or otherwise tilt the balance in favour of one party.

These are essentially the same tests set out by Arbitrator Taylor in *Accenture Business Services* as the tests generally used by arbitrators in B.C.

71. In *ICBC,* the Board declined to grant the interim order. In reaching that decision, it cited two authorities relied upon by the union, *Electrical Safety Authority and Power Workers' Union,* [2021] CarswellOnt 18219 (Stout), and an American case, *Fraternal Order of Police Chicago Lodge No. 7,* [2021] CH 527. In each of those cases, the unions involved challenged the legitimacy of the employers' mandatory vaccination policies and were successful in obtaining relief. The Board in *ICBC* found that those cases were not helpful to its analysis because the case before it did not involve an inquiry into the reasonableness of the employer policy, only that it was enacted without proper consultation. It did not make a determination as to whether the union and its members would suffer irreparable harm because it found that the normal remedy for a breach of S. 54 was an order that a meeting take place, not a declaration that the policy was not valid. To the extent that the union may have been damaged, it found that adequate relief would be available to the union through compensation for the lost opportunity to discuss an adjustment plan.

72. In *Electric Safety Authority,* Arbitrator Stout determined that the employer's Covid-19 vaccination clause was unreasonable. At paragraph 5, he said:

> 5 After carefully considering the parties' submissions, I find that the ESA's current Vaccination Policy is unreasonable to the extent that employees may be disciplined or discharged for failing to get fully vaccinated. It is also unreasonable at this time to place employees on an administrative leave without pay if they do not get fully vaccinated.

> However, that may change as the situation unfolds in the coming weeks and months. I do not find it to be unreasonable for the ESA to require employees to confirm their vaccination status as long as the personal medical information is adequately protected and only disclosed with their consent. Employees may provide a general consent to disclosure of vaccination status in order to access third-party premises or an employee may reserve the right to disclosure on a case by case basis. Employees must be cognizant of the fact that in the current circumstances they may be required to disclose their vaccination status to gain entry to third-party premises and the ESA's offices. I am directing that the ESA refer their Vaccination Policy and this award to the Joint Health and Safety Committee (JHSC) together with the concerns raised by the ESA in this matter. The JHSC shall have a reasonable period of time for review, so they may identify dangers or hazards and make written recommendations. If concerns still exist and the situation has evolved to a point where additional measures need to be made but the PWU objects, then the matter may be brought back before me on an urgent basis for resolution.

73. Unlike the instant case, however, *Electrical Safety Authority* did not involve an application for an interim stay. Rather, it dealt with the merits of the employer's Covid-19 mandatory vaccination policy. While that case may be of considerable assistance to the unions in the arbitration on the merits of the Employer's policy, I do not find it helpful in relation to whether the application of such a policy should be enjoined before a hearing on its merits.

74. I was referred to four Ontario cases that dealt with interim relief related to Covid-19 mandatory vaccination policies. Two of those cases, *Lavergne-Poitras and Wodjan* are Federal Court of Canada cases. *Toronto Transit Commission* is a decision of the Ontario Superior Court of Justice. *Canada Post Corporation* is an arbitration decision. In each of those cases, the application for injunctive relief was denied.

75. In *Canada Post Corporation,* Arbitrator Burkett considered the decisions issued in *Lavergne-Poitras* and *Toronto Transit Commission* which had been decided shortly before he made his decision. In those cases, and in *Wodjan,* which came later, the courts found that the applicants had failed to prove irreparable harm.

76. In the case before Arbitrator Burkett, the union argued (as do the Unions in this case) that there is a less coercive alternative to mandatory vaccination, in particular, testing.

Arbitrator Burkett had the advantage of hearing experts called by both parties in relation to the effectiveness of both testing and vaccination.

77. Two key issues were determined in *Canada Post Corporation*. In relation to irreparable harm, Arbitrator Burkett said this (referring to the decision in *Toronto Transit Commission)*:

> I accept the court's definition of harm. The court in *TTC* reasoned, at paragraphs 50, 52, 75 and 77:
>
> > [50] In my view, NOWU [the union] has mischaracterized the harm at issue. The harm which the employees may suffer is being placed on unpaid leave, or being terminated from employment, if they remain unvaccinated. They are not being forced to get vaccinated; they are being forced to choose between getting vaccinated and continuing to have income on the one hand, or remaining unvaccinated and losing their income on the other.
> >
> > [52] Because I have concluded that the harm in this case is not the alleged violations of informed consent, bodily autonomy or the reasonable probability of personal injury from being coerced into becoming vaccinated, the expert evidence proposed by the parties with respect to the safety of vaccines is not relevant, and I need not address it, nor consider whether experts ought to be qualified. No one is forced to get vaccinated.
> >
> > [75] Irreparable harm cannot exist for some employees and not others because they react differently to the same policy. As much as it is legally untenable to determine the court's jurisdiction on a case-by-case basis, it is equally untenable to ascertain irreparable harm in an application brought by a union on a member-by-member basis, importing a subjective element into the analysis.
> >
> > [77] Fundamentally, I do not accept that the TTC's vaccine mandate policy will force anyone to get vaccinated. It will force employees to choose between two alternatives when they do not like either of them. The choice is the individual's to make. Of course, each choice comes with its own consequences; that is the nature of choices.
>
> It follows from the foregoing that the harm in this case is harm that can be remedied by means of compensation, the restoration of seniority, etc. if a determination is made on the merits that the imposition of the

> mandatory vaccine policy constitutes an improper exercise of managerial discretion under the collective agreement. It is reparable harm.

78. The other key finding in *Toronto Transit Commission* is that the most efficacious means of accomplishing the necessary health and safety objectives is through mandatory vaccination. This led to a finding that, for the purposes of the injunctive relief sought, the balance of convenience rested with the employer.

79. The Unions in this case submit that arbitrators and courts in Ontario view irreparable harm differently from British Columbia arbitrators and courts. For reasons that follow, I do not find it necessary to agree or disagree with the views of irreparable harm as stated by Arbitrator Burkett or of the court in *Toronto Transit Commission.*

**The Application of Principles to This Case**

80. There is no issue in this case that, in the words of RJR MacDonald, "there is a serious question to be tried," or, as Arbitrator Taylor put it in *Accenture*, the case is not frivolous or vexatious. The Employer does not contend otherwise.

81. In my view, the decision must be based on an assessment of whether the granting of the interim order is, in the words of Madam Justice McLachlin (as she then was) in *Wale*, "just and equitable in all the circumstances of the case."

**Irreparable Harm**

82. The Employer argues that the type of harm that some members of the applicant Unions claim will follow should the application be denied, is not the type of harm normally contemplated by the term "irreparable harm" in that it is too speculative and remote.

83. I accept the Employer's point that some of the types of damage set out in the Statutory Declarations of some of the witnesses are matters that may flow from any type of situation in which employees lose their employment income, either on an extended temporary or permanent basis. For example, employees who are terminated for alleged just and reasonable cause may find themselves to be ineligible for Employment Insurance, may lose health benefits, may be unable to keep up with mortgage payments, or may be unable to continue to pay costs associated with important medical procedures or treatments for themselves or members of their families pending the outcome of any grievances filed in relation to the dismissal. With the exception of EI eligibility, the same may be true of employees who are laid off or on extended unpaid leave for any reason.

84. I also accept that normal "make whole" remedies, which may follow findings that a termination was without just and reasonable cause or that a layoff was improper, can never put things back to the way they would have been had the dismissal or layoff never occurred. Indeed, there may have been all manner of consequences from a layoff or dismissal that a "make whole" order could never address. Loss of employment income will normally have consequences such as putting pressure on families, creating tensions within households, and anxiety for either the employee or members of their families.

85. Nevertheless, make whole orders are the best available legal tool to compensate an employee who has lost a job when that should not have happened.

86. There is a strong argument to be made that "make whole" orders, which almost always involve the payment of some money along with other directly employment-related rights such as having seniority restored, are what is legally considered to be appropriate compensation. Other losses, such as the consequences of having to take a child out of an expensive therapeutic program that cannot be afforded without employment income, or marital strife that may be caused by the difficult circumstances when employment income is lost, are not generally compensable. The Employer argues here that those types of damage are too speculative and remote. The parties did not direct me to any case where an unjust dismissal or improper layoff resulted in damages for those types of consequences.

87. However, I find that it is not necessary for me to decide whether the types of consequential harm that affiants in this case depose may befall them could ever be considered irreparable harm. That is because whether they amount to irreparable harm or not, this case will ultimately be determined on the balance of convenience test.

**Privacy and Bodily Integrity Rights**

88. The Unions also argued that the Policy's intrusion into their members' privacy rights is a harm that cannot be adequately remedied after it has taken place.

89. It is clear that privacy rights and the rights to bodily integrity are very significant and must not be intruded upon without good cause. On this issue, I agree with the Unions and find that, to the extent that the policy requires individuals to disclose their vaccination status or to become vaccinated against their wishes, that loss cannot be completely compensated by a later monetary award. For the purposes of this decision, I am prepared to accept that having to disclose one's medical status or being vaccinated against one's wishes are harms that are not fully reparable once they have occurred and fall into the category of irreparable harm.

90. At the same time, in relation to privacy issues, it seems to me that by their own submissions, the Unions implicitly recognize that the Covid-19 pandemic is an unusual situation in which preventative measures override what in other circumstances would be improper intrusion onto the privacy and bodily integrity rights of their members. While each of the Unions submits that the Policy is offensive in that it requires employees to disclose personal medical information and perhaps undergo a vaccination that they don't want, each Union has also suggested that an alternative policy involving testing for unvaccinated individuals may be an acceptable alternative. They may be right about that and will have the opportunity to make that case at arbitration. I note, however, that even a lesser policy that required mandatory testing and reporting out of the results of such testing would involve an intrusion into the privacy and bodily integrity rights that may be offensive to some of their members. While testing may be a more palatable alternative to vaccination for some, it does not eliminate intrusion into privacy and bodily integrity rights.

91. As set out earlier, some of the affiants and some CUPE members who spoke to their Union are concerned about potential medical effects of vaccination and are resisting complying with the Policy for that reason. However, none of them was able to produce a medical certificate setting out the need for an exemption to the vaccine policy. The Policy allows for "bona fide exemptions," so if there are legitimate medical reasons for an individual employee not to be vaccinated, they would presumably be exempted. If an employee does have a documented medical certificate setting out the need for an exemption, the Employer must take that into account.

**The Balance of Convenience**

92. The third element of the *RJR MacDonald* is what is called the balance of convenience test. To repeat it:

> …an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

93. As set out earlier, I find that, to the extent that the Policy intrudes on privacy and bodily integrity rights of members of the Unions, it causes a harm which cannot be fully remedied. That, however, does not necessarily dictate the outcome of the interim application. I must still determine whether the balance of convenience lies in favour of the Unions or the Employer.

94. In *Teck Coal,* Arbitrator Taylor denied an application for an interim order staying an employer drug and alcohol test pending the outcome of the arbitration on its merits.

While acknowledging the serous intrusion on privacy rights that the impugned policy could have, he concluded:

> **137** This is a very difficult decision. Notwithstanding the irreparable nature of an industrial accident, the Union has presented two strong arguments. The first is that the Employer has not demonstrated a compelling problem with accidents due to impairment. This will remain an important consideration on the merits: i.e., in determining the scope of the Employer's rights. However, in the context of an inherently risky workplace, I have determined it does not justify intervening to preclude the Employer from acting on a preventative basis, where the Employer has a substantial and *bona fide* argument that it is entitled to do so.
>
> **138** That leads to the second point: the Union has presented a strong argument that the Employer's actions, insofar as drug testing is concerned, are precluded by existing jurisprudence. I have ultimately concluded that the existing law is the "balancing of interests", which does not dictate a particular result, but rather the balance that is justified in the particular case. The case put forward by the Employer here relies, in support of the balance it says is justified in this case, on very substantial expert evidence and authority that does not appear to have been considered in the earlier arbitral jurisprudence. I am not able to discount the case on its merits, at this preliminary stage, on the basis of arbitral jurisprudence that does not consider it. It is a case that cannot reliably be assessed until its full merits are heard.
>
> **139** The Union's application for a stay also includes the Policy's random alcohol testing. Accordingly, the considerations relevant to that balance between privacy (administration by breathalyzer) and safety (detection of impairment by alcohol at work) are also part of the balance to be weighed in this stay application.
>
> **140** In the result, I am left with a weighing of drug and alcohol testing versus the risk of industrial accident in terms of "irreparable harm". I have concluded that drug and alcohol testing are more amenable to being compensated in damages, whereas the risk of industrial accident carries greater potential for irreparable harm.

95. In short, Arbitrator Taylor accepted that the preventative nature of the policy at issue justified the significant intrusion on individual employees' privacy rights.

96. A key argument of the Unions in this case is that the practices and protocols of the City before the Policy was enacted were effective in preventing the spread of Covid-19. They point out that there were only 27 known "exposures" and only one case of workplace transmission. As a result, they argue that it is appropriate for me to order a return to the status quo ante pending the outcome of the hearing on the merits.

97. Further to this point, the IAFF argued that the enactment of a policy, such as the one adopted by the City, could only be justified upon the proof by the Employer that a considerable risk is present in the workplace. They say that evidence of such risk would be that a considerable number of infections were transmitted at the worksite. Counsel argued that other cases where such policies have been found to be proper were based on evidence of many cases of transmission in the workplace and, in some cases, death, before the policy was enacted.

98. In my view, this IAFF argument goes more towards the merits of the case than to whether an interim stay of the Policy should be ordered. The argument can be resurrected at the arbitration should IAFF choose to do so. For the purpose of the interim application, I am not prepared to accept that a policy that has prevention of sickness or death as its purpose must be stayed pending the outcome of the arbitration procedure simply because the very thing that the policy is designed to avoid has not yet come to pass.

99. In my view, the Unions' arguments fail to give proper weight to the preventative element of the Policy. The Unions invite me to consider that the protocols to date have been successful. I certainly accept and expect that the types of protocols in place prior to enactment of the Policy have ameliorated what likely would have a much worse situation. However, that does not, in itself, indicate that I can find on an interim basis that a Policy that is aimed at lowering the infection rate is improper.

100. At his point, of course, I make no findings as to the merits of the Unions' grievances. At hearing, they may well be able to establish that the Policy is unreasonable in that it is overreaching. They may show that, taking into account the risk of workplace infections and consequences from such infections, a policy that does not intrude so deeply on employees' privacy and bodily integrity rights may adequately address the interests of the Employer (and of the Unions) in preventing the spread of Covid-19. However, I can make no such findings on the basis of the evidence currently in front of me. For example, I have no evidence on the efficacy of Covid-19 testing. On the other hand, I do have evidence submitted both by the Employer and by CUPE that attests to the relative effectiveness of vaccines. That evidence shows unvaccinated individuals are significantly more likely to contract Covid-19 and be hospitalized or die from its effects. Similar to the issue before Arbitrator Taylor found in *Teck Coal*, I am left with the weighing of an employer policy that may intrude significantly on individual employees'

rights to privacy and bodily integrity versus the risk to employees or members of the public with whom they interact contracting Covid-19 and suffering harsh and continuing health consequences or even death.

101. As did Arbitrator Taylor in *Teck Coal*, I find that the health and safety risks to employees and to members of the public with whom they interact outweigh the intrusion into privacy and bodily integrity rights of those members of the Unions who choose not to comply with the Policy.

**Article 30 of the IAFF Collective Agreement**

102. The IAFF collective agreement has a provision not found in the CUPE collective agreements. Counsel for the IAFF submits that Article 30 eliminates a balance of convenience test if I find that the Policy inflicts irreparable harm on some of its members. Again, that provision reads:

> Should any difference arise between either party to this Agreement concerning its interpretation, application, operation or alleged violation thereof, there shall be no stoppage of work *or change of operation or personnel* on account of such difference, and it shall be subject of collective bargaining between the Union and the City and be finally and conclusively settled under an by the following procedure…..(emphasis added)

103. This type of clause is often referred to as a "status quo ante" clause and, in some circumstances, operates to prevent the employer from undertaking certain challenged changes in the workplace pending the outcome of the arbitration process. The IAFF cited *Delta (Corporation) and Delta Firefighters Association Local 1763)(Application for an Interim Order)*, [1997] CarswellBC 3975 (Munroe), in which an almost identical clause was considered. In that case, the employer decided to implement a major fire department reorganization that was permanent in nature and would have removed senior positions from the bargaining unit. Arbitrator Munroe issued an interim order preventing the reorganization from taking place pending the outcome of the arbitration. At paragraph 5, he said:

> **5** Provisions like the above-quoted paragraph of Article X are described in the arbitral jurisprudence as status quo ante clauses. Arbitrators tend to construe such clauses narrowly, and sometimes to require a showing of irreparable harm prior to applying them. But where a status quo ante clause is found to be applicable, and is enforced,

> its effect is to restrain the disputed employer action pending the outcome of the arbitration proceeding.

However, while Arbitrator Munroe granted the interim order, he did not conclude that the language precluded a consideration of the balance of convenience:

> **18** In my view, the intended re-organization will involve a "change of personnel" within the meaning of Article X of the collective agreement; that is to say, it includes a change to the body of persons employed in the bargaining unit. It involves the elimination of the senior-most bargaining unit positions, with consequential changes to the personnel comprising the bargaining unit. Thus, in the view I take of the matter, the intended re-organization is within the ambit of the status quo ante clause.
>
> **19** That conclusion does not automatically mean that the union is entitled to the relief sought in this interim proceeding. Clearly, if the union's underlying grievance is frivolous or vexatious, or otherwise obviously without merit, the fact that the disputed employer action involves a "change of personnel" would not justify the issuance of an order restraining such action pending the conclusion of the grievance and arbitration procedures. I make that observation not because I hold the view that in the instant case, the union's grievance is in the category of grievances just described. Rather, my observation is simply to say that the point has been included in my deliberations. It may well turn out that the union's underlying grievance lacks merit and therefore fails at arbitration. However, I am unable at this stage to formulate an opinion on that score, one way or the other.
>
> **20** If it is necessary for the union to show irreparable harm, I conclude that a showing of irreparable harm has been made out. The intended re-organization will have quite a sweeping impact on the bargaining unit. The changes will include the elimination of positions; and the movement of persons into other jobs, including from inside the bargaining unit to managerial positions outside the unit. Those kinds of changes can be enormously difficult to undo i.e., if the union's underlying grievance succeeds. As well, the only way the employer could altogether avoid the impact of cross-shifting in the interim (which is not something for which an ex post facto remedy can easily be found), would be to decline to fill the newly-created bargaining unit vacancies except by acting appointments. That is something which

> might involve the employer going into contravention of other parts of the collective agreement.
>
> **21** *Those considerations are pertinent as well to an examination of the balance of convenience. Other considerations going to the balance of convenience are the fact that the arbitration of the union's underlying grievance is only about seven weeks away, and the relative lack of prejudice which will be suffered by the employer by having to wait that period of time to implement the re-organization (i.e., assuming the employer is successful in its defense of the grievance).* In that regard, I intend to treat the August 18 hearing date as preemptory. (italics added)
>
> **22** My award is that to the extent the employer's intended re-organization impacts on the existing structure and make-up of the bargaining unit, it shall not be implemented pending the outcome of the arbitration proceeding. The interim order does not apply to the offers of early retirement which have been made by the employer to bargaining unit personnel, and accepted by them.

104. The circumstances before Arbitrator Munroe in *Delta (Corporation)* were significantly different from those in this case. The employer sought to permanently reorganize the department. There was no emergency underlying the reorganization and no health or safety issue it was intended to address. There was nothing that the employer there could not have done after the arbitration on the merits as before it. On the other hand, the arbitrator considered that the changes the employer would make would be very difficult to undo later. Not only did the learned arbitrator consider the balance of convenience in those circumstances, he found that it favoured the union and that was the basis of his decision.

105. In support of its Article 30 argument, the IAFF also referred to *Victoria Times Colonist and CEP, Local 2000,* [2009] CarswellBC 3996 (Dorsey). Section 2(a) of the collective agreement in that case included: "The conditions prevailing prior to any action or circumstance which results in a dispute shall be immediately reinstated and maintained until a decision is reached." Arbitrator Dorsey did an extensive analysis of the clause as it had developed and been applied in the newspaper industry. He referred to it as a status quo ante clause. In his decision, he referred to the decision of Labour Relations Board Chair Donald Munroe (as he then was) in *Re Canadian Newspapers Company Ltd.,* [1980] BCLRBD No. 56 which, in turn, provided background to the article. To briefly a summarize somewhat checkered history of the clause, it had been applied in two British Columbia cases prior to Chairperson Munroe's consideration of it. Both of those cases involved Pacific Press. The first was decided in 1979 by Arbitrator Joe Weiler and the other in 1980 by Arbitrator R.M. Brown. Without getting into too much

detail, those two cases were decided relying on an American newspaper industry decision issued in 1971 by Arbitrator Peter Seitz. Suffice it to say that Chairman Munroe later questioned the logic of the Seitz decision in that it appeared to conflate the issue of the merits of the case with the requirements for an interim order. To compound that, Arbitrator Dorsey pointed out that Arbitrator Weiler's decision misstated one of the key tests of the Seitz decision and then Arbitrator Brown reasoned his award based on the guidance provided by the Weiler decision with its misstatement of the test, rather than on the original (flawed, in Chairman Munroe's view) Seitz decision. Notwithstanding all of that, Dorsey found that the parties had negotiated their collective agreement language in full knowledge of the Weiler and Brown decisions, so history dictated that the language be given the effect set out in those awards. Given all of that, I have concluded that the reasoning regarding the application of the status quo ante clause in the newspaper industry is of little assistance in this case or possibly in relation to other industries.

106. In short, I find that Article 30 of the IAFF collective agreement does not lead to the result suggested by the IAFF, that is, that the balance of convenience test is not ousted even if some IAFF members could suffer irreparable harm.

## V. CONCLUSION

107. In all of these circumstances, I cannot conclude that any harm that may be suffered by those who choose not to comply with the Policy would outweigh the harm that may occur should the Policy not be in force between now and when the matter is determined. What may happen in the interim is inevitably speculative in nature. However, if employees of the Employer, or members of the public with whom they interact, become infected through contact with an unvaccinated and infected employee, the damage done to such people may truly be irreparable. We know that some people suffer considerable and serious long-term health consequences from contracting Covid-19 and some die. There is no legal remedy that could address that.

108. Of course, compliance with the Policy does not guarantee that there will be no infections that follow. However, I accept that the Policy is intended to reduce the risk of spread of the virus. I cannot conclude that such a preventative policy should be stayed for any period of time until the grievances are determined.

109. I therefore deny the applications of the Unions to order the stay of the implementation of the Policy pending the outcome of the arbitration process.

**Partial Exemptions**

110. Each of the Unions has asked that, should I decide not to grant their applications for a stay, that as an interim measure I order that the Policy should not be applied to certain groups of employees who have more limited contact with other employees or members of the public. I am not prepared to make such an order. More limited contact does not mean no contact. Even for those who work primarily from home, I understand that they do come into the workplace for various amounts of time. An individualized assessment for each employee is impractical as the amount of contact with others may vary from one employee to another. One thing that all the employees have in common is that the Employer has the right to require them to attend at the workplace. Again, I do not have enough evidence before me to show that the Policy is overreaching or that there is a better, less consequential and less intrusive alternative. McHaffie J. made a similar point in *Lavergne-Poitras,* at paras. 100-101. Although that case was a common law case and that these comments by McHaffie J. were arguably *obiter*, I find the reasoning to be persuasive.

> **100** In the alternative to his request that the supplier vaccination policy be suspended as a whole, Mr. Lavergne-Poitras seeks an interlocutory injunction suspending the policy with respect to his workplace, the Blainville facility, or declaring the policy does not apply to it. He argues that the risk of him infecting a federal government employee at the Blainville facility is so low given the number of such employees, his limited interaction with them, and the largely outdoor nature of his work, that the harm to him of applying the policy outweighs any risk or harm in suspending it.
>
> **101** I cannot agree. My conclusions above about the lack of a serious issue to be tried and the lack of irreparable harm apply equally to the narrower alternative relief. I also agree with the Attorney General that the positive impact of the policy is weakened by any attempt to apply a piecemeal approach to its implementation. The risks of Covid-19 transmission may well be higher or lower in different federal workplaces. But it is simply unfeasible to adopt as many different policies as there are federal workplaces. The limits on the scope of the policy provide reasonable assurance that it is not applied where there is no contact with federal government employees. It is neither the role of the Court nor in any way workable for the Court to create further individualized exceptions based on claims by particular supplier personnel that they pose little risk of transmission. As Justice Little of

this Court stated in *Monsanto v Canada (Health)*, *2020 FC 1053* at paragraph 113:

> [...] the harm to the public interest is not to be measured principally in this case by assessing the extent of the risk that the applicant will infect another person, based on his evidence that he is cautious and has always taken precautions to protect himself and others from Covid-19. Rather, it must be measured with reference to the broader public interest at stake [...].

## VI. SUMMARY

111. The Employer has enacted its vaccination policy with a view to limiting the spread of Covid-19 among its workforce and members of the public with whom the workforce interacts. The Unions claim that the Policy is overreaching and that either the status quo ante or a less intrusive vaccination policy would suffice to meet the Employer's goal.

112. The application before me is for interim relief and does not involve an analysis of the merits of the Unions' grievances

113. I understand that some Union members who choose not to comply with the Policy may suffer significant consequences to their personal lives. However, I do not have enough evidence before me to show that there is an equivalent or acceptable alternative to the Policy that would meet the goals of preventing the spread of the virus while eliminating those personal consequences. If I were to grant the order sought by the Unions, and subsequently employees or others were exposed to the virus and became seriously ill or died, there is no amount of a monetary award that could remedy that.

114. I find that the balance of convenience test applies and that balance lies in favour of the Employer. In these circumstances, granting the application for staying, limiting or altering the Policy would not be just and equitable in all the circumstances of the case. The Unions' applications are hereby denied.

DATED and effective at New Westminster, British Columbia on January 12, 2022

RANDALL J. NOONAN
Arbitrator