IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Purolator Canada Inc. v. Canada Council of Teamsters,* 2025 BCSC 148

Date: 20250130
Docket: S240143
Registry: Vancouver

Between:

Purolator Canada Inc.

Petitioner

And

Canada Council of Teamsters,
Teamsters Local Union No. 31 and Arbitrator Nicholas Glass

Respondents

Before: The Honourable Justice B. Smith

On judicial review from: A decision of the Arbitrator dated December 14, 2023

Reasons for Judgment

Counsel for the Petitioner:	G. Griffiths Z. Lebane
Counsel for the Respondents:	D.P. Reynolds R.N. Kearns
Place and Date of Hearing:	Vancouver, B.C. May 6-7, 2024
Place and Date of Judgment:	Vancouver, B.C. January 30, 2025

Introduction

[1] This is a judicial review of an arbitrator's decision involving disputes between an employer and a union. The disputes stem from the employer's implementation of a COVID-19 vaccination policy and its subsequent requirement for employees to attest to vaccination-status. The review is brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[2] The employer seeks an order quashing and setting aside the arbitrator's decision.

[3] For the reasons that follow, the petition is dismissed.

Overview

Background Information

[4] Purolator Canada Inc. (“Purolator”) is a federally regulated employer subject to federal labour and employment legislation. Purolator operates across Canada, providing customers with freight, package and logistics services.

[5] Canada Council of Teamsters (the “Council”) is a union which holds bargaining rights for Purolator’s employees and owner/operators covered by bargaining certificates issued by the Canada Labour Relations Board.

[6] Purolator and the Council are the parties to a Canada-wide collective agreement (the “Collective Agreement”).

[7] The Council has many constituent local unions, including Teamsters Local Union No. 31 (“Local 31”).

[8] While the Council may delegate some of its authority to local unions, the parties to all disputes under the Collective Agreement are Purolator and the Council.

[9] In early 2020, a coronavirus which could cause severe respiratory illness and death (“COVID-19”) began spreading around the world. Thousands died from COVID-19 during the ensuing pandemic, mostly the elderly or health-compromised. The rapid emergence, prevalence and mutation of COVID-19 created a global public health crisis unprecedented in the modern age.

[10] Globally, governments responded to COVID-19 in various ways, including by prohibiting gatherings in places such as sports arenas, theaters, restaurants and churches. People were required or urged to wear masks and limit their physical contact with others, either through social isolation, gathering only in small groups, or engaging in practices such as distancing. Many businesses had to cease, drastically curtail or modify operations.

[11] From the outset of the pandemic, there was an urgent need to develop COVID-19 vaccines.

[12] Before the end of 2020, several types of vaccines were developed for use in North America. In Canada, starting in the spring of 2021, various Health Canada-approved vaccines were broadly distributed.

[13] In August 2021, the federal government announced a primary vaccine requirement for its employees and workers involved in some federally regulated travel. This requirement did not extend to Purolator.

[14] By the late summer of 2021, provincial governments began issuing public health rules encouraging or mandating vaccination. Many provincial health services issued vaccine mandates covering employees who provided patient care in hospitals and other clinical settings.

[15] On September 15, 2021, Purolator unilaterally introduced a vaccine mandate policy called the COVID-19 Safer Workplaces Policy (the “SWP”). The SWP is at the heart of the dispute which led to the arbitrator’s decision under review.

[16] Pursuant to the SWP, Purolator’s employees and owner/operators were required to be vaccinated. Any employee or owner/operator who did not comply with the SWP was required to provide a negative test result to a rapid antigen test administered at least twice a week in order to be permitted access to a Purolator facility.

[17] By December 2021, the Omicron variant of COVID-19 had become dominant in Canada. Omicron proved highly resistant to existing vaccines, and there was general agreement among experts that it spread more easily than previous variants, including among those who had been vaccinated. In most cases, Omicron caused much less serious forms of illness.

[18] On December 30, 2021, the Chief Public Health Officer of Canada issued a statement recommending booster shots, saying that accumulating data continued to demonstrate that Omicron was the most highly transmissible variant to date, and that prior immunity, either from vaccination with a two-dose primary series or previous infection, did not offer good protection against infection.

[19] After January 10, 2022, pursuant to the SWP, unvaccinated Purolator employees were placed on unpaid leave of absence and unvaccinated

owner/operators had their contracts suspended.

[20] In response to the SWP, the Council, through its constituent locals, filed hundreds of grievances across Canada relating to the reasonableness of the SWP.

[21] Between December 23, 2021 and January 31, 2022, Local 31 filed several individual grievances, and one group/policy grievance, challenging the reasonableness of the SWP (collectively the "SWP Grievances"). The parties agreed the SWP Grievances would proceed before Arbitrator Nicholas Glass (the "Arbitrator").

[22] In January 2022, Council grievances filed in Ontario challenging the reasonableness of the SWP proceeded to arbitration before Arbitrator Wilson.

[23] On January 21, February 24 and April 12, 2022, Council grievances filed in Quebec challenging the reasonableness of the SWP proceeded to arbitration before Arbitrator Morin.

[24] On March 15, 2022, Arbitrator Wilson issued an award concerning the Ontario grievances, finding the SWP reasonable (the "Wilson Award").

[25] On April 27, 2022, Arbitrator Morin issued an award concerning the Quebec grievances (the "Morin Award"), finding them *res judicata* on the basis the parties and issues were the same as the Ontario grievances.

[26] In the early months of 2022, various scientific reports were published, which concluded that primary vaccines had reduced effectiveness in preventing the spread of Omicron, and were subject to further reduced effectiveness due to rapid waning within a few months.

[27] In September 2022, proceedings commenced before the Arbitrator to determine the SWP Grievances (the "Glass Proceedings").

[28] In November 2022, Purolator required all employees and owner/operators to attest to their vaccination status. Those who did not were administratively terminated.

[29] On December 16, 2022, Local 31 informed Purolator that it was grieving the termination of three persons it believed to be included in the SWP Grievances, as

well as any employees or owner/operators who had not attested to their vaccination status and were subsequently terminated (collectively the “Attestation Terminations”). Local 31’s position was that the Attestation Terminations were included in the SWP Grievances and should be determined as part of the Glass Proceedings. Purolator took the position that the Attestation Terminations were a new grievance that had not been brought in accordance with the Collective Agreement. Purolator objected to the Attestation Terminations being determined as part of the Glass Proceedings.

[30] On April 30, 2023, Purolator suspended the SWP.

[31] In September 2023, the Glass Proceedings concluded.

[32] On December 14, 2023, the Arbitrator issued his decision (the “Decision”).

[33] Concerning the SWP Grievances, the Arbitrator upheld them, finding:

a) the SWP was reasonable from when it was initiated in September 2021, and remained reasonable until June 30, 2022;

b) Purolator failed to establish the SWP continued to be reasonable after July 1, 2022, until Purolator suspended it on April 30, 2023;

c) the grievors were entitled to compensation, including any lost wages and benefits, for their losses between July 1, 2022, and their first day of work following May 1, 2023.

[34] Concerning the grievance as a result of the Attestation Terminations, the Arbitrator upheld it, finding:

a) he had jurisdiction to address it as part of the SWP Grievances, because it was directly as a result of the grievors non-compliance with the SWP;

b) the attestations were required during the period when the SWP was no longer reasonable;

c) the grievors were entitled to the same level of compensation as the other grievors.

Positions of the Parties

SWP Grievances

[35] It is undisputed that the reasonableness standard of review applies to the SWP Grievances.

[36] Purolator submits the Arbitrator applied an inappropriate balancing of interests test in finding the SWP unreasonable after June 30, 2022. In the alternative, Purolator submits the Arbitrator misapplied the test in a number of ways.

[37] Local 31 submits the Arbitrator correctly applied the appropriate balancing of interests test and that Purolator is now generally attempting to re-litigate numerous issues, largely factual, in a manner that is inappropriate on judicial review.

Attestation Terminations

[38] Purolator submits the Attestation Terminations are properly considered a new grievance, in respect of which the Arbitrator's determinations are subject to judicial review on a reasonableness standard, except for procedural fairness issues associated with his having assumed jurisdiction over them. Purolator submits procedural fairness issues are subject to review on the correctness standard, arguing they engage questions of law of central importance to the legal system.

[39] Purolator submits the Arbitrator erred by incorrectly assuming jurisdiction over the Attestation Terminations. In the alternative, Purolator submits that the Arbitrator's determinations were not reasonable.

[40] Local 31 submits the Attestation Terminations properly form part of the SWP Grievances.

[41] Local 31 submits the Arbitrator reasonably assumed jurisdiction over the Attestation Terminations, because they fit within the essential nature of the continuing SWP Grievances, and that his determinations were reasonable.

Discussion

Standard of Review

[42] It is undisputed that the reasonableness standard of review applies to the SWP Grievances.

[43] The reasonableness standard of review was discussed at length in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[44] *Vavilov* at paras. 12–13 reminds and instructs reviewing courts that reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision-maker rather than to the reviewing court. It must entail a sensitive and respectful, but robust, evaluation of administrative decisions. It is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates respect for the distinct role of administrative decision-makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision-makers from accountability. It remains a robust review.

[45] At para. 15 of *Vavilov*, the Court said that in conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision-maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision-maker's place.

[46] I approach my task in this case keeping these principles in mind.

SWP Grievances

Balancing of Interests

[47] The parties agree that in determining the reasonableness of the SWP, the Arbitrator had to engage in a balancing of interests, which involved balancing the

legitimate interests of Purolator against those of its employees and owner/operators.

[48] The parties also agree that the approach for determining the reasonableness of an employer's policy is as set out in *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co,* 16 L.A.C. 73, 1965 CanLII 1009 (ON LA) [*KVP*], which involves an analysis of a number of questions.

[49] Where the parties disagree is about the applicability of the post-*KVP* case of *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.,* 2013 SCC 34 [*Irving*]. Purolator submits *Irving* does not apply. Local 31 submits that it does.

[50] In *Irving*, the employer policy at issue contained a universal random alcohol testing component, whereby a small percentage of employees in safety sensitive positions were to be randomly selected for unannounced breathalyser testing over the course of a year. A positive test result for the presence of alcohol attracted disciplinary action, including dismissal. Failure to submit to testing was grounds for immediate dismissal. The majority of a labour board found the policy unjustified when weighing the employer's interests in random alcohol testing as a workplace safety measure against the harm to employees' privacy interests. The Supreme Court of Canada ultimately upheld the board's determination as reasonable.

[51] The application of *Irving* involves a balancing of interests which requires labour arbitrators, in determining the reasonableness of an employer's policy, to assess things such as "the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy impact on employees": *Irving* at para 27. The impact on employees' privacy interests, including their interests in personal autonomy and bodily integrity, forms part of the assessment.

[52] The Arbitrator characterised the SWP as a unilaterally implemented employer policy, which he found engaged the application of *KVP* and *Irving*.

[53] At para. 21 of the Decision, the Arbitrator said:

> 21. *KVP* and *Irving* which are the leading authorities in this sphere recognize the need to weigh in the balance the interests of the affected employees against the interests of the employer, when determining the validity of the policy. It is my task as adjudicator to determine if the interests

> of the employer encapsulated in the policy failed to outweigh the interests of the affected employees at any point over the duration of the policy including but not restricted to its implementation. If they did the grievances succeed. The only question then would be a matter of quantum.

[54] Regarding the balancing of interests, the Arbitrator described his role as akin to that of a "referee who must continually weigh those interests in the balance and depending on the outcome reach a conclusion as to whether or not the policy or rule in question at any given time is reasonable": Decision, at para. 21.

[55] The Arbitrator said that he had identified "a tipping point at which what was reasonable graduated to what was no longer reasonable, regarding the employer's continuing enforcement of the SWP": Decision, at para. 21.

[56] At paras. 22–23 of the Decision, the Arbitrator identified four main reasons Purolator advanced in support of the reasonableness of the SWP, and his conclusions in regards to each:

- first, allowing unvaccinated workers into the workplace endangered other workers, because unvaccinated workers were more likely to be infected and transmit infection to other workers;
    - [the Arbitrator found this was still the prevailing medical opinion when the SWP was implemented, and supported a finding that it was reasonable from its implementation, up to June 30, 2022.];
- second, third-party (customer) requirements for Purolator employees, especially couriers, who attended their premises to be vaccinated, rendered the policy operationally necessary;
    - [the Arbitrator found there was sufficient evidence of third-party requirements to support the reasonableness of the SWP from its implementation.];
- third, vaccination provided protection against serious illness if infected, so unvaccinated workers brought with them into the workplace an increased risk (for them) of serious illness;

    - [the Arbitrator found the medical evidence in this regard did not change much for the duration of the SWP, but upon careful analysis, did not qualify as a sufficient workplace safety risk or danger – among other reasons, allowing unvaccinated workers into the workplace did not increase their risk of infection leading to serious illness, nor did it alter the risk of infection in the workplace leading to serious illness for vaccinated workers.]; and

- fourth, unvaccinated workers were more infectious once infected than vaccinated workers;

    - [the Arbitrator found the data used in the studies to support this reason came from very small, highly specialized population samples, that study authors acknowledged serious limitations related to the difficulties associated with measuring infectiousness, and that meta-studies which reviewed the range of studies on the issue reported results for Omicron which were very similar for the unvaccinated and the vaccinated, and differed markedly from a study which Purolator focussed on, consequently this reason was not adequately proven to present a workplace danger sufficient to justify the SWP].

[57] The Arbitrator identified chronology as key in assessing the continued reasonableness of the SWP. He said the SWP had to be reasonable from its deadline for compliance until it was discontinued. He found that by the end of June 2022, the first and second reasons identified above no longer existed: Decision, paras. 25–26.

[58] Concerning the third reason, the Arbitrator concluded that excluding unvaccinated workers from the workplace after June 2022 did nothing for their safety, contributed nothing to the safety of others in the workplace, and was not a reasonable and proportionate workplace safety measure: Decision, para. 27.

[59] Concerning the fourth reason, the Arbitrator found that while it arguably remained valid as at the late spring of 2022, it was of questionable validity, and wholly inadequate to justify excluding unvaccinated workers from the workplace, with its attendant loss of livelihood: Decision, para. 28.

[60] At para. 29 of the Decision, the Arbitrator concluded: “The *KVP/Irving* balancing of interests by June 2022 became heavily weighted against the ban.”

[61] At para. 68 of the Decision, the Arbitrator said:

> 68. It should be noted that the balancing of interests in the present case concerns not just the rights of personal autonomy and bodily integrity of the affected employees, which in a sense were not directly infringed because the SWP provided them the option to not get vaccinated and suffer no disciplinary consequence, but also and more directly, the serious economic impact of the policy, should they elect not to get vaccinated, which banned them from the workplace and thus deprived them of their livelihood.

[62] Purolator submits the Arbitrator’s statement that “the present case concerns not just the rights of personal autonomy and bodily integrity of the affected employees, which in a sense were not directly infringed” reveals an inherent contradiction in the Decision about a key point: whether employees’ personal autonomy and bodily integrity interests are engaged. Purolator submits it was unreasonable for the Arbitrator, having said that employees’ rights of personal autonomy and bodily integrity were not directly engaged, to then engage in a line of analysis which proceeded on the basis that these rights were engaged.

[63] Purolator does not disagree with the Arbitrator’s other characterization of the harm, being the economic impact of the SWP on the affected employees.

[64] Purolator submits *Irving* applies to cases which engage employees’ interests in personal autonomy and bodily integrity, such as those involving alcohol and drug testing. Purolator submits it is inappropriate to apply *Irving* in cases which do not engage employees’ personal autonomy and bodily integrity interests. Purolator submits this is such a case, and that it involves only choices with economic consequences. Purolator submits the Arbitrator made a reviewable error by applying *Irving* in his analysis of the reasonableness of the SWP, and adopted an approach which is incompatible with the nature of an employer’s health and safety obligations in the context of the pandemic.

[65] As authority for its submission that employees’ personal autonomy and bodily integrity interests are not engaged, Purolator relies on the decision in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2021 ONSC 7658 [*TTC*], which involved unions’ applications for interim injunctive relief in connection with employers’ mandatory vaccination policies. At para. 50, the

court described the harm to affected employees as one involving “having to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other”.

[66] Purolator submits other arbitrators have followed *TTC*, in decisions such as *Lakeridge Health v. CUPE, Local 6364*, 2023 CanLII 33942 (ON LA) at para. 174 [*Lakeridge Health*]; and *Re Canada Post Corp. and CUPW (N00-20-00008),* 334 L.A.C. (4th) 255, 2021 CarswellNat 6742 at para. 9 [*Canada Post 2021*].

[67] Purolator submits *TTC, Lakeridge Health* and *Canada Post 2021* make clear that in the context of a COVID-19 vaccination mandate policy, employees’ rights of personal autonomy and bodily integrity are not engaged in the balancing of interests.

[68] I am not persuaded that this is the conclusion to be drawn from *TTC, Lakeridge Health* and *Canada Post 2021*. The cases are all distinguishable, and none engaged in the sort of analysis of the issue which the Arbitrator engaged in here.

[69] As noted, *TTC* involved union applications for interim injunctive relief to restrain employers from enforcing mandatory vaccination policies. The applications were heard and decided on an urgent basis, with reasons for judgment delivered three days after the hearing. The case was decided in November 2021, some six months prior to the point at which the Arbitrator here found the SWP became unreasonable. One of the applications (described in the reasons as the Sinai application) was dismissed on the basis that there was no gap in the legislative regime that would support the exercise of the court’s residual jurisdiction: at para. 8. The other application (described in the reasons as the TTC application) was dismissed on the basis that the applicant unions failed to establish two elements of the test for an interlocutory injunction: irreparable harm, and balance of convenience. Accordingly, the court concluded it was not in the interests of justice to grant the relief sought.

[70] The court’s comments which are relied upon by Purolator were made in the context of the court’s characterization of the nature of the harm as remediable. At para. 3, the court said:

> [3] These reasons are not about whether the respondents’ mandatory vaccination policies are in breach of the collective agreements, nor whether

> the respondents were entitled to enact the policies. These reasons are not about the rightness or wrongness of the policies. The challenges to the vaccination policies are before the labour arbitrators, not the court.

[71] *Lakeridge Health* involved COVID-19 vaccination mandate policies. The Union acknowledged that one of the employer's policies at issue was reasonable to June 2022: at para. 148.

[72] Arbitrator Herman's statement at para. 174 that "[e]mployees were not forced to get vaccinated, they were required to get vaccinated only if they wished to continue to work for the Hospital" must be taken in context. They came at the conclusion of his discussion of whether breach of a unilaterally imposed policy could be grounds for discipline, not whether employees' rights of personal autonomy and bodily integrity are properly considered in the balancing of interests.

[73] The employer was a hospital. As Arbitrator Herman put it at para. 183, the circumstances at play in *Lakeridge Health* are distinguishable from other vaccination policy termination cases because they did not arise in the context of a hospital providing life saving services during the pandemic that would face significant difficulties in attracting new employees for temporary positions.

[74] *Canada Post 2021* involved an application for a cease and desist order pursuant to the provisions of a collective agreement. As in *TTC*, Arbitrator Burkett's comments which are relied upon by Purolator here were made in the context of his determining issues of reparable harm and balance of convenience. Also, as in *TTC*, *Canada Post 2021* was decided in November 2021, some six months prior to the point at which the Arbitrator here found the SWP became unreasonable.

[75] The Arbitrator did not discuss *TTC, Lakeridge Health* or *Canada Post 2021* in the context of his discussion of whether employees' rights of personal autonomy and bodily integrity are engaged in the balancing of interests, but in the circumstances, this was completely understandable, for the reasons discussed above.

[76] In my view, *TTC*, *Lakeridge Health* and *Canada Post 2021* do not stand for the proposition that in the context of a COVID-19 vaccination mandate policy, employees' rights of personal autonomy and bodily integrity are not engaged in the balancing of interests.

[77] For its part, Local 31 submits that pre-*Irving*, labour arbitrators had developed a clear and consistent line of jurisprudence for dealing with unilateral workplace rules which intruded on employees' interests; and that *Irving* confirmed a deferential approach when applying this jurisprudence.

[78] Local 31 referred to several arbitration cases in which *Irving* was applied to COVID-19 vaccine mandate policies:

a) *Re Coca Cola Bottling Inc. and TC Local 213*, 342 L.A.C. (4th) 181, 2022 CarswellBC 1846 [*Coca Cola*];

b) *Re BC Hydro and Power Authority and IBEW, Local 258,* 338 L.A.C. (4th) 122, 2022 CarswellBC 837 [*BC Hydro*];

c) *Quinte Health v. Ontario Nurses Association*, 2024 CanLII 14991 (ON LA) [*Quinte Health*];

d) *Toronto Professional Firefighters Association IAAF Local 3888 v. City of Toronto*, 2022 CanLII 78809 (ON LA) [*Firefighters*];

e) *Central West Local Health Integration Network v. Canadian Union Of Public Employees, Local 966 (Mandatory COVID-19 Vaccination Grievance),* [2023] O.L.A.A. No. 182 at para. 11 [*Central West*]; and

f) *Re Canada Post Corp. v. CUPW (N00-20-00008),* 339 L.A.C. (4th) 353, 2022 CarswellNat 1662 at para. 57 [*Canada Post 2022*].

[79] In *BC Hydro*, *Quinte Health*, and *Firefighters*, the arbitrators relied on *Irving* to uphold COVID-19 vaccine mandate policies substantively, but found the disciplinary aspects of the policies unreasonable.

[80] In *Firefighters*, Arbitrator Rogers said:

> [312] The Irving Pulp & Paper analysis is fundamental to the approach one must take to this dispute. The Court accepted that, in determining reasonableness, labour arbitrators would "assess such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees."

[81] In *Central West*, Arbitrator Goodfellow stated:

> [11] Employer Covid-19 mandatory vaccination policies have now been the subject of many arbitral awards. All have applied KVP. Most have done so with the assistance of the "balancing of interests" approach to reasonableness identified in Communications Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd. …

[82] In *Canada Post 2022*, Arbitrator Joliffe stated that management rules:

> [57] … must be objectively reasonable, in that the rule "represents a proportionate response in light of both legitimate safety concerns and privacy interests" as stated in Communications, Energy and Paperworks Union of Canada, Local 30 v. Irving Pulp & Paper Ltd., [2013] 2 SCR 548 (SCC). These reasonableness principles have now been considered by arbitrators in dealing with COVID vaccination cases, as taken from the very recent arbitration award submitted by counsel, such as Power Workers' Union v Elexicon Energy Inc.…

[83] Based on the authorities relied on by Local 31 which apply *Irving* in cases involving COVID-19 vaccination policies, it is clear that *Irving* can be applied in such cases. I find persuasive Local 31's submission that the real issue is always whether the benefits of the impugned policy outweighs the harms to employees, not the narrower question of whether their rights of personal autonomy and bodily integrity are infringed.

[84] I acknowledge para. 68 of the Decision could be interpreted such that the Arbitrator on one hand found "the balancing of interests in the present case concerns not just the rights of personal autonomy and bodily integrity of the affected employees" and simultaneously concluded that "in a sense" they "were not directly infringed". However, while this statement could be interpreted as contradictory, when the Decision is considered as a whole, it is apparent that the Arbitrator clearly considered employees' rights of personal autonomy and bodily integrity were indeed infringed: see, for example, paras. 19, 20, 21, 31, 43, 63, 64, 65, 66, 68, 69, 274, 281, 282, 283, 284, 285, 286, 287, 297, 314, 321, 430 of the Decision.

[85] After considering the Decision as a whole, and specifically considering the portions referring to the employees' rights of personal autonomy and bodily integrity, I find that the Arbitrator:

a) engaged in the *Irving* balancing of interests;

b) was of the view that it was appropriate to consider employees' rights to personal autonomy and bodily integrity in the balancing of interests: Decision at paras. 19–21;

c) recognized these rights can be infringed where required by weightier interests, such as workplace safety: Decision at para. 31;

d) considered these rights to be of fundamental importance akin to rights which attract constitutional protection: Decision at paras. 63–66;

e) recognized the balancing of interests as an ongoing process: Decision at para. 43;

f) described the adverse impact on the employees as engaging their rights of personal autonomy and bodily integrity, as well as an economic loss of livelihood: Decision at paras. 43, 68–69, 314;

g) found that until it became the prevailing medical opinion that two-dose vaccination after 25 weeks provided insignificant protection from infection, the arbitral consensus was that the balancing of interests favoured the employer in ensuring the safety of employees by protecting them from the workplace hazard of allowing unvaccinated workers into the workplace, a consensus he agreed with: Decision at paras. 314–315;

h) considered and rejected Purolator's argument that it had a duty to continue to protect its unvaccinated employees and banning them from the workplace accomplished that objective by removing them from exposure to infection from vaccinated employees in the workplace: Decision at paras. 274, 281–287; and

i) having engaged in the balancing of interests, found that after June 2022, employees' interests, which included personal autonomy and bodily integrity, outweighed Purolator's interests: Decision at paras. 43, 274, 281–287.

[86] I find that the Arbitrator's reliance on employees' rights of personal autonomy and bodily integrity in the balancing of interests is not a fatal flaw in the overarching logic of the Decision. The Arbitrator clearly was of the view that these

rights were very important in the relationship between Purolator and its employees, but like all rights, they were not absolute, and may be subject to more important considerations in the balancing of interests. Indeed, that is precisely what the Arbitrator determined to be the case here – initially those rights were outweighed by other interests, but as of the end of June 2022, they outweighed those other interests.

[87] I find the Arbitrator cannot be said to have acted unreasonably. He determined the SWP engaged employees' rights of personal autonomy and bodily integrity. He determined it was appropriate to consider those rights in the balancing of interests. He determined that the balancing of interests was not fixed in time, but something which could change as circumstances changed. He found that as of the end of June 2022 circumstances had indeed changed, such that the SWP, although reasonable when it was implemented, was no longer reasonable after that date. He provided detailed reasons, in which he explained his analysis and conclusions, including extensive references to the evidence before him, and decisions in other cases. Considering the Decision as a whole, the Arbitrator's comments at para. 68, which Purolator submits reveal an inherent contradiction about whether employees' personal autonomy and bodily integrity interests are engaged, are not of concern. The Arbitrator clearly proceeded on the basis that employees' personal autonomy and bodily integrity interests were engaged, and it was reasonable for him to do so.

[88] I have considered all of Purolator's other arguments, and do not find them persuasive. However, for the sake of completeness, I will now discuss each of them.

[89] Generally, Purolator's other arguments focus on alleged errors with the law and evidence the Arbitrator considered throughout the weighing exercise when engaged in the balancing of interests. I find these arguments invite me to engage in an analysis of the Decision that is beyond the scope of a reasonableness review, for the following reasons. First, they frequently take issue with the Arbitrator's findings of fact, in a way I am precluded from interfering with on reasonableness review. Second, they often amount to an attempt to re-litigate matters already raised before the Arbitrator and addressed in the Decision. Finally, they pertain to issues with the Arbitrator's analysis concerning matters which I

consider minor in the sense that they do not lead me to a conclusion that the Decision as a whole is unreasonable.

Precautionary Principle

[90] Purolator submits the *Irving* balancing of interests cannot apply to the SWP because *Irving* requires an employer to demonstrate a dangerous work environment or a demonstrable problem in the workplace in order to justify a policy. Purolator submits that requiring it to demonstrate this is a breach of the precautionary principle. Purolator submits the precautionary principle is consistent with and necessary for compliance with health and safety obligations under Article 22 of the Collective Agreement and s. 124 of the *Code*.

[91] In support of this proposition, Purolator relies on the reasoning in *Coca Cola Canada Bottling Inc. and Teamsters Local 213*, [2022] BCCAAA No. 69 (Noonan) [*Coca Cola*] at paras. 74–75, where Arbitrator Noonan states that early non-COVID drug and alcohol cases such as *Irving* are of limited assistance in determining the reasonableness of COVID-19 mandatory vaccination policies due to the precautionary principle. In other words, the reasonableness of anti-COVID-19 policies must be analyzed as policies designed to prevent or reduce the consequences of the problem before it takes hold in the workplace.

[92] I find as follows:

a) Purolator's characterization of the *Irving* balancing of interests on this point is an over-simplification;

b) *Irving* focuses on the question of whether the benefits of the policy outweigh the harms, which often, but not necessarily, involves remediation of a workplace problem;

c) *Coca Cola* does not support Purolator's assertion that the *Irving* balancing of interests is unreasonable in the pandemic context. Instead it is an example of using *Irving* to assess the reasonableness of a COVID-19 vaccination mandate policy, outside the context of random drug and alcohol cases, as a reaction to a problem specific to the workplace. At paras. 72–73 of *Coca Cola*, Arbitrator Noonan expressly holds that the *Irving* balancing of interests must be conducted to determine whether the policy is reasonable.

Arbitrator Noonan proceeds to apply the balancing of interests and the precautionary approach: *Coca Cola* at para. 76;

d) the above paragraphs from *Coca Cola* (along with the various other cases cited by Local 31) demonstrate that the *Irving* balancing of interests does apply to COVID-19 cases, albeit in a context-specific fashion particular to those cases; and

e) *Coca Cola* does not stand for the proposition that the *Irving* balancing of interests is unreasonable in the COVID-19 vaccination policies context, but rather that non-COVID-19 cases which dealt with similar issues are of limited assistance in determining the reasonableness of COVID-19 vaccination policies.

[93] Purolator submits the Arbitrator misapplied the precautionary principle.

[94] The Arbitrator found that "based on the evidence in this case, as well as *FCA*, there was, by the late spring of 2022, no longer any scientific uncertainty about the fact that two-dose vaccination after 25 weeks provided statistically insignificant protection against infection": Decision at para. 225. He concluded that "[t]he precautionary principle no longer had any application with respect to protection against infection": Decision at para. 225.

[95] Purolator relies on the approach adopted by the Court of Appeal for Ontario in *Ontario (Labour) v. Quinton Steel (Wellington) Limited*, 2017 ONCA 1006 [*Quinton Steel*] for the proposition that statutes which guarantee a minimum level of protection for the health and safety of workers should be interpreted generously in a manner that is in keeping with the purpose and objective of the legislative scheme and that "[n]arrow or technical interpretations that would interfere with or frustrate the attainment of the legislature's public welfare objective are to be avoided.": *Quinton Steel* at para. 19.

[96] I find as follows:

a) the precautionary principle operates upon the premise that precautionary polices can prevent or reduce the consequences of a problem before it manifests;

b) Purolator's articulation of the precautionary principle (reasonableness of policies must be interpreted generously and analyzed as being designed to prevent or reduce the consequences of the problem before it takes hold in the workplace: *Coca Cola*; *Quinton Steel*); align generally with that of Local 31 and the Arbitrator: (efforts to reduce risk need not wait for scientific certainty: *R. v. Michaud*, 2015 ONCA 585 at para. 102, citing *114957 Canada Ltée v. Hudson (Town)*, 2001 SCC 40); *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) at para. 340, ref'd to at para. 184 of the Decision);

c) the Arbitrator determined the SWP was unreasonable because Purolator could not establish that it prevented or reduced the consequences of the problem in the workplace, not because Purolator failed to establish there was a problem; and

d) the Decision is compatible with the precautionary principle, as the Arbitrator found that after June 2022 it was unreasonable for Purolator to conclude the SWP was preventing or reducing risks associated with COVID-19.

[97] In *Coast Mountain Bus Company v Unifor, Local 111,* 2022 CanLII 94447 (BC LA) [*Coast Mountain*] at paras. 82–84, Arbitrator De Aguayo adopted the same approach as Arbitrator Noonan in *Coca Cola*.

[98] Purolator takes issue with the Arbitrator distinguishing *Coast Mountain* on the basis that, unlike the workplace in *Coast Mountain*, Purolator's workplace did not have a risk of exposure to infection and serious illness significantly greater than ordinary exposure risk: Decision at para. 303.

[99] I find as follows:

a) this is a finding that the Arbitrator was entitled to make on the evidence before him;

b) a finding that Purolator's workplace is not at significantly greater risk than ordinary is not synonymous with requiring Purolator to establish there was a demonstrable problem in the workplace;

c) the Arbitrator's main conclusion was that the precautionary principle no longer applied because there was no longer scientific uncertainty after June

2022; and

d) where there is no scientific uncertainty whether precautionary measures will prevent or reduce the consequences of the problem, the precautionary principle does not apply.

Mr. Darrell Hayashi

[100] Purolator submits the Arbitrator's findings were inconsistent with the evidentiary record, because they did not properly account for the evidence of one of its witnesses, Mr. Darrell Hayashi. Purolator submits the Arbitrator unreasonably dealt with Mr. Hayashi's evidence by:

a) ignoring his evidence that during the pandemic, Purolator needed more employees in the same spaces, which elevated the risk of exposure to COVID-19 in the workplace;

b) paying little attention to his evidence regarding serious outbreaks and the thousands of Purolator employees who contracted COVID-19; and

c) failing to explain why he discounted his evidence.

[101] The Arbitrator discussed Mr. Hayashi's evidence at length, beginning at para. 70 of the Decision, continuing for 21 pages, to para. 117. In the course of discussing Mr. Hayashi's evidence, the Arbitrator covered a number of topics: the early impact of the pandemic; Purolator's legal and collective agreement obligations, including the precautionary principle; the Canadian government's vaccine mandate for federal public servants; and third-party requirements.

[102] For example, at paras. 74, 79 and 99 of the Decision, the Arbitrator said:

> 74. [Mr. Hayashi] testified that large numbers of Purolator workers were affected by being close contacts of a COVID-19 positive person, either resulting in illness or, at the very least, requiring isolation. Hundreds of Purolator workers tested COVID-19 positive. In May 2020 there were 103 cases of employees having COVID-19. Four Purolator workers were hospitalized due to contracting COVID-19.
>
> […]
>
> 79. Mr. Hayashi testified that COVID-19 had a serious impact on the health of Purolator's employees, as well as the viability of its operations.

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

[103] At para. 80 of the Decision, the Arbitrator noted that Mr. Hayashi referred in support of his evidence about serious outbreaks to a Purolator Health and Safety meeting document from 2023 claiming thousands of COVID-19 cases among Purolator's employees. The Arbitrator said the "the document did not identify any dates, or the seriousness of the cases and Mr. Hayashi was unable to shed any further light on that."

[104] I find that Purolator is inviting me to interfere with the Arbitrator's findings of fact, and engage in an analysis of the Decision that is beyond the scope of a reasonableness review.

Res Judicata

[105] Purolator submits the Arbitrator's findings regarding the workplace were inconsistent with the evidence and the principles of *res judicata* arising from the Wilson Award and the Morin Award.

[106] The Arbitrator considered Purolator's *res judicata* arguments and rejected them. The Arbitrator was of the view that the Decision is consistent with the Wilson Award and the Morin Awards because he too found the SWP reasonable at the time it was implemented, and until June 30, 2022. However, Purolator submits the Wilson Award expressly noted the context of Purolator's workplace was "crucial to the reasonableness assessment" and that Purolator's unique workplace consideration increased the likelihood of COVID-19 infection. Thus, Purolator argues *res judicata* should apply and, similar to *Canada Post 2022*, the SWP was justified on the basis that vaccines reduced the likelihood of serious illness in vaccinated individuals who become infected.

[107] Purolator submits this is an inherent contradiction in the Arbitrator's treatment of the Wilson Award and the Morin Award which renders the Decision unreasonable.

[108] I agree with Purolator that there are factual similarities between Arbitrator Jolliffe's description of the employer's workplace environment at para. 92 of *Canada Post 2022*, and Purolator's workplace environment. However, *Canada Post 2022* involved a different employer and Local 31 submits Arbitrator Wilson made no findings regarding exceptional risks in Purolator's workplace environment which do not exist in ordinary life.

[109] That, however, is not the crux of the matter. The Wilson Award and the Morin Award were temporally connected, not only because they were decided close in time, but also because of the evolutionary stage of COVID-19 at that time. June of 2022 remained in the future.

[110] I find it was reasonable for the Arbitrator to determine that the doctrine of *res judicata* had no application in determining the reasonableness of the SWP. The issues giving rise to the Wilson Award and the Morin Award may have been the same as each other, but they were not the same as the issue here. The issue here involved the continued reasonableness of the SWP after June 2022. That issue was not engaged in the arbitrations resulting in the Wilson Award and the Morin Award, nor could it ever have been, because June 2022 was still in the future.

Nexus Between SWP and Protection Against Severe Illness

[111] Purolator argues some of the Arbitrator's factual determinations regarding nexus between the SWP and protection against severe illness were not grounded in evidence.

[112] The Arbitrator referred to a number of points in rejecting Purolator's contention that its decision to continue the SWP was reasonable because a two-dose series protected against severe illness, hospitalization, and death:

a) the percentage of increased risk to the workforce from reintroducing unvaccinated employees was "vanishingly small": Decision at para. 263;

b) the age demographic overwhelmingly impacted by the risk of serious illness was individuals over 80, which was not the age bracket of any Purolator employees: Decision at para. 265;

c) Omicron mortality rates plunged by about 80 – 90%: Decision at para. 266;

d) serious illness was not a significant feature of Purolator's June 2022 management discussions about lifting the SWP: Decision at para. 267;

e) Purolator's concern over civil or criminal liability for allowing unvaccinated employees to come to work after June 2022 was unfounded: Decision at paras. 268–270;

f) Purolator led no evidence the increased chance of serious illness in unvaccinated workers might affect levels of absenteeism or cost of insurance premiums: Decision at paras. 271–272; and

g) the risk of contracting serious illness was the same for unvaccinated employees whether they were in the workplace or elsewhere: Decision at paras. 281–288.

[113] Purolator takes issue with some of these points summarized above, specifically:

a) the Arbitrator arbitrarily estimated the risk of serious illness for the vaccinated was 5% and, using that percentage, calculated re-introducing the unvaccinated to the workplace would cause little risk of serious illness;

b) the Arbitrator held that the 80-year-old plus demographic was overwhelmingly at increased risk because COVID-19 posed serious health risks to people of all ages; and

c) although Omicron mortality rates decreased by 80 – 90%, even if mortality rates under Omicron were reduced, COVID-19 still posed a range of serious health outcomes.

[114] As before, I find that Purolator is inviting me to interfere with the Arbitrator's findings of fact, and engage in an analysis of the Decision that is beyond the scope of a reasonableness review.

Nexus Between SWP's Protection from Severe Illness and Workplace

[115] Purolator submits the Arbitrator departed unreasonably from established jurisprudence in rejecting a nexus between the SWP's protection from serious illness and the workplace. Purolator is critical of the Arbitrator's analogy, made in

the context of applying the balancing of interests, between a policy requiring vaccination when unvaccinated employees pose no risk of infection or transmission, and a policy prohibiting employees from being 20% overweight.

[116] The Arbitrator analogized that a rule which requires workers to get vaccinated or lose their livelihood when the danger from unvaccinated employees to others in the workplace is statistically insignificant, is essentially the same as a rule prohibiting employees from being admitted to the workplace if they are 20% overweight: Decision at paras. 289–290.

[117] Purolator submits the Arbitrator's analogy was inapt. Purolator relies on *British Columbia Rapid Transit Company Ltd. v. Canadian Union of Public Employees, Local 7000*, 2022 CanLII 100819 (BC LA) [*Rapid Transit*], at paras. 32–35, where Arbitrator Noonan followed *Coast Mountain* and determined the prevention of severe illness and death falls within an employer's statutory health and safety obligations and therefore has a nexus to the workplace.

[118] Purolator submits that its decision to continue the SWP to prevent severe illness must be considered in light of its obligations under s.124 of the *Code* to "ensure that the health and safety at work of every person employed by the employer is protected'', which are given paramount importance: *Quinton Steel*, at paras. 19–21.

[119] I agree with Local 31 that here the Arbitrator distinguished *Coast Mountain* and expressed a view consistent with the reasoning in *Trimac Transportation Services - Bulk Systems v Transportation Communications Union (Drug Testing Grievance),* [1998] OLAA No 352, 74 LAC (4th) 444 [*Trimac*], that a policy that does not confront the problem itself can amount to imposing a lifestyle choice.

[120] The Arbitrator concluded that unvaccinated employees posed no additional risk of infection or transmission of COVID-19 than other employees. It was logically coherent for the Arbitrator to find that if the SWP did not protect against additional risk in the workplace then there was no nexus to the workplace, regardless of Purolator's health and safety obligations under the *Code*. I find the Arbitrator's conclusion was reasonable.

Infectiousness and Susceptibility Post-Vaccination

[121] Purolator raises various issues with the Arbitrator's treatment of the expert evidence on infectiousness and susceptibility post-vaccination.

[122] The Arbitrator considered the evidence and arguments of the parties with respect to the expert evidence on infectiousness post-vaccination. His conclusion at paras. 214–215 was:

> 214. The net message from Dr. Kalyan's and Dr. Rebick's evidence was that the possible vaccination benefit of reduced infectiousness was not clearly established. Whatever the benefit, the effectiveness of the vaccines waned noticeably along with protection against infection. It was not listed by the health authorities as a reason to get vaccinated. It was also insufficiently established to cross a reasonable threshold over which to activate the precautionary principle.
>
> 215. In these circumstances this unproven possible benefit was nowhere near adequate, standing alone, by the late spring of 2022, to justify a workplace vaccine mandate when balanced against the massive adverse impact of depriving the grievors of their livelihood by placing them on unpaid LOAs.

[123] Local 31 submits that to the extent that the Arbitrator determined he had insufficient evidence to make various findings, and that meaningful reduction in infectiousness was "not clearly established", Purolator bore the onus to support its claim that the benefit of the SWP outweighed employees' interests after June 30, 2022. I agree.

[124] Purolator submits the Arbitrator's reasons for finding that a two-dose series did not reduce the likelihood of transmission of COVID-19 lacked the required transparency, intelligibility, and justification, and that he cherry-picked one part of one figure in a study in support of his decision, without referencing the study's overall conclusion.

[125] The study in question is the Madewell et al., *Household Secondary Attack Rates of SARS-CoV-2 by Variant and Vaccination Status*, JAMA Network Open, 2022 (the "Madewell Study") meta summary of four Omicron studies. At para. 198, of the Decision, the Arbitrator found that the Madewell Study "demonstrates overall only minor differences in the secondary attack rates (SARs) applicable to vaccinated and unvaccinated primary cases." Purolator submits that the Arbitrator compared the ratios cited, and decided in error, without any expert evidence, that

the differences are minor despite the study's overall conclusion that for the Omicron variant, a two-dose series of vaccination provided an 18.2% effectiveness against transmission (infectiousness), an 18.1% effectiveness against infection (susceptibility) and a 35.8% total vaccine effectiveness.

[126] However, the Madewell Study's conclusion on vaccine effectiveness for infectiousness and susceptibility makes no claim regarding vaccine effectiveness more than six months after vaccine administration. This explains why the Arbitrator would not rely on it, in light of his finding that vaccine protection for Omicron infectiousness rapidly waned (based on Tan et al*., Infectiousness of SARS-CoV-2 breakthrough infections and reinfections during the Omicron wave*. Pre-print, August 9, 2022, p. 6, study). I find that the interpretation of the Madewell Study as showing only minor differences in secondary attack rates applicable to vaccinated and unvaccinated primary cases is one which is within the knowledge and experience of an arbitrator, such that assistance of an expert was not required.

[127] I am to hold the Arbitrator to a standard of reasonableness in his consideration of the expert evidence of infectiousness, not correctness. I find the Arbitrator carefully considered the expert evidence and arguments of the parties on this issue. Although I have not addressed all of Purolator's issues with the Arbitrator's analysis on this issue, the above example concerning the Madewell Study demonstrates Purolator's attempt to re-litigate expert evidence that was before the Arbitrator. I find the Arbitrator reasonably dealt with the expert evidence in light of the factual record before him.

[128] Purolator submits the Arbitrator departed from the weight of arbitral authority which establishes, even after June 2022, that a two-dose series provides adequate protection against infection, without proper explanation and justification for doing so. Purolator relies on three main authorities on this point:

a) *Fire Fighters*, dated August 26, 2022;

b) *Coca-Cola Canada Bottling Limited v. United Food and Commercial Workers Union Canada, Local 175,* 2022 CanLII 83353 (Ont Arb) (Arbitrator: Robert Herman). [*Coca-Cola Bottling Ltd.*], dated September 12, 2022; and

c) *Rapid Transit*, dated October 13, 2022.

[129] The Arbitrator favoured the reasoning of *FCA Canada Inc. v. Unifor, Local 195 (COVID-19 Vaccine Mandate Grievance)*, 349 L.A.C. (4th) 174, 2022 CarswellOnt 10587 [*FCA*], which takes a contradictory view on the efficacy of the two-dose vaccine. At para. 107 of *FCA*, Arbitrator Nairn concluded that although the policy at issue there was initially reasonable, it no longer remained reasonable after June 25, 2022, based on the evidence of the waning efficacy of two-dose vaccination status on reducing the risk of transmission of Omicron.

[130] The Arbitrator distinguished the cases relied on by Purolator.

[131] Concerning *Firefighters*, the Arbitrator distinguished it on the basis the expert evidence on this point was unchallenged. He noted that there was "nothing before [Arbitrator Rogers] to support an argument that a person having received two doses of a two-dose regimen is not substantially better protected and less likely to present a risk to others than an unvaccinated colleague": *Firefighters* at para. 266; Decision at para. 365.

[132] Concerning *Coca-Cola Bottling Ltd.*, the Arbitrator distinguished it on the basis that the union led no contrary scientific evidence. He posed a rhetorical question: "How many goals will a hockey team score against a team without a goaltender? The employer was pumping puck after puck into an empty net. Again, I do not criticize it for doing so. But this is a classic example underscoring the value of a well-executed adversarial system of justice as the best engine for arriving at the truth": Decision at para. 340.

[133] Concerning *Rapid Transit*, the Arbitrator disagreed with Arbitrator Noonan's conclusion at para. 29 that "the Provincial Health Officer of British Columbia continues to advise that individuals with two doses of the vaccine pose a lesser risk of contracting the diseases, transmitting it, and becoming seriously ill or dying compared to unvaccinated individuals": Decision at para. 302. The Arbitrator was of the view that Arbitrator Noonan's conclusion was based on Arbitrator De Aguayo's statement at para. 71 of *Coast Mountain*:

> [71] However, I find that the Employer has established a workplace nexus. The Employer's stated interest in maintaining the Policy is based on its duty to protect employees from serious illness under the Act and the presumption of occupational disease set out in Schedule 1.

[134] In *Rapid Transit*, the union argued that it's case could be distinguished from *Coast Mountain* due to Arbitrator De Aguayo's reliance there on the WorkSafe BC presumption of occupational disease. Arbitrator Noonan rejected this argument, and stated that two independent factors supported the mandate in *Coast Mountain*: the duty to protect employees under the WorkSafe BC legislation and the presumption of occupational disease set out in Schedule 1 of the legislation.

[135] The Arbitrator disagreed with Arbitrator Noonan's interpretation of *Coast Mountain* in *Rapid Transit*, as stating two independent factors supporting the reasonableness of the mandate. Instead, he read *Coast Mountain* as "matching up the employer's statutory duties with the applicability of the presumption in Schedule 1, and the particular risks associated with that workplace": Decision at para. 302.

[136] While I do not necessarily agree with the Arbitrator's conclusions about *Fire Fighters*, *Coca-Cola Bottling Ltd.* and *Rapid Transit,* it would not be fair to say that he did not consider these cases, or that he unreasonably departed from the weight of arbitral authority without explaining why he was distinguishing them. At para. 312 of the Decision, while the Arbitrator acknowledged he may be parting company with other awards on this issue, he relied on his finding that there was insufficient enhancement to workplace safety to justify the mandate after June 2022.

[137] I find the Arbitrator reasonably dealt with this issue.

Public Health Guidance

[138] Purolator submits the Arbitrator erred by misinterpreting, discounting, and failing to afford appropriate deference to public health guidance in considering Purolator's reliance on that guidance.

[139] Purolator refers to the Ontario Court of Appeal decision in *J.N. v. C.G.*, 2023 ONCA 77, cited in the Decision at para. 122, for the proposition that public health guidance is inherently reliable and trustworthy: *J.N.* at para. 26. Although this does not compel a judge to give the evidence any weight, there is at least an obligation to explain why public health materials are not trustworthy: *J.N.* at para. 27; *Finestone v. The Queen*, [1953] 2 S.C.R. at 109, 1953 CanLII 81. The purpose of the public health document exception to the hearsay rule is that it removes the

need for parties to re-litigate the science of vaccination, and the legitimacy of public health recommendations, every time there is a disagreement over vaccination: *J.N.* at para 29.

[140] Purolator submits Arbitrator Glass ignored this, and instead required the parties to re-litigate the science of vaccination. Purolator also references the approach in *Parmar v. Tribe Management,* 2022 BCSC 1675 at para. 135 [*Tribe Management*], where the court allowed the employer to rely on generally available information that vaccines were the best available chance to prevent infections, were safe, and mandated as a requirement for participation in many other aspects of life.

[141] The court in *Tribe Management* held that "in the extraordinary circumstances of the pandemic in the winter of 2021 and January 2022, implementing an MVP was a reasonable policy choice for employers, including Tribe": at para. 133.

[142] As noted, here the Arbitrator upheld the SWP during this time period, and until June 30, 2022.

[143] The Arbitrator also provided two other reasons to place less weight on the government and health authorities. The first was that the general public health benefit of vaccination does not always equate with a specific workplace safety benefit or justify compulsion: Decision at para. 124. The second was based on his conclusion that increased levels of protection from serious illness, hospitalization, and death generally do not justify a vaccine mandate, in contrast with increased levels of protection from infection, that arguably do: Decision at para. 125.

[144] The documents at issue are public documents. Public health documents are admissible because they are inherently reliable and trustworthy. However, here the Arbitrator was entitled to place little weight on the public health guidance due to his reasoning that general public health information on the benefits of vaccination should not be taken as a specific endorsement of two-dose vaccination after 25 weeks as providing meaningful protection against infection after the spring of 2022: Decision at paras. 118–139.

Burden on Purolator in the Balancing of Interests

[145] Purolator submits Arbitrator Glass unreasonably departed from the approach taken by this court in *Tribe Management* by requiring Purolator to prove that a two-dose series was effective.

[146] I find *Tribe Management* is distinguishable.

[147] Unlike this matter, *Tribe Management* was a civil case, which considered whether an employer was entitled to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy, or whether this constituted constructive dismissal. The court applied *KVP* and held the employer's policy was reasonable in accordance with its statutory obligation under s. 21 of the *Workers Compensation Act*, R.S.B.C. 2019, c. 1. The court said the employer's policy "was a reasonable and lawful response to the uncertainty created by the COVID-19 pandemic based on the information that was available to it": *Tribe Management* at para. 138.

[148] Purolator submits that paras. 26 and 198–213 of the Decision evidence the Arbitrator's imposition of a standard of scientific certainty beyond reasonableness.

[149] At para. 26 of the Decision, the Arbitrator found that Purolator did not provide meaningful evidence to support its contention that there were third-party and customer requirements for Purolator employees to be vaccinated. At paras. 198–213 of the Decision, the Arbitrator considered the evidence and arguments concerning the expert evidence on infectiousness. He concluded that the expert evidence was insufficient to establish a possible two-dose vaccination benefit of reduced infectiousness to Omicron.

[150] The Arbitrator was required to hold Purolator to a standard of reasonableness, not correctness or perfection. I do not agree with Purolator that the Arbitrator's consideration of the expert evidence demonstrates that he held it to the higher standard. The Arbitrator's findings regarding the expert evidence before the him cannot be viewed in a vacuum without regard to the Arbitrator's conclusion at para. 225 of the Decision, where he finds that it was not reasonable for Purolator to maintain the policy after June 2022, due to the evidence available to it about the effectiveness of a two-dose primary vaccine against infectiousness to Omicron.

[151] The Arbitrator was entitled to conclude that the SWP was not then a reasonable response to COVID-19 based on the information that was available to Purolator.

Unvaccinated Employees' Reasons for Non-Compliance

[152] Purolator submits the Arbitrator erred by failing to properly consider unvaccinated employees' reasons for non-compliance with the SWP in the balancing of interests, following the approach taken at para. 92 of *Power Workers' Union v Elexicon Energy Inc (COVID-19 Vaccination Policy Grievance),* [2022] OLAA No 48, 2022 CarswellOnt 1223, and para. 253 of *Firefighters*.

[153] The Arbitrator found it antithetical to privacy rights to require workers to disclose personal reasons when asserting them: Decision at para. 321. He acknowledged that workplace safety often overrides workers' rights of personal autonomy and bodily integrity, but stated it is an error "to hold that failure to provide adequate personal reasons for asserting those rights should weigh unfavourably in the reasonableness balance": Decision at para. 322.

[154] Purolator submits the Arbitrator's reasoning is an error given his statement at para. 68 of the Decision that the rights of personal autonomy and bodily integrity are not directly infringed, as the SWP only directly impacts the employees economically.

[155] I have already found that the Arbitrator reasonably determined the SWP engaged employees' rights of personal autonomy and bodily integrity. Accordingly, I find it was reasonable for the Arbitrator to find that employees' failure to provide adequate personal reasons for asserting those rights should weigh unfavourably in the balancing of interests.

[156] I turn now to the Arbitrator's determination of the issues concerning the Attestation Terminations.

Attestation Terminations

[157] The portion of the Decision pertaining to this issue (and all sub issues raised by Purolator) is found in the Decision at paras. 51–54 and 469.

[158] At paras. 51–54 the Arbitrator said:

> 51. These terminations came about because on November 16, 2022 the employer asked these grievors to re-attest their vaccination status and they refused or neglected to do so. As a consequence, they were "administratively terminated". These terminations were the subject of new grievances filed by the union, although the union advised the employer that they were also covered by the existing group grievance. The employer takes the position that these new grievances are not before me, and the terminations are not covered by the existing group grievance.
>
> 52. These terminations arose directly as a result of non-compliance with one of the provisions of the SWP, the reasonable application of which is part of my remit as arbitrator appointed with respect to this vaccination grievance dispute. The fact that they were terminated after I was appointed does not deprive me of jurisdiction.
>
> 53. They are also covered by the group grievance which complained of the placement of unvaccinated members on leaves of absence "and/or terminating their employment". I find that I have jurisdiction to address these terminations as part of the group grievance and also because the terminations occurred directly as a result of non-compliance with the SWP.
>
> 54. I conclude that these grievances are upheld. The employer's request to re-attest as required by the policy came after the date when the policy was no longer valid. The dismissals were a breach of the rules in *KVP*. Insofar as there was a disciplinary element to the dismissals, they were dismissed for being in breach of an unreasonable rule. This does not amount to just and reasonable cause.

[159] At para. 469 of the Decision the Arbitrator said:

> **XIX Non Attestation Terminations**
>
> 469. There is nothing to add to what was stated in the summary section of this award at paragraphs 51 to 54. Insofar as the group grievance covers these terminations this aspect of the group grievance is upheld. Insofar as the individual grievances filed in November 2022 cover these terminations, they are upheld.

[160] The SWP provided for leave of absence for unvaccinated employees and discipline for those who refused to attest.

[161] It is undisputed that the issues before the Arbitrator were the reasonableness of the SWP, including concerning its application.

Alleged Errors

[162] Purolator submits the Arbitrator erred in assuming jurisdiction over the Attestation Terminations, for four reasons.

[163] First, Local 31's failure to submit written grievances in accordance with the pre-established grievance procedure in the Collective Agreement rendered the Attestation Terminations "not arbitrable" under the terms of the agreement.

[164] Second, the Attestation Terminations were neither grieved within the mandatory timelines under the Collective Agreement nor referred to the Arbitrator by mutual consent of the parties, such that he could reasonably assume jurisdiction.

[165] Third, if the Attestation Terminations were arbitrable, the Arbitrator did not have the power to consolidate proceedings absent mutual consent of the parties.

[166] Fourth, even if the Arbitrator did have the power to consolidate the proceedings, it was unreasonable for him to exercise such power in the circumstances because:

a) the Attestation Terminations were materially different in nature; and

b) consolidating them after the Local 31 Grievances had already commenced resulted in procedural unfairness.

[167] Purolator submits that it maintained throughout the Glass Proceedings that the Arbitrator did not have jurisdiction to determine the grievances in connection with the Attestation Terminations. Purolator asserts that:

a) the grievances in connection with the Attestation Terminations were neither processed nor referred to arbitration;

b) the names of the allegedly affected persons were not fully particularized; and

c) the parties did not lead evidence at the Glass Proceedings regarding the specific circumstances of the allegedly affected persons.

[168] Purolator submits it suffered prejudice by being denied the opportunity to make legal and strategic decisions regarding how it would advance its case, which impeded its ability to call or challenge evidence at the start of the Glass Proceedings.

[169] Purolator submits it had no opportunity to lead evidence or make submissions on whether there was a legal basis for the Attestation Terminations.

[170] Purolator submits the Arbitrator prevented it from making submissions on the Attestation Terminations by:

a) reserving on the issue of whether he had jurisdiction to decide the Attestation Terminations until the end of the Glass Proceedings;

b) not considering evidence or submissions on the issue of whether there was a legal basis for terminating the employment of the grievors who failed to attest in November 2022; and

c) not indicating the parties would be without opportunity to make those submissions or lead evidence on this issue later, should he find he had jurisdiction in accordance with the Collective Agreement.

[171] Local 31 disputes all these alleged errors, on the basis that the grievance was of a continuing nature. It submits that where a grievance has an ongoing effect, events after the date of filing are or can be covered by the original grievance.

[172] Local 31 submits that:

a) On December 16, 2022, shortly after the Attestation Terminations in November 2022, it filed a grievance concerning the Attestation Terminations, in which it notified Purolator that its position was that the Attestation Terminations were covered by the SWP Grievances and that the subsequent grievance was being filed “[i]n an abundance of caution”;

b) On January 12, 2023, it informed the Arbitrator of its position concerning the subsequent grievance, at which time Purolator raised a jurisdictional question;

c) the SWP Grievances complained of termination and forced leave of absence;

d) the SWP Grievances are properly characterized as an ongoing grievance, in that they had an ongoing effect, and in such circumstances, events after

the filing date of the original grievance are or can be covered by the original grievance

[173] Local 31's letter of December 16, 2022 is reproduced below:

> December 16, 2022
>
> RE: Termination [Grievance]
>
> Dear Jessica,
>
> Although the union believes our previous grievance regarding our members who were put on leave and/or terminated is covered in respect of your Termination email sent to our office naming three members; please be advised the union is grieving the terminations of;
>
> Robert Lantos – Linehaul Richmond
>
> Jamie Reid – Linehaul Richmond
>
> Nicholas Vu – AM Sorter Port Kells
>
> In an abundance of caution, the union is grieving any employees/ o/ops who haven't signed the attestation and were thus terminated as a violation of, but not limited to, the collective agreement and/or law etc.
>
> As a remedy, the union requests all o/ops and employees be reinstated and made whole.
>
> Yours truly,
>
> (signed)
>
> Grant Coleman

[174] Purolator's submissions concerning the Attestation Terminations turns on the characterization of the grievance which Local 31 submitted following the Attestation Terminations. As noted, Purolator submits the grievance is materially different to the SWP Grievances, and that treating them as one resulted in procedural unfairness.

[175] Local 31 relies on several cases to support its position that the grievance it submitted following the Attestation Terminations was part of the continuing nature of the SWP Grievances.

[176] Local 31 submits that when a grievance is of a continuing nature, arbitration boards regularly conclude that subsequent events captured by the grievance are

part of the arbitration proceedings. Local 31 submits it is neither necessary nor desirable that a party needs to file a new grievance and potentially have a new arbitration hearing every time the grieved event occurs. In support of its position, Local 31 relies on the arbitral decisions in: *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975), 8 OR (2d) 103, 1975 CanLII 707 (ON CA) [*Blouin* Drywall]; CAW-*Canada, Local 1941 v. Atkinson Re-Work (Layoffs Grievance)*, [2006] OLAA No 466, 86 CLAS 259 [*Atkinson Re-Work*], at para. 18; *Trillium Health Partners v. Canadian Union of Public Employees, Local 5180 (Inconsistent Application of Vaccination Policy Grievance)*, [2023] OLAA No 142 [*Trillium*], at para. 30.

[177] In *Blouin Drywall*, the court said:

> When a board of arbitration is satisfied on the evidence that a party to a collective agreement is in breach thereof, it is the board's obligation to render its decision accordingly. However, that decision is not simply a statement of the finding of the board with respect to the allegation made in the grievance but is also the consequential order or award, if any, that is required to give effect to the agreement. Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions and this whether by way of declaration of rights or duties, in order to provide benefits or performance of obligations or a monetary award required to restore one to the proper position he would have been in had the agreement been performed.

[178] In *Atkinson Re-Work*, Arbitrator Watters said:

> In my judgment, some prospective effect must be given to a Policy Grievance which contests an Employer's practice or approach to the administration of the collective agreement. Such a grievance serves to put an Employer on notice that the Union contests its method of administering the agreement. In the context of this case, I do not think that the Union is required to file a fresh Policy Grievance for each subsequent and similar violation pending the resolution of its initial grievance.

[179] In *Trillium*, the union filed a policy grievance regarding, among other things, the inconsistent application of the employer's vaccination policy. Following commencement of the arbitration hearing, but before the continuation of the matter after a mediated settlement proposal, the situation changed in the employer's hospital due to Omicron. The employer paused the application of the vaccination policy which added to the Union's frustrations because it led to further inconsistencies in the application of the policy. The employer objected to Arbitrator

Steinberg's jurisdiction over the subsequent events arising from Omicron as they were not part of the original grievance.

[180] At para. 30 of *Trillium*, Arbitrator Steinburg referred to *Fanshawe College and O.P.S.E.U. (01C049) (Re)*, 2002 O.L.A.A. No 1032 [*Fanshawe*], where at para. 13 Arbitrator Burkett said:

> In deciding whether the issue that is framed at arbitration is the same issue raised in the grievance as filed, an arbitrator must compare the grievance as written, including the remedy sought, to the issue raised at arbitration, including the remedy sought. To the extent that Re Mississauga Hydro-Electric Commission, supra, and Re Toronto (City) and C.U.P.E., supra, as relied upon by the Union, can be read as distinguishing between the grievance filed and the remedy sought, this is an artificial distinction that, if relied upon, undermines the inquiry into whether the issue raised at arbitration is the issue raised in the grievance. Indeed, this is why the filing of a grievance at step 1 under this collective agreement must set forth "the nature of the grievance, the surrounding circumstances and the remedy sought". The acid test is whether an issue not encompassed within the grievance that requires the calling of evidence and the making of legal submissions has been raised. Without restricting the authority of an arbitrator to fashion an appropriate remedy at the conclusion of a case, which may or may not differ from the remedy sought, it is the statement of the grievance read in conjunction with the remedy sought that defines the essential nature of the grievance and the issues that have been raised by the grievance, thereby allowing the arbitrator to decide if a grievance has been improperly expanded.

[181] Arbitrator Steinberg concluded that the fundamental issue in the grievances was whether the policy had been applied consistently and permitted the hearing to proceed while including the new events since the prior hearing date.

[182] I agree with Arbitrator Steinburg's analysis in *Trillium*, and with what Arbitrator Burkett said in *Fanshaw College*. I do not agree with Purolator's characterization of the grievance submitted after the Attestation Terminations. I find that grievance is correctly characterized as part of the continuing nature of the SWP Grievances.

[183] I find that Purolator's submission fails, for the reasons identified by the Arbitrator at paras. 51–54 of the Decision.

[184] Although the Arbitrator disposed with the issues concerning the attestation grievances in only four short paragraphs, it is important to consider the ground he covered in those paragraphs.

[185] The Arbitrator was alive to Purolator's position (Decision at para. 51). He found that the terminations arose directly as a result of non-compliance with the SWP, the reasonable application of which was part of his remit (Decision at para 52). He found that the terminations having occurred after his appointment did not deprive him of jurisdiction (Decision at para. 52). He found that the terminations were also covered by the group grievance component of the SWP Grievances, which complained of the placement of unvaccinated members on leaves of absence "and/or terminating their employment" (Decision at para. 53). He found that he had jurisdiction to address the terminations as part of the group grievance and also because they occurred directly as a result of non-compliance with the SWP (Decision at para. 53). He proceeded to uphold the grievance in connection with the Attestation Terminations (Decision at para. 54).

[186] I find the Arbitrator did not fall into reviewable error by assuming jurisdiction over the Attestation Terminations.

[187] I find there was no procedural unfairness to Purolator.

[188] Purolator's submission that it suffered prejudice by being denied the opportunity to make legal and strategic decisions regarding how it would advance its case, which impeded its ability to call or challenge evidence at the start of the Glass Proceedings, is not persuasive. Purolator was aware of Local 31's position as early as December 16, 2022. As of January 12, 2023, when the parties first raised the issue before the Arbitrator, expert witnesses were giving evidence, and Purolator had not called any witnesses other than its expert, Dr. Rebick.

[189] Purolator's submission that it was deeply prejudiced in not knowing the case it had to meet, and was denied the opportunity to present evidence and make submissions on whether there was a legal basis for the Attestation Terminations, is also not persuasive. Purolator was aware of Local 31's position as early as December 16, 2022. The Glass Proceedings proceeded intermittently until they concluded in September 2023. As noted by Local 31, Purolator did not request any adjournments to consider its position or prepare to deal with the issue of the Attestation Terminations. That the Arbitrator reserved his decision on Purolator's objection to his jurisdiction over the Attestation Terminations did not deprive it of the ability to further address the issue, any more than the Arbitrator's reserving on the *res judicata* issue prevented it from later presenting evidence and

making submissions on that issue. I find that Purolator knew the case it had to meet.

[190] As I have found that there was no procedural unfairness to Purolator, I do not need to determine whether the correctness standard of review would have applied to procedural aspects associated with the Attestation Terminations.

Conclusion

[191] My role in this judicial review is to consider the Decision in light of its underlying rationale in order to ensure that it as a whole is transparent, intelligible and justified. I must focus on the Decision, including the justification offered for it, and not on the conclusion I would have reached in the Arbitrator's place. I have done so. I find the Decision is transparent, intelligible and justified, and thus reasonable.

[192] The petition is dismissed.

[193] Local 31 is entitled to its costs.

"B. Smith J."

B. SMITH J.