IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADA POST CORPORATION

("Corporation")

AND:

CANADIAN UNION OF POSTAL WORKERS

("Union")

IN THE MATTER OF:

APPLICATION FOR INTERLOCUTORY CEASE AND DESIST ORDER
IN RELATION TO CUPW GRIEVANCE NO. N00-20-00008

ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE CORPORATION:

Christopher Pigott	- Counsel
Lennie Lejasisaks	- Counsel
Rebecca Rossi	- Counsel
Grace Skowronski	- Senior Legal Counsel, Canada Post

APPEARANCES FOR THE UNION:

Jackie Esmonde	- Counsel
Kylie Sier	- Counsel
Jan Simpson	- National President, CUPW
Carl Girouard	- National Grievance Officer, CUPW

AWARD

I have before me a cease and desist application filed under article 9 of the collective agreement. There is no challenge to my jurisdiction to hear and determine this matter.

The cease and desist application before me arises out of the imposition of a mandatory vaccine policy by the Corporation. The Corporation announced that, effective Friday, November 26, 2021, all bargaining unit employees (indeed, all employees of the Corporation) must attest to having been fully vaccinated or partially vaccinated failing which, unless unable to be vaccinated, employees will be "restricted from attending at work, including remotely, and placed on leave without pay after November 26, 2021, or if the employee is not actively at work when they provided such attestation, on the expected date of return to work." This sanction, therefore, would apply to the group of employees who "attest to being unwilling to be fully vaccinated."

The parties are agreed that under article 9.93 the two relevant criteria for the issuing of a cease and desist order in this case are:

- Firstly, the balance of inconvenience must favour the granting of such an order;

- Secondly, that without such an order the consequences of the contravention would be severe and could not be eventually corrected or compensated adequately, i.e. reparable harm versus irreparable harm.

It is important to emphasize that this is not a hearing on the merits and that nothing herein should be taken as speaking to the merits. Indeed, the brevity of this decision reflects the need to address the narrow issues that pertain to whether or not a cease and desist order should be granted without influencing the substantive determination that will be made after a full hearing before another arbitrator.

The Union argues that there is a much less coercive alternative to the mandatory vaccination policy that is being imposed upon unwilling employees by the Corporation – an alternative that would satisfy the same health and safety objectives. The Union proposes that those unwilling to be vaccinated be required to undergo a self-administered antigen test (quick test) prior to each shift so that there would be a high degree of certainty that they are not coming to work infected. The Union points out that this is the same regime as proposed by Canada Post prior to the direction of the federal government to all Crown corporations to mirror the federal public service and impose a vaccine mandate and it is essentially the same regime as would apply to those under the policy who are willing but must await the second dose. The Union maintains that for many employees the threat of withholding income effectively removes any real choice and forces them to become vaccinated, an irreparable event. The Union tendered

employee evidence to establish the coercive effect and relied on the evidence of its expert witness to establish that a testing regime as proposed would satisfy the necessary health and safety objectives of minimizing employee transmission.

Two expert witnesses were called, one by each party. The Union expert is Dr. Colin Furness, a non-medical infection control epidemiologist and assistant professor at the University of Toronto. The Corporation expert is Dr. Mark Loeb, a medical doctor and professor at McMaster University in the Departments of Pathology and Molecular Medicine and Health Research Methods who holds the Michael G. De Groote Chair in Infectious Diseases. For our limited purpose, their evidence establishes:

- Vaccination is safe and effective (Furness and Loeb);
- There is a "significantly lower" risk of becoming infected with COVID-19 if a person is vaccinated (Furness and Loeb);
- Vaccination represents the most effective strategy to reduce transmission in a workplace such as Canada Post (Loeb);
- Rapid antigen testing is a better diagnostic test than screening tool (Loeb);
- Rapid antigen testing cannot be considered equivalent to vaccination as a means of reducing transmission (Loeb);
- The ideal frequency of testing is unknown and early infection might not be detected with rapid antigen testing (Loeb);
- The sensitivity of a rapid antigen test might be compromised if conducted by an untrained employee and not by laboratory or health care professionals (Loeb).

Two very recent court decisions that refused to grant injunctive relief from the *Amalgamated Transit Union, etc. and TTC Superior Court of Justice – Ontario (November 20, 2021), as yet unreported* and *Lavergne-Poitras and PMG Technologies (November 13, 2021) 2021 FC 1232.*

The Union argues that these judgements should not be followed because:

- Arbitrators under collective agreements have established their own jurisprudence that should govern. Specific reference is made to the award of arbitrator Swan between these parties (see *re: Canada Post and CUPW Natl Co. N00-12-00003, April 26, 2013)* wherein he found that an invasion of privacy constitutes an irreparable harm within the meaning of article 9 of this collective agreement and that the harm does not have to be the same for every member.

- The court in *TTC* mistakenly conflated two harms (loss of income and coerced invasion of body privacy).

- The *Lavergne-Poitras* judgement deals with a different claim of harm, i.e. loss of employment and stress.

The Union position, summarized, is that given the option of daily rapid testing, which was the initial Corporation response, the alternative of the vaccine mandate with

its specified consequences tilts the balance of convenience in its favour. Further, given the coerced invasion of bodily privacy, it is asserted that a case of irreparable harm has been made out.

The Corporation position, summarized, is that the Canada Post workplace is at risk given the evidence of 19 previous declared outbreaks, including the shutdown at the Gateway hub for a shift, the last of which was declared in September 2021. The Corporation, relying on the expert advice, points to the vaccine mandate, as compared to voluntary vaccination with self-administered daily rapid testing for the unwilling, as the most effective option. The position of the Corporation is that the court judgements cited are on all fours with this case, especially the *TTC* judgement of the Ontario Superior Court, and should be followed. As for the 2013 Swan award, the Corporation points to the caution therein that "the privacy of individuals sometimes must yield to other interests...." It is submitted that this is such a case. In the circumstances of a pandemic, where the federal government, in the interests of public safety, has advocated a vaccine mandate and where the evidence is that this is the most effective way of minimizing transmission, both tests (balance of convenience and irreparable harm) weigh in favour of denying the application for a cease and desist order.

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 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 an 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 the 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.

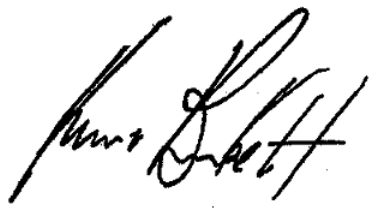
It follows from the foregoing that the harm in this case is harm that can be remedied by means of compensation, the restoration of seniority, etc. if a determination is made on the merits that the imposition of the mandatory vaccine policy constitutes an improper exercise of managerial discretion under the collective agreement. It is reparable harm.

The efficacy of the alternative means of accomplishing the necessary health and safety objectives, as proposed by the Union, is relevant to determining where the balance of convenience lies. In this case, it is clear on the evidence that the most efficacious means of accomplishing the necessary health and safety objectives is

through mandatory vaccination. Accordingly, for the narrow purpose of deciding whether or not to grant the injunctive relief sought (and not for the purpose of deciding whether the alternative sufficiently satisfies the health and safety objectives so as to outweigh the choice that has been forced on employees as a precondition to active employment in determining whether there has been a breach of the collective agreement), the balance of convenience must rest with the Corporation. This is so because a cease and desist order would result in an added risk to employees and the public, however small, of severe illness.

Having regard to all of the foregoing, the application for a cease and desist order is denied. Further, pursuant to my authority under article 9.97 of the collective agreement, I hereby order that this grievance be heard by way of priority in the same manner as described in article 9.96.

Dated this 30th day of November, 2021 in the City of Toronto.



KEVIN BURKETT