

Power Workers' Union v. Elexicon Energy Inc.

Canadian Employment Safety and Health Guide

Ontario Labour Arbitration Award

Before: C. M. Mitchell, Chair

Decision: February 4, 2022.

UTELE-P-2 (COVID-19 Vaccination Policy)

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2022 CSHG para. 96,415 | [2022] O.L.A.A. No. 48

Power Workers' Union v. Elexicon Energy Inc.

See commentary at CSHG para. 1947.

Case Summary

Employers' duties and rights — Infectious disease outbreak/pandemic preparation — COVID-19 — Mandatory COVID-19 vaccine policy — Employer introduced COVID-19 policy requiring all employees to confirm full vaccination status — Under policy, employees required to confirm they received first dose by January 2022, and second dose by February 2022 - - Policy included requirement for third or booster dose — Union challenged policy — Grievance dismissed — Policy reasonable for all employees, except for those who were required to work from home with no expectation of return to office in near future, and for those who worked exclusively outdoors or who could be accommodated to do so — Employer justified in introducing Policy because it had statutory duty to take every reasonable precaution to protect workers — Employer provided essential service (transmission of electricity) and had to take steps to ensure it had workforce to provide that service — Occupational Health and Safety Act, RSO 1990, c. O.1, s. 25(2)(h).

Facts: Elexicon Energy Inc. (the "Employer"), an electricity distribution company, had 273 employees in total. Some of its employees worked exclusively in offices, while others worked "in the field" or a combination of both. In October 2021, the Employer introduced a mandatory COVID-19 vaccination policy (the "Policy"). The Policy required all employees to confirm "full vaccination status". Under the Policy, employees were required to confirm that they had received a first dose by January 21, 2022, and a second dose by February 21, 2022. The Policy also required any recommended "boosters". As such, under the Policy, full vaccination status included a third or booster dose. For future employees, vaccination would be a condition of employment. Under the Policy, unvaccinated employees or those unwilling to disclose their vaccination status were required to pay for rapid antigen testing and to pay \$25 towards the cost of PCR testing. The vaccination and testing requirements were subject to medical and human rights exemptions. Non-compliant employees would be placed on unpaid leave and could be subject to discipline, including termination of employment. The Power Workers Union (the "Union") had supported voluntary vaccination and compulsory testing. However, it did not support unilateral compulsory vaccination policies or the requirement that unvaccinated employees or those unwilling to disclose their vaccination status pay the cost of rapid antigen testing and contribute to the cost of PCR testing. The Union challenged the Policy. At issue was whether the Policy was reasonable and whether it was reasonable for the Employer to require unvaccinated employees to pay for rapid antigen testing and contribute to the cost of PCR testing. It is important to note that the Policy was issued and grieved when the Delta variant of COVID 19 was predominant in Ontario (i.e., October 2022). When the matter was heard (i.e., January 2022), the Omicron variant of COVID-19 was the dominant strain in Ontario. Omicron was "highly transmissible" and spread rapidly. The number of cases had increased, lockdowns and other public health restrictions were reimposed, hospitalizations increased, schools and businesses closed again, and the Employer had introduced new measures to address the spread of Omicron.

HELD: The grievance was dismissed.

The Policy was reasonable for all employees, except for those who the Employer required to work from home, and for those who worked exclusively outdoors. The change in circumstances since the Policy was introduced, particularly, the increase in COVID-19 cases due to the Omicron variant, demonstrated that the reasonableness of a mandatory vaccination policy in the course of a pandemic is "contextual and highly dynamic". Consequently, precedents decided in a "completely different context, even as recently as November 2021", may become less relevant. The Policy was reasonable in the circumstances because it required "a small minority of unvaccinated employees to become vaccinated with three doses of the vaccine" and required "the large majority of employees with two doses of the vaccine to become vaccinated with the third or booster dose." The Employer was justified in introducing the Policy because it had a duty to "take every precaution reasonable in the circumstances for the protection of a worker" under paragraph 25(2)(h) of the *Occupational Health and Safety Act* ("Act"). Vaccinated employees were at a lower risk of becoming infected with Omicron than those who were unvaccinated, and were less likely to transmit the virus to others. The Union had argued that there was no evidence that vaccination was more effective in preventing the spread of Omicron, even in conjunction with testing, masking, and distancing, than those measures alone without vaccination. However, employers can take action to act to protect employees "even if it cannot be established with scientific certainty that there is a cause-and-effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown". The Union had also argued that it was "undemocratic" for the Employer to address a general public health issue, and that it should be left to the government to decide. However, there was "nothing fundamentally undemocratic about an employer making health and safety rules for its workplace, especially in the context of a dangerous pandemic." Those decisions should not be left to the government. In Ontario, "aside from long term care, the Government has explicitly left it to individual employers to determine in the context of their individual workplaces whether mandatory vaccination should be implemented." Additionally, the Policy was reasonable because the Employer provided an "essential service" (the transmission of electricity) and it had to take steps to ensure that it had a workforce to provide that service. "The enormous transmissibility of the virus and the scientific data that third doses of the vaccine decrease significantly the likelihood of severe disease, means it is reasonable for an employee of an electrical utility with two doses to be required to have a third dose and for unvaccinated employees to have three doses to attempt as much as possible to preserve the health of the workforce." The Policy was not reasonable as it applied to unvaccinated employees who worked from home with no expectation of a return to the office in the near future (i.e., "until April at the earliest"). It was unknown if the Employer would require those employees to be vaccinated if they did return to the office in the future. The application of the Policy to those employees could be reviewed at that time. The Policy was also not reasonable as it applied to employees who worked entirely outside or who could be accommodated to do so. Outdoor work does not engage the same risk of transmission of the virus as indoor work. It was unnecessary, in the circumstances, to determine if it was reasonable for the Employer to require unvaccinated employees to pay for rapid antigen testing and contribute to the cost of PCR testing.

Counsel

D. McDonald and S. Black for the employer; J. Monger and J. Latimer for the union

AWARD

Summary

1 In this case, the Union challenges the mandatory vaccination policy introduced by Elexicon, a local energy distributor serving Ajax, Whitby, Oshawa, Belleville, and Gravenhurst. The owners of Elexicon are five local area municipalities.

2 The Power Workers Union ("PWU" or "the Union") represents all unionized workers at Elexicon, and it has strongly supported the voluntary vaccination of its members and compulsory testing, but it draws the line at

unilateral compulsory vaccination policies which it considers to be unreasonable in the circumstances. It also objects to the requirement in the policy that unvaccinated employees or those unwilling to disclose their vaccination status pay the cost of rapid antigen testing and make a contribution towards the cost of PCR testing.

3 One of the critical aspects surrounding this case is that the vaccination policy was drawn up and finalized in the period from September to October 2021 when the Delta variant of COVID -19 was the predominant variant circulating in Ontario and the Omicron variant was unheard of. By the time this matter came on for hearing on January 14, 2022, the Omicron variant of COVID-19 had become the overwhelmingly dominant strain of the virus circulating in Ontario. The onset of the spread of Omicron has created a very different dynamic and set of circumstances than those prevalent at the time the policy was issued and grieved. As a result of this dramatic change, the current circumstances with the spread of Omicron have taken on greater significance than the experience of the Employer and employees with the spread of the Delta variant of COVID 19 in the pre-Omicron period. Normally the experience before the introduction of the policy would have formed the critical background for consideration of the reasonableness of the policy. Instead, while the history and the events pre-Omicron are certainly not irrelevant, they are not nearly as relevant as would have been the case had the dramatic changes not occurred after the policy was introduced. None of this could have been anticipated when the policy was introduced by the Employer on October 28, 2021, or when the policy was grieved by the Union on November 1, 2021. Omicron was not even reported to the World Health Organization ("WHO") until November 24, 2021, and only became a variant of concern on November 26, 2021. It rapidly became the dominant strain of COVID-19 in Ontario. I should add that the parties included in their written and oral submissions large amounts of material regarding the current circumstances with Omicron at the time of the hearing on January 14, 2022, and subsequent submissions also addressed the period after the hearing.

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

5 I have determined that the general policy of the Employer requiring vaccination by its employees is reasonable in the particular circumstances of this case, particularly as it requires a small minority of unvaccinated employees to become vaccinated with three doses of the vaccine and requires the large majority of employees with two doses of the vaccine to become vaccinated with the third or booster dose.

6 To summarize, the first essential reason for my finding is that all employees have the right by law to a safe workplace and the Employer under the law has a duty to take every reasonable precaution in the circumstances to that end. Here vaccinated employees are at less risk of becoming infected with the Omicron virus than are unvaccinated employees, and the more likely employees are to become infected, the more likely they are to transmit the disease to others. The Union's argument that there is no evidence vaccinations will be more effective in preventing the spread of Omicron, even in conjunction with testing, masking, and distancing, than those measures alone without vaccination, is inconsistent on these facts with the precautionary principle which justifies that action be taken to protect employees where health and safety are threatened "even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown": *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (CanLII).

7 The second reason the policy is reasonable is that the Employer has the responsibility of providing essential services, namely the transmission of electricity in the community, and must assure that it has a workforce that can

provide the necessary services. The enormous transmissibility of the virus and the scientific data that third doses of the vaccine decrease significantly the likelihood of severe disease, means it is reasonable for an employee of an electrical utility with two doses to be required to have a third dose and for unvaccinated employees to have three doses to attempt as much as possible to preserve the health of the workforce.

8 I have also found, however, that the policy is not reasonable at this time as it applies to unvaccinated employees who have been working exclusively from home and for whom there is no expectation of a return to the office until April at the earliest, or to employees who work exclusively outside or who can be accommodated such they can work exclusively outside.

9 I have found it unnecessary in the circumstances of this case to determine the issue of the responsibility of unvaccinated employees to pay for rapid antigen testing and to pay \$25 towards the cost of PCR testing but I remain seized to deal with the issue if necessary.

PROCESS

10 On agreement of the parties no oral evidence was heard in this case nor was there any affidavit or "will say" material filed. The parties each produced extensive briefs and later filed letters and charts. They also made oral arguments. After the hearing on January 14, 2022, the Board asked the parties to comment if they wished on two Evidence Briefs issued by Public Health Ontario on January 6 and 14, 2022, as well as the Ontario Dashboard, issued daily by the Ontario Science Table. Both parties did so. The parties also urged me to consider the expert evidence that was summarized together with some extracts of that evidence in the case of *Electrical Safety Authority v. Power Workers' Union* (Stout) dated November 22, 2021 ("ESA").

ISSUES IN DISPUTE

11 There are two issues in dispute. The first is whether the policy requiring mandatory vaccination is reasonable under the test set out in *KVP, (1965), 16 LAC 73 (Ont Arb) (Robinson)*, and second, whether the rule requiring unvaccinated employees to pay the cost of antigen testing is reasonable.

12 The vaccination policy was implemented on October 28, 2021. There was consultation with employees before its introduction but there was no consultation with the Union. Perplexingly, there was also no consultation with the Joint Health and Safety Committee which was advised of the policy just before its issuance. I was not asked to make a finding on whether such consultation was necessary, but no doubt it would have been far preferable had it occurred and continued to occur as the pandemic progresses.

13 The policy requires all employees to confirm full vaccination status. For future employees, it is stated that this will be a condition of employment. The original date for compliance was January 7, 2022, but this was later delayed to January 21, 2022, for notification of vaccination with a first dose and February 21 for the second dose. Elexicon agreed to take no actions in respect of this matter until after this arbitration process was completed and at the time of the hearing it was understood the decision would not be issued prior to January 21, 2021.

14 The policy considers full vaccination status to be two doses but also requires additional vaccinations as recommended by governmental and/or healthcare authorities, for example, any third or "booster shots". It is my understanding that the policy presently includes a requirement for the third vaccination, and I have considered its reasonableness on this basis. The policy states that Elexicon will initially pay for the rapid antigen testing for the unvaccinated but effective December 13, 2021, this will be the responsibility of the employee. It is also proposed that the unvaccinated employees pay \$25 towards the cost of the PCR tests administered by Elexicon. This date was later extended to February 22, 2022. The Provincial Government is currently providing free rapid antigen tests, but the Employer says whereas it formerly had sufficient supply to provide two antigen tests weekly to those who are not advising of their vaccination status or are unvaccinated, it now can only provide one.

15 Grounds for exemption from the policy and refusing vaccination are those grounds that are protected by the Ontario *Human Rights Code*, including confirmed medical reasons. The policy indicates the Employer will attempt to provide an appropriate individualized accommodation plan if the reasons for refusal of vaccination are covered by the Human Rights Code. Exempted individuals will be required to complete twice-weekly rapid antigen tests and demonstrate a negative result. The cost of testing for exempted individuals will be paid by Elexicon.

16 Employees who have not provided a valid reason for remaining unvaccinated, or who are non-compliant with the policy will be required to complete COVID-19 vaccine awareness training and, if they remain unvaccinated by February 21, 2022, will be restricted from entering Elexicon property and worksites and will be placed on an unpaid leave of absence. Depending on the circumstances, the policy states an employee may also be subject to disciplinary action up to and including termination of employment. Any such discipline will remain subject to arbitral review.

BACKGROUND FACTS

17 WHO declared that the spread of COVID-19 constituted a global pandemic on March 11, 2020. Soon after the Government of Ontario enacted Emergency Orders locking down businesses, schools, restaurants, bars, retail, and many other facilities, while also setting limits on public and private gatherings. There were also border closures, bans, and restrictions on travel imposed by the Federal Government and many other measures which had a profound radical impact on daily life, the health care system, the economy, and people's livelihoods. The pandemic caused very significant disease and death taking over 32,000 lives in Canada and over 10,500 deaths in Ontario to date. It has also caused severe lingering disease in a significant percentage of patients known colloquially as "long haul cases". Since it is an infection of the respiratory system, COVID-19 spreads most commonly in indoor spaces in ways that are still controversial among experts.

18 The virus has mutated often; the original strain was followed by many others, but principally for our purposes by the Alpha, and then the Delta variants. The latter was found to be much more contagious than the Alpha variant. The Delta variant began to spread broadly in Ontario in May-June of 2021 after vaccines were already more broadly available. (Vaccine distribution in Canada got off to a slow start in late 2020/early 2021 and then escalated rapidly). The Delta strain was significantly more transmissible than the Alpha variant and resulted in a new wave of the disease. It has been almost completely replaced now by the Omicron variant which began to spread in late November 2021, and which is many times more transmissible than the Delta variant. Since the spread of the Omicron variant, there have been an additional approximately 3000 deaths in Canada above the number of deaths reported in the *ESA* award on November 22, 2021, (from approximately 29,000 to approximately 32,000) and an increase in the number of hospitalizations daily from 2029 reported in the *ESA* award to 10,588 on January 17, 2022. The increase in the number of cases of COVID-19 can no longer be accurately measured because public testing of all who wanted or needed a test stopped because the pervasive spread of the disease in the community meant the demand for PCR testing could not be met. Also, as will be seen below, there is no assurance that the results of rapid Antigen testing will be reported by individuals to public health authorities. For context, the number of hospitalizations in Canada had dropped to under 500 for a period in the summer of 2021 before starting to steadily rise again into the fall to the 2000+ range. It was in this period from September to October 2021 that the Employer developed its vaccination policy.

19 Vaccines for COVID-19 first became available in late 2020, had a slow initial distribution in Canada but grew quickly after that. Vaccines were widely available in Canada by the time the Employer began to work on its policy in September 2021. The overwhelming majority of Canadians have voluntarily sought out vaccination. The percentage of Ontarians according to the Ontario Science Table Dashboard ages 5 and up with at least one dose of the vaccine is almost 89% and with two doses 83.2%. Bloomberg reports that over 10 billion vaccines (all vaccines, not just those commonly distributed in Canada) have been administered around the world. The Arbitrator in the *ESA* case, John Stout, found that the vaccines are overwhelmingly safe and there may be minor reported side effects that may

include fatigue, flu-like symptoms for one or two days, and swelling at the injection site. There are also potentially more serious side effects. He found that:

18. Major reported side effects include heart muscle swelling and anaphylaxis, neither of which are typically fatal, nor soon resolve. However, thrombosis can also occur, which has a high mortality rate. Public Health Ontario data indicates that of the 22 million vaccinations doses delivered in Ontario, 0.06% are associated with reported side effects.
19. *The vaccines are considered safe, and Dr. Furness advises that there is no evidence of vaccines having long term effects. A comparison of the risks associated with the vaccines with those of being infected with COVID-19 indicates that apart from anaphylaxis, the side effects of the vaccine also appear in COVID-19 infection, but the severity is much worse from infection.*
20. *The expert evidence provided in this case, supported by relevant data, reveals that vaccines are effective, and they help reduce the transmission of infection and the severity of illness in those who are vaccinated. Those persons who are unvaccinated make up most of those individuals who require hospitalization and are in ICUs.*
21. Mandating vaccination is not a new or novel requirement in the modern world. Many governments mandate vaccinations for travel or attending school. In Ontario, nine vaccines are mandated as a condition of attending public school, subject to certain exemptions.(emphasis added)

Facts and Conclusions from Ontario Public Health Authorities

20 The following are extracted from reports published by Public Health Ontario:

- (i) Based on what is known so far about Omicron, and its rapid case growth in Ontario, increased community-based public health measures accompanied by ongoing accelerated vaccination efforts (e.g., third and fourth doses) targeting those most at-risk of severe outcomes and onward transmission (e.g., those in congregate living settings and schools/daycares) it is important to protect Ontarians, health system capacity (including public health capacity), *and limit the impact to key societal functions such as critical infrastructure* and in-person learning: Public Health Ontario Evidence Brief January 6, 2022, p. 1 (hereafter "PHO EB 1/6/22, 1")
- (ii) On December 28, 2021, 80.4% of samples tested at the PHO laboratory exhibited SGTF, indicating that Omicron is the dominant variant circulating in Ontario. PHO EB 1/6/22, 2.
- (iii) *Individuals with at least two doses of vaccine are significantly less likely to contract COVID-19, be hospitalized for COVID-19, or be admitted to the ICU, compared to those who are unvaccinated.* PHO EB 1/6/22, 10.
- (iv) 204 of 441 patients in Ontario ICUs were unvaccinated as of January

28:<https://covid19.ontario.ca/data/hospitalizations#Byvaccinationstatus>

- (v) *The risk of severe disease, particularly amongst unvaccinated individuals, is moderate with a moderate degree of uncertainty.* PHO EB 21/1/22,1
- (vi) *It is estimated that each Omicron case is infecting 4.5 times more individuals than Delta (95% CI: 4.0 to 5.1) in Ontario during the November 28 to December 16, 2021, period.* PHO EB 6/1/22, 13
- (vii) Reporting of polymerase chain reaction (PCR)- confirmed case counts in Ontario is an underestimate of the true epidemiology of SARS-CoV-2 infections due to changes in PCR testing eligibility and no requirement or mechanism to report positive rapid antigen test (RAT) for the general population. PHO EB 1/6/22, 1
- (viii) *The literature suggests that three doses of a Coronavirus Disease 2019 (COVID-19) vaccine provide greater protection against severe outcomes of Omicron variant infection when compared to two doses*

of a COVID-19 vaccine. The duration of protection from a third dose or recent infection remains unclear. PHO EB 1/14/22,1; PHO EB 1/19/22, 1.

- (ix) During the week of December 27, 2021, to January 2, 2022, the World Health Organization (WHO) global number of new COVID-19 cases increased by 71% (9.5 million new cases) from the previous week, and the number of new deaths decreased by 10% (41,000 new deaths). PHO EB 1/14/22, 2
- (x) As observed in a previous study, a lag in the detection of COVID-19 cases by rapid antigen tests during the early period of disease was described in a high-risk occupational case cohort of 30 individuals. With daily testing during an Omicron outbreak in December 2021, reported that most Omicron cases were infectious for several days before being detectable by rapid antigen tests, based on viral load and transmissions confirmed through epidemiological investigation. On Days 0 and 1, all rapid antigen tests produced false-negative results, despite 28/30 pairs having infectious viral loads within the range of confirmed Omicron transmissions in the cohort. The median time from first positive PCR to first detectable antigen positive was 3 days. PHO EB 1/14/22, 4
- (xi) The data from South Africa shows that the Omicron wave peaked around four weeks, suggesting Omicron waves may exhibit a rapid, steep peak and resolution, but it remains unclear if Omicron will behave similarly in other jurisdictions. PHO EB 6/1/22, 3 (emphasis added)

21 Data published by the Ontario Science Table in its Daily Dashboard shows that the vaccine effectiveness and degree of protection for vaccinated people with two doses of the vaccine against Omicron are significantly less than it was against Delta. As of February 4, 2022, the Ontario Science Table Dashboard indicates that a person with at least two doses of the COVID-19 vaccine has an approximately 60% reduced risk of developing the virus compared to those who are unvaccinated: [Ontario Dashboard - Ontario COVID-19 Science Advisory Table \(covid19-sciencetable.ca\)](https://ontariosciencetable.ca). The Union provided the data for January 11, 2022, from the same source at the hearing, and at that time the percentage was 31.2%. The data was later updated by the Employer, and the Board itself updated the data as of February 4, 2022.

22 The parties agree that in the case of both the Delta and Omicron virus, vaccines significantly reduce the risk of hospitalization, severe illness, and death. On January 11, 2022, the Ontario Science Advisory Table reported a 77.5% (83.3% on February 4, 2022) reduction in hospitalizations, and a 90.1% (91.5% on February 4) reduction in ICU admissions, among people vaccinated with at least two doses compared to those who are unvaccinated. As indicated above, the Union in its brief conceded that there is a 31.2% reduction in Omicron cases among people vaccinated with at least two doses compared to those who are unvaccinated (as of February 4, this rose to approximately 60%) but the Union emphasizes how reduced this number is as compared to the effectiveness of the vaccine with the Delta variant among people vaccinated with at least two doses.

23 The Union asserts that vaccines do not prevent an infected person, whether vaccinated or otherwise, from transmitting the virus to others. It asserts "for this reason" Ontario's Science Advisory Table stated that vaccination as a single focus is insufficient. Rather, reducing social contacts, physical distancing, high-quality masks, improved ventilation, and rapid testing are all needed to defend against COVID-19, and in particular the Omicron variant. It relies on the December 16, 2021, Science Advisory and Modeling Consensus Tables.

24 In my view, this assertion, and the words "for this reason" does not capture the intent of the Ontario Science Table's admonition as to the necessity for and effectiveness of the vaccine. The December 16 document states that at that time the Omicron variant was about to become dominant, (which it has), that it transmits very quickly, early evidence was it can produce severe disease, (but see paragraph 20 (x) above), and that although vaccines are less effective against Omicron, boosters can substantially increase protection and that two doses provide strong protection against severe disease which is dramatically higher in the unvaccinated. It concluded vaccination alone could not *slow the wave of the virus then occurring*, but public health measures and booster campaigns could blunt it. Its message was that high-quality masks, physical distancing indoors, improved ventilation, and increased access to rapid testing can "buy time for boosters to take effect ..." I do not read the Ontario Science Table extract relied on

by the Union as meaning vaccination is not important in mitigating the spread of the disease or that other measures without vaccination are sufficient to mitigate the spread of the disease.

25 Because of the rapid spread and highly transmissible nature of the Omicron variant, the Government of Ontario revised its COVID-19 testing and isolation guidelines. PCR testing is now no longer available free of charge to the general public but has been limited to asymptomatic and symptomatic individuals in institutions such as in hospitals, long-term care, and retirement homes. Other Individuals with symptoms are presumed to be positive and are required to isolate for five days if fully vaccinated and their symptoms are improving for at least 24 hours, or 10 days if unvaccinated. The Government of Ontario has also indicated that it has a limited supply of rapid antigen tests that are being prioritized for health care and highest risk settings. Elexicon receives a supply of these tests but now can only provide one a week instead of two, although it advises it has been trying to obtain more.

26 The Government of Ontario has not imposed mandatory vaccines on the citizenry, or its employees, or any workplace except long-term care homes. In dramatic contrast, the Federal Government has mandated vaccinations for all its employees, and employees of federally regulated employers. The Government of Ontario did require hospitals, community and home-care service providers, ambulance services, post-secondary institutions, licensed retirement homes, and similar institutions that care for the vulnerable to have COVID-19 vaccination and testing policies in place, but the Directive does not require that all staff be vaccinated: See Directive 6 issued August 17, 2021. Some hospitals, universities, and other institutions subject to the directive have issued compulsory vaccination policies for their workplaces and/or students, as have certain School Boards like Toronto for its employees. The City of Toronto, the Toronto Transit Commission, and others have also implemented mandatory vaccination policies for their employees.

27 In the unionized power sector in Ontario, the largest employers such as Ontario Power Generation ("OPG") and Bruce Power have not introduced mandatory vaccination policies. Neither has twenty-four other local distribution companies at which the PWU holds bargaining rights. Only employers at a few other utilities in the sector such as Elexicon, Toronto Hydro, and Alectra, have done so and are awaiting arbitration hearings or decisions including this one. These utilities currently potentially subject to mandatory vaccination have approximately 1700 employees compared to the approximately 15,000 total of such workers in the unionized sector in the province. The Union has agreed to what it describes as reasonable mandatory testing regimes and generally has not opposed mandatory testing which it forcefully distinguishes from mandatory vaccination. To be clear, the Union has strongly encouraged voluntary vaccination among its members.

28 The Electrical Safety Authority, the agency responsible for electrical inspections in the Province of Ontario, imposed a mandatory vaccination policy, and a grievance challenging it was upheld in the *ESA* decision issued in November 2021. This decision is discussed in detail below.

Elexicon and its Employees

29 As stated above, Elexicon is a municipally owned electricity distribution company. It is responsible for distributing power to local customers in Pickering, Ajax, Clarington, Belleville, and Gravenhurst. The bargaining unit has 176 employees with office and field staff. The utility has 273 employees in total. Employees are divided into regions and work out of regional yards/offices as well as regional offices. Some employees work exclusively in the office, while others work in the field, or a combination of both. Some work primarily outside. The policy does not distinguish between these groups but applies equally to everyone. Certain employees who normally work in the office have been working exclusively from home since the outset of the pandemic, except for a brief period where employees also worked in the office part of the time. That brief period ended with the onset of Omicron, however, and employees who could do so were again required to work exclusively from home. This will remain in effect until at least April 2022.

30 Elexicon paid for approximately 16,000 days of absence for bargaining unit employees who were at home sick

with COVID-19, living with an individual who tested positive for COVID-19 or awaiting testing results. On an annualized basis for the bargaining unit employees, this is equivalent to approximately 2% of payroll.

31 Elexicon's recent experience with rapid antigen testing for Omicron which it has conducted itself is that it is unreliable in exposing that the person tested has been infected. Many employees who tested positive on a PCR test initially tested negative several times using the rapid antigen tests.

32 86% of the employees in the bargaining unit are fully vaccinated meaning two doses of the MNRA or AstraZeneca vaccines or one dose of the single-dose vaccine. 14% of employees have not provided confirmation of vaccination but four of these are on extended medical leaves and I was not advised whether they have been asked to confirm their vaccination status. This leaves twenty-one or 12% of the active employees who have not confirmed their vaccination status and 88% of active employees that have. Only three of those who are now working exclusively from home are unvaccinated, while the rest of the unvaccinated employees either work in the field or are required to work in the office or a combination of the office and the field.

33 In some classifications, 100% of employees are vaccinated, while there is a concentration of unvaccinated employees in the linesperson classification and a sprinkling in others. The Union provided a chart detailing the location and classification of the 21 unvaccinated employees. A majority of the unvaccinated employees are linespersons and 14 of 55 linespersons including bargaining unit supervisors, are unvaccinated. Approximately a week after the hearing, the parties made further submissions in response to the Board asking for comments on certain Public Health Ontario and Ontario Science Table materials, and Elexicon then submitted that seven employees, all in the area of distribution and lines could not work because they have tested positive or are in isolation because of symptoms or close contacts. Three of the seven were unvaccinated.

34 Employees who work inside are positioned so that they remain separate from other employees and are required to use masks, practice physical distancing and submit to testing.

35 Below I set out details regarding the work of some of the classifications where there are unvaccinated employees.

36 Linespersons spend most of the workday outside where transmission is less likely. Eleven subforepersons who are in the bargaining unit work both in the office and in the field. I have no detail on the percentage of their work in the office as opposed to the field or on the location of the offices. Only a small part of the work of linespersons requires interaction with members of the public but they are a construction crew and often are a trade on-site on construction projects. They are part of first responders where hydroelectric poles are involved in a motor vehicle accident. They do need to interact with each other and work in crews of 2-5 but can try to maintain physical distancing, and where they cannot, they can use personal protective equipment ("PPE") to try to reduce the possibility of transmission. Typically, there would be more than one employee in an Elexicon vehicle used to move to and between worksites, but Elexicon instituted a policy during the pandemic of only one employee in a truck to reduce the spread of the virus. It removed that restriction for a time but then reinstated it with the onset of Omicron. Linespersons including unionized supervisors are required to attend at Elexicon's workplaces at the beginning and end of the workday, but these are not in an office. The garages, as I understood it, are indoor and the Union asserts they are well ventilated, but there is no evidence that they all are or are not. Because of Omicron, these employees are currently directed not to enter Work Centre offices but to remain in the garage or satellite locations "unless absolutely critical".

37 The five linespersons and one subforeperson who work out of the City of Belleville, use a common garage facility with the City of Belleville which is leased from the municipality. Elexicon also has its Belleville office in a building owned by the City of Belleville. Four of the six bargaining unit employees in the linespersons classification in Belleville are unvaccinated. The City of Belleville has a vaccination policy that requires mandatory vaccination of persons entering City buildings. The garage facility houses the City of Belleville operations center, and while it was not clear that the garage is considered to be a "City Building" under the policy, on the face of it, there is no obvious

reason why it would not be considered to be such, particularly when it houses the City's operations center. The Belleville policy has been in place since September 14, 2021, but the Union says it has not been enforced against Elexicon employees. Elexicon advised that it has been asked for attestation by the City of Belleville that its employees entering its buildings are fully vaccinated in compliance with the City policy. Linespersons including those in Belleville could be required to enter into hospitals or long-term care homes where persons must be vaccinated to enter, and other locations for that matter, but how serious a possibility this was or how often it occurs was not canvassed by the parties.

38 Inspectors do come into contact with members of the public in their jobs but can practice physical distancing and maintain other COVID 19 protocols. Metering employees have been directed not to enter homes, apartment buildings, or areas where they would have a high chance of being in contact with the public. Thus far in the pandemic they have not entered long-term care institutions or hospitals but will have to at some time in the future. Hospitals and long-term care homes in Belleville have policies requiring entrants to those facilities to be vaccinated. There have been a few instances in which unvaccinated employees have not been granted access to a customer's site for metering work and the work had to be re-routed to a vaccinated employee. The employer anticipates that vaccination will be required by more customers in the future. I do note, however, that the Union materials do not appear to indicate that any of the metering employees are currently unvaccinated.

39 One of five system operators is not vaccinated and must work inside. System operators work in shifts of 2-3 employees during day shifts (usually 3) and 1-2 employees (usually 1) at night. The Ajax Control Room is a large space that allows employees to be well separated from one another, with plexiglass barriers between desks. Employees have been issued KN95 masks, and the current direction is that masks must be worn throughout the shift. The Company is utilizing a spare Control Room at the Whitby location to allow for further distancing/isolation. Now on the day shift, 1 System Operator works in Ajax and 2 remain in Whitby; on the night shift, the 1 System Operator will work in Ajax. Additionally, all System Operators have been requested to perform a COVID-19 rapid test (self-administered) prior to the shift start when returning from days away from the office.

40 One of two P&C Technicians is not vaccinated. They typically work in pairs but maintain COVID- 19 protocols such as masking and remaining 6 feet apart.

41 From the commencement of the pandemic, Elexicon implemented procedures and guidelines related to mask-wearing, other PPE equipment, physical distancing, hand hygiene, cleaning, and disinfection. It also conducted testing. As set out above, it required that office work be performed remotely for many workers who could do so exclusively, and others who must come into the office from time to time also worked remotely for much of the time. Also, as indicated above, Elexicon required that when Company vehicles need to be used for work which occurs daily for a large number of employees, only a single person would travel inside the vehicle.

42 As of November 10, 2021, eight employees had tested positive for COVID-19. None were attributed to transmission in the workplace. However, all cases managed, i.e., close contact and presumed positive cases, totaled 192.

43 From December 22, 2021, to January 22, 2022, there have been 27 confirmed cases of COVID -19, of whom 7 were unvaccinated. This represents an admittedly small and not necessarily meaningful sample, in which 26% of the confirmed cases were among unvaccinated employees in that time frame, or more than double the percentage of unvaccinated to vaccinated employees in the workplace generally.

44 In December and January, the Company announced changes to their COVID-19 work procedures directed in particular to the spread of Omicron. Elexicon asserts that these measures were taken in the absence of a fully vaccinated workforce. Elexicon has implemented the following:

- (a) Delayed its safe return to the office policy to April 2022

- (b) Returned to the earlier policy wherein company-owned vehicles are restricted to single occupancy. As a result, it asserts it has incurred large expenses to rent large trucks and additional equipment
- (c) Field crews will remain in established cohorts and crossing districts and/or crews is strongly discouraged.
- (d) Three-layer masks are required in the office if employees are away from their desk, and in the field;
- (e) System Operators issued KN95 masks to wear for the entirety of their shift, and access to the System Control Centre was restricted.
- (f) Additionally, the Company's Distribution Operations department implemented other new measures to be in place until at least January 26, 2021.

45 Elexicon does not have a large group of retirees or other qualified workers in the community to whom it can turn for replacements for those who may become ill.

46 Elexicon has required symptomatic employees to be subject to PCR tests because it has been found that rapid antigen tests are not as effective. As an example, on December 29, 2021, three employee rapid tests were positive. However, of those same employees, eleven (11) tested positive using PCR tests. Elexicon has spent \$651,539.65 on COVID-19 PCR tests and nurse hours during the pandemic but this number will be less on an annualized basis.

47 Elexicon has weekly testing clinics. Participation doubled in the first two weeks of January. Elexicon asserts it will require more than one nurse to conduct future testing. In the absence of case management by Public Health authorities, Elexicon's small team performs this function. Elexicon has determined that it costs approximately \$250 per PCR test when factoring in the costs of the test, administration, logistics, etc. In recent weeks, the total costs of Elexicon's s testing program have ranged between \$15,000 to \$30,000 per week.

SUBMISSIONS OF THE PARTIES

Union Submissions

48 The Union submits that the policy is unreasonable but also overly broad not taking into account any consideration of particular work assignments in individual classifications, available resources, location, or any specific occupational health and safety factors, or consideration of alternatives such as regular performance of rapid antigen testing or working from home as has been the case for many employees for 22 months. The policy is far beyond what the Ontario Government is requiring for almost all employers except in long-term care homes.

49 The requirement for reasonableness requires taking into account the significance of the employer objective, any intrusive or adverse impact upon employees, and whether the employer's objective can be accomplished through less intrusive measures. Given the inherently intrusive nature of vaccination, the alleged benefit sought by the Company must be an important benefit of such magnitude to outweigh the fundamental right an individual is recognized to have concerning personal autonomy and physical integrity. Elexicon must prove that its essential need will be and can only reasonably be achieved through the application of the policy. If Elexicon's essential need will not be achieved through the policy, it cannot be justified; and if there are less intrusive means of achieving the demonstrably important goal, they must be utilized instead.

50 The employer must show how its legitimate business interests, not societal interests, outweigh the legitimate interests of the actual individuals who will be coerced into a medical procedure. It failed to do so. The harm to the workers forced to vaccinate against their will, on pain of losing their ability to feed their families, outweighs an unproven and at best speculative gain to workplace safety or other legitimate operational concerns.

51 The Union takes strong issue with what it alleges is a fundamentally undemocratic usurpation by this Employer (and for that matter, by this Arbitrator) of the legitimate role of the Government of Ontario which has responsibility

for public health in this sector, not the Employer. It says the Government is accountable to the public for its decisions, while the Employer is not, and the Government has chosen not to implement mandatory vaccination for the vast majority of employers and its own employees. It denies the relevance of contrary actions by the Federal Government affecting employers within federal jurisdiction because the constitutional division of powers matters and public policy for this Employer is the responsibility of the Provincial Government.

52 This Employer policy is unnecessary as it goes beyond industry norms in the sector evidenced by the large majority of large and small other companies in the sector who have not introduced such mandates. No special need for such a policy has been demonstrated by Elexicon and given the availability of testing and other measures which have succeeded thus far, the policy is unreasonable. More than that, the Employer failed to consult with the Union which most other employers in the sector have done, and has failed to consult even with the Joint Health and Safety Committee.

53 The Union asserts that the measures taken by the company thus far have worked: there have been no instances of workplace transmission up until now. There is thus no need for the policy. The special measures to have employees work from home wherever possible, restrictions on more than one employee in a vehicle, and other restrictions imposed by the company, many of which were recently reimposed, have worked and there is no need for mandatory vaccination. The company found it did not need a mandatory vaccination policy through most of the pandemic including the Delta wave. The company has remained fully operational and there is no heightened degree of disruption or difficulty relative to the rest of Ontario. Elexicon has not been hard hit by the pandemic. Voluntary vaccination has largely succeeded and only a relatively small number of unvaccinated employees remain, and efforts should concentrate on seeing what accommodations can be made if necessary to their particular work situations rather than compelling them to become vaccinated.

54 There have been no significant operational consequences as a result of employees working from home and this can continue for that group. The other employees who work inside are positioned to be separated from other employees, are required to use masks, practice physical distancing and submit to testing. Employees who must drive in the course of their employment are doing so individually in one vehicle. Employees who work outside are not generally at risk, and to the extent they work with others practice physical distancing where possible and use PPE. The indoor garage facilities are well ventilated, and those employees do not enter the office at all under the existing COVID-19 rules.

55 While vaccines prevent more serious disease, hospitalization, and death, they do not sufficiently protect vaccinated persons against breakthrough infections and do not prevent vaccinated persons from transmitting the disease, which in the case of Omicron is highly transmissible. None of the scientific material suggests that vaccination makes the slightest bit of difference to the spread of the disease in an environment where everyone is wearing masks, separated, and appropriate hygiene protocols are being followed.

56 Forced vaccination significantly impacts and undermines bodily integrity rights. There are real side effects to any drug, including a vaccine, and the COVID-19 vaccine in particular commonly causes pain, nausea, and other unpleasant symptoms, with occasional cases of tremendously serious, even deadly, side effects. The right to decide to have a drug injected into one's body, or to undergo any medical treatment, is deeply personal and should not be intruded upon by one's employer except where doing so is demonstrably necessary, and the employer's interests can be shown to legitimately and demonstrably outweigh the employee's interest in self-determination with issues of bodily integrity. The Union relied on *St. Peters Health System*, 106 L.A.C.(4th), 170 (Charney).

57 The Union relied extensively on the decision in the ESA case and said the circumstances here were not materially different and that a combined voluntary vaccination and testing policy was a reasonable alternative to mandatory vaccination. While that decision is not binding, it submits that the similarity of the issues and the facts, including the context of these two Employers being within the electricity sector, should be persuasive. It also relies on *Halton District School Board v Elementary Teachers Federation of Ontario*, 2020 CanLII 5702 (ON LA) (Stout).

58 Until late October 2021, and throughout the Delta wave, the Company did not deem it necessary to even have a mandatory testing regime for unvaccinated employees. In light of this, it is not now justifiable to assert a mandatory vaccination policy is necessary to protect its operational interests.

59 Nothing in the public health material leads to the conclusion that if masking protocols, social distancing, working from home and other protocols are followed the unvaccinated present any greater risk to others than the vaccinated. The vaccinated are not immune from getting and transmitting the virus, and asymptomatic cases capable of transmitting COVID may be proportionately much higher than previously. There is no evidence vaccination reduces the chance of transmission in an environment where everyone is masked and because of the significant transmissibility of this variant among the vaccinated and unvaccinated.

60 With so many of the employees vaccinated, there is no evidence that any of the negative workplace implications of COVID for an employer will be avoided if the few unvaccinated holdouts must comply with the policy.

61 The public health material appears to demonstrate that the number of hospitalizations and severe outcomes -- which were already low, and very materially and disproportionately skewed to those of non-working age with significant co-morbidities-, are lower with Omicron than prior variants, and are not increasing at anything close to the increased rate of infection. Without minimizing the significance of the disease the risk presented to Elexicon's business interests of one of its few unvaccinated employees ending up in a hospital is remote, and probably more remote than at any time prior in this pandemic, in the event of infection.

62 Increased vaccination will not, as was once hoped, hasten the "end" of the pandemic. There can be no doubt that Lexicon's 21 unvaccinated employees will not materially affect when the problems caused by COVID will end for Elexicon.

63 There appears to be some evidence that the Omicron wave peaks quickly, then rapidly declines. Given that multiple shots, over many months, are required to achieve maximum protection through vaccination, it seems highly likely that this wave will have passed before any of the unvaccinated would reach fully vaccinated status. It also appears clear that anything other than fully vaccinated status provides only modest protection against infection.

64 The Company cannot rely on the City of Belleville policy to shelter itself from a determination as to whether the policy is a reasonable one and relies on *MVT v ATU*, 2020 CanLII 34933 (ON LA) (Randall). In the alternative, the City of Belleville's policy does not justify mandating vaccination for the entire workforce, or even in Belleville and the policy has never been enforced.

65 Regarding the payment for COVID-19 testing, the company has not set out what it would expect employees to pay, because the provincial government currently provides employers such as Bruce Power with free rapid antigen test kits. Given that the testing is being imposed as part of the Company's statutory duty to provide a safe workplace, the cost of the test, both time and expense, should be borne by the Company. The PWU relied upon *Power Workers Union v Ontario Power Generation*, November 12, 2021 (Murray) and *Power Workers Union v Hydro One Inc November 22, 2021*, (Stout) where arbitrators have ruled that the cost of rapid antigen tests ought to be borne by the employers but not for the time spent taking the tests.

Company Submissions

66 Elexicon submits that its policy is reasonable and considered public health recommendations and governmental standards to inform its approach. The emergence of the Omicron variant has made the policy compelling as it changed the risk landscape. The virus is far more transmissible while testing and contact management are no longer generally available. It is more difficult to detect and prevent the spread of the virus such that mandatory vaccination is now required. The number of new cases is extremely large and massively underreported. While the variant is not as severe as Delta, there is an increase in hospitalizations given the broader spread of the disease.

All of this has required the Government of Ontario to reimpose lapsed lockdowns and curbs on retail, restaurants, schools, office workers, gatherings, etc. and these concerns show the policy is reasonable.

67 The provincial mandatory vaccination policy applicable to long term care homes, as well as the broader policies imposed by the federal government, and provincial policies requiring vaccination and testing policies in some higher risk settings (while not making vaccination mandatory but permitting them), show there is nothing presumptively unlawful or unreasonable about such policies in the unionized employment context.

68 Elexicon submits that the policy was introduced to address a pressing health and safety need, as well as address operational considerations needed to provide an essential public service. The policy requires employees to be protected to the fullest extent possible, which became more important with the Omicron variant surge and unprecedented infection and hospitalization rates. The Policy will facilitate an eventual return to the office which is an important consideration for Elexicon operationally. The Policy is balanced in providing exemptions for human rights considerations and it respects employees' privacy rights by protecting information appropriately.

69 Elexicon relies on its statutory duty under section 25(2)(h) of the Occupational Health and Safety Act, R.S.O. 1990, c. O.1, as amended ("OHSA"). There is strong medical evidence that vaccination reduces the risk of infection, which thereby reduces the risk of transmission.

70 The shortage of rapid antigen tests, the limited eligibility for PCR tests, and the inability of Public Health Ontario to continue performing case management have removed important safety measures for Elexicon's workplace. Elexicon is unable to provide two rapid antigen tests any longer for unvaccinated employees or those who have not disclosed their vaccination status but can only now provide one. All this makes it more likely that Elexicon's workforce will become more ill and suffer reductions for significant periods impairing its ability to function effectively and justify the policy.

71 The cost of absences for COVID-19 borne by the company was significant and a fully vaccinated workforce would reduce these losses by minimizing the risk of employees becoming infected and the amount of time employees who are infected must isolate as now an unvaccinated infected person must isolate for five more days than vaccinated employees. This is a *bona fide* management interest with a direct relationship to the ability of the Company to provide its essential service.

72 Elexicon asserts numerous consequences of having an unvaccinated workforce. The first claim is that the measures taken in December and January would not have been necessary had there been a fully vaccinated workforce. Second, it claims that remote work is not preferable to working in the office. It claims there has been a loss in mentorship, employee morale, operational efficiency, and performance effectiveness, as well as improvement opportunities. Elexicon wishes to go back to its ordinary practices as soon as possible. It had intended to implement a gradual phased return to the office for some employees starting January 10, 2022. In mid-December 2021 it delayed this until April 2022. Further Elexicon asserts there have been a few instances in which unvaccinated employees have not been granted access to a customer's site for metering work and the work had to be re-routed to a vaccinated employee.

73 Elexicon asserts its risk of workplace transmission is high as its employees work in close contact with each other for significant periods. While it has made significant efforts to reduce contacts, the nature of on-site work involves mobility across several service territories. Moreover, from time to time, Elexicon requires employees to cross districts and intermingle, e.g., for on-call coverage, or in the event of a need for more resources in one area. This can expose employees to potential infection. It has had to send an entire crew in Clarington home pending test results. Some of the crew members had also worked inside the office and had other exposures to other employees. Many of Elexicon's employees interact with members of the public and enter third party premises. Outside crews complete trouble calls, connection/disconnection issues, and attend at job sites. They are in constant interaction with the public. Notwithstanding the high rate of two-dose vaccination among employees, current data indicates that it does not provide sufficient protection against infection by the Omicron variant. Meanwhile, the Omicron variant is

far more transmissible than other variants. It claims the level of containment is minimized and community spread is rampant. In this context, public health and government officials continue to urge Ontarians to obtain their primary series (first and second dose), as well as a booster dose, to mitigate the risk of infection and transmission.

74 Community spread is rampant and despite the high rate of two-dose vaccination among employees, it does not provide enough protection against infection by the Omicron variant, which is much more transmissible, but a booster dose will provide significantly greater protection. The policy requiring booster doses is, therefore, necessary to reduce absences, the severity of disease and thereby be able to maintain and provided essential services.

75 Elexicon cautions "against an unduly narrow framework which presumes that employees outside certain industries pose a minimal risk to others in the event of their infection". It should not be subject to a policy of greater reasonableness or a higher threshold than industries that serve the sick or the vulnerable. The federal position of requiring vaccination in all federally regulated industries demonstrates that it is entirely reasonable to protect the health and safety of employees who do not work exclusively with vulnerable or high-risk populations. Further, it applies to employees who work in all settings. Moreover, employees at Elexicon may have young children, grandparents, or immuno-compromised family members for whom they act as primary caregivers.

76 Elexicon denies that the policy is a significant intrusion on an employees' right to bodily integrity. It denies that employees are forced to become vaccinated. It relies on the decisions of the Superior and Federal Courts in *Amalgamated Transit Union, Local 113 et al v. Toronto Transit Commission and National Organized Workers Union v. Sinai Health System*, 2021 ONSC 7658 ("TTC") and *Wojdan v. Canada*, 2021 FC 1244, where the courts concluded there was no irreparable harm because the employees were not being forced to vaccinate but only to choose between being vaccinated and having an income and being unvaccinated and not having an income.

77 Elexicon distinguishes the *ESA* case as having been decided in the context of the Delta variant. Further, as compared to the experience with testing at the time of the *ESA* case, PCR testing is not available through public institutions to the general public any longer and Elexicon's experience indicates that rapid testing is not as effective in detecting the variant as PCR tests, which are in short supply and costly to obtain.

78 The lack of prior incidence of work transmissions is not in itself an indicator that mandatory vaccination is unnecessary. It relies on the decision in *Bunge Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (ON LA), (Herman) that "the lack of recent confirmed cases does not render unreasonable what is otherwise a reasonable policy".

79 It submits that employees without a valid exemption for their lack of vaccination pose an unjustifiable risk to their colleagues, who may then contract a virus that may result in death or long-term health complications. It endorses as applicable here Arbitrator Stout's admonition in *Power Workers Union V Hydro One Inc. (O'Reilly)*, November 25, 2021, (Stout), that the employee's right to his/her opinion of testing does not trump the collective right of other employees to a safe workplace. In addition, as a provider of essential services, Elexicon is justified and required to consider the health and safety of its clients and the public in the KVP balancing exercise.

80 Elexicon also relies on *Teamsters Local Union 847 v Maple Leaf Sports and Entertainment*, 2022 CanLII 544 (ON LA) (Jesin) and *Paragon Protection Ltd.*, November 9, 2011 (Von Veh).

81 As for discipline and termination as the consequence of breaching the policy, Elexicon is not rushing to discipline and in any event, any discipline or termination remains subject to arbitral review on its own facts. It endorses the approach to not determining disciplinary matters at this stage as was taken by Arbitrator Herman in *Bunge Hamilton Canada supra*.

82 Elexicon submits it is reasonable for employees to pay for rapid antigen tests subject to availability and up to \$25 for a PCR test should they become available. While the company has the cost of antigen testing paid for currently by the provincial government, it bears significant administrative and logistical costs to implement the

program such as shipping, distribution, and personnel costs. Moreover, a key component of Elexicon's testing protocols is the administration of PCR tests, which is not included in the Program. Elexicon requires that symptomatic employees must complete PCR tests because it has been found that rapid antigen tests do not detect the Omicron variant with the same effectiveness symptomatic individuals. It gives the example of testing on December 29, 2021, three (3) employee rapid tests were positive. However, of those same employees, eleven (11) tested positive using PCR tests. Elexicon has spent \$651,539.65 on COVID-19 PCR tests and nurse hours.

83 Elexicon holds clinics for testing every week. Participation doubled in the last two (2) weeks. Ultimately, the recent level of testing at Elexicon is beyond the capacity to be conducted by one nurse. In the absence of case management by Public Health authorities, Elexicon's small team must do it. Elexicon has determined that it costs approximately \$250 per PCR test when factoring in the costs of the test, administration, logistics, etc. In recent weeks, the total costs of Elexicon's testing program have ranged between \$15,000 to \$30,000 per week. It submits it should not be required to pay the costs associated with an employee's personal choice that needlessly jeopardizes the health and safety of colleagues, clients, and members of the public. The need to pay for the cost of testing is part of the responsibility of an employee under the internal responsibility system of OHSA.

ANALYSIS AND CONCLUSIONS

84 Since the availability of vaccines for COVID-19 and the introduction of compulsory vaccination policies by employers, some policies have been challenged by some unions as unreasonable. The first arbitration case in Ontario to be decided in this COVID-19 context was *ESA* where the mandatory vaccination policy was found to be unreasonable. In setting out the basic framework for analysis Arbitrator Stout explained that the reasonableness of a policy was a highly contextual matter involving the balancing of interests that will vary from workplace to workplace, and will be fluid, potentially changing as circumstances change. He said as follows:

68. Context is extremely important when assessing the reasonableness of any workplace rule or policy that may infringe upon an individual employee's rights. The authorities reveal a consensus that in certain situations, where the risk to health and safety is greater, an employer may encroach upon individual employee rights with a carefully tailored rule or policy, see *Carewest v. AUPE* (2001), 104 L.A.C. (4th) 240 (Smith). (In *Carewest, supra*, the arbitrator permitted a carefully crafted vaccination policy that only applied to certain employees in certain situations where the risks were extremely high.
69. In cases where the rule or policy involves health and safety, one must consider the obligations that arise under the Occupational Health and Safety Act, including an employer's obligation to "take every precaution reasonable in the circumstances for the protection of the worker," see s. 25(2)(h). This statutory obligation fits neatly within the KVP test, which is grounded in a contextual analysis and a balancing of interests approach to determine the reasonableness of any rule or policy.
70. While an individual employee's right to privacy and bodily integrity is fundamental, so too is the right of all employees to have a safe and healthy workplace. The interests in this case raise extremely important public policy issues during a very unique and difficult time in our history. The context is very unusual, but the existing law provides guidance for the analysis.
71. In workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinated), then mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations.
72. However, in other workplace settings where employees can work remotely and there is no specific problem or significant risk related to an outbreak, infections, or significant interference with the employer's operations, then a reasonable less intrusive alternative, such as the VVD/T Policy employed prior to October 5, 2021, may be adequate to address the risks.
73. It must also be noted that the circumstances at play may not always be static. The one thing we have all learned about this pandemic is that the situation is fluid and continuing to evolve. What may have

been unreasonable at one point in time is no longer unreasonable at a later point in time and vice versa.

85 Arbitrator Stout went on to find that the ESA had done a "tremendous job" protecting employees and did not have an outbreak. Also, the vast majority of employees were vaccinated, (only 14 of 415 or 3%, as opposed to 12% here, did not disclose their vaccination status). There was also a prior Voluntary Vaccination/Testing Policy in place which allowed employees who did not voluntarily disclose their vaccination status to be tested regularly, and there was not a significant change in circumstances since the adoption of that policy. He found that testing is a reasonable tool to utilize in protecting a workplace and the Employer had not shown any difficulties in protecting their workplace utilizing a combined vaccination and testing regime. The arbitrator found that the evidence indicated that the Employer could keep their employees and clients safe and their business productive throughout the pandemic by having most employees work remotely. There was no evidence that work has been significantly impeded or lost as a result of some employees not being vaccinated. He found that the Employer had jumped to a hasty conclusion without turning its mind to the validity of the concerns and analyzing if the concerns will manifest themselves in serious workplace problems that cannot be addressed by a VVD/T Policy that combines vaccination with a testing alternative.

86 The hearing in that decision and the initial award itself issued in November 2021, if not the final award which issued in early January 2022, preceded the emergence and the rapid spread of Omicron in the province. The parties and the Arbitrator did not consider the new circumstances created by the Omicron virus, and instead, the case was impacted by the specific facts there including the fact that testing at that time was found to constitute a reasonable alternative, that there had been no outbreaks, and there was no explanation as to why a working voluntarily vaccination and compulsory testing mandate could no longer continue to work. In my view, the case is not as relevant on the facts as it might otherwise have been had the new circumstances surrounding the dramatic arrival and fast spread of Omicron not occurred since that decision was issued.

87 In my view, there is also some difference between the primary functions of the two Employers in these cases. While the work of the Electrical Safety Authority in regulating and promoting electrical safety in Ontario is undoubtedly very important, it is nonetheless not, like Elexicon, responsible for the transmission of electricity to customers and the critical maintenance of the supply of electricity. Modern society cannot function without electricity and Elexicon's operation must be considered to be "critical infrastructure" as referred to in the Public Health Ontario Evidence Brief quoted above from January 6, 2022. The Employer must be diligent and alert so that it can provide critical services as and when they are needed by its consumers and it must ensure, therefore, that it has a workforce that is adequate to supply those needs.

88 I agree with Arbitrator Stout that the reasonableness of this policy involves a balancing of interests and I accept his framework for analysis over that in *St. Peters Health System*, 106 L.A.C.(4th), 170 (Charney) for the reasons given by him. I also agree that the interests of the employees in privacy and to preserve their bodily integrity is a legitimate and important interest.

89 Elexicon challenges the characterization of the Union that the policy requires the employees to "subject themselves to COVID-19 vaccinations", and to force employees to get vaccinated. It relies on the *TTC* decision of the Ontario Superior Court of Justice denying injunctive relief where the Court found there was no irreparable harm because:

[...] 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.

90 In *Wojdan v. Canada (Attorney General) supra*, the Federal Court relied on those Ontario Superior Court decisions stating that a vaccine mandate "does not cause irreparable harm because it does not force vaccination".

Arbitrator Burkett accepted the TTC case analysis in declining to issue interim relief in *Canada Post Corporation*, November 30, 2021 (Burkett).

91 I respectfully do not agree with this analysis and do not consider that it is binding on me. None of those decisions were determining the reasonableness of a unilateral policy under a collective agreement. Arbitrator Stout pointed out in *ESA* that the Supreme Court of Canada has recognized the critical importance of employment as fundamental to one's identity and livelihood:

The Supreme Court of Canada has on a number of occasions recognized that work is fundamental to one's identity, providing a means of financial support and a contributory role in society, see *Machtiger v. HOJ Industries Ltd.* [1992] 1 SCR 986. The Supreme Court of Canada went on to indicate that not only is work fundamental to an individual's identity, but the manner in which employment can be terminated is equally important.

92 Whatever may constitute irreparable harm in an application for injunctive or interim relief, in the context of an assessment of the reasonableness of a mandatory vaccination policy, it would be inaccurate and disrespectful to the legitimate interests of employees in maintaining their income and their employment in my view, to ignore the genuinely coercive nature of a policy which threatens the loss of income and possible termination of employment if it is not complied with. Employees everywhere rely on their employment whatever their skill levels, but it must also be recognized that in an industry like electrical power transmission there are skilled trades and other occupations and professions where the employees may not easily find another employer in the same geographic area to work for. Even if they could do so, they would have to give up their seniority and other benefits of long service which they earned in the course of their employment. The coercive impact of the threat of loss of income, benefits, and employment and the impact on stability and careers is very real. In my view, of course employees have a choice, but just saying that the choices are hard is insufficient when it comes to determining the reasonableness of the policy. In my view, arbitrators should take into account in the balancing exercise the deep dilemma of employees who strongly do not wish to be vaccinated whatever their motives, and who may have few or no other realistic choices to work elsewhere or who will have to give up a significant amount of earned benefits and stability if they choose not to get vaccinated. Just because there are hard choices, as opposed to no choice at all, does not make the policy not coercive, or render it more reasonable. Of course, the policy may be reasonable notwithstanding the potential consequences to the individual employees, but in my view, there is little legitimacy in a decision that finds the policy to be reasonable while denying the lived reality of employees faced with the coercive impact of these policies.

93 On the other hand, just as the Employer's interests may be deserving of less weight when they are not sufficiently significant as was found in *ESA*, so too I consider that in the balancing of interests it matters what the basis is for the objection of the employees. In my view, neither the interests of the employees nor the employer are absolute, and if the employer interests in a healthy and safe workplace for all the employees, the maintenance of critical infrastructure and the efficiency of operations can be seen to be less important in some cases like *ESA* because there was said to be little evidence to justify it, or there are less intrusive methods to achieve the same objectives, so too the employee interests can be of less significance and weight if there is a lack of objective reasonableness behind the objection. If the vaccine, for example, had dangerous potential side effects of considerable significance to the health and safety of the employees or was not sufficiently tested, that could weigh heavily in the balancing. In this case, the Union had very little to say about the reasonableness of the employee objection to or fear of vaccination beyond the importance of preserving the right to bodily integrity and privacy *per se* (it did mention the risks, effects, and discomfort of possible side effects). Besides criticizing the introduction of the mandatory policy as radical and invasive, the reasonableness of the basis for employees objecting to the vaccine was not seriously put forward by the Union as a justification to weigh in the balance, except to the small extent that it referred to the unpleasant potential side effects and very small risks of serious illness or death. Indeed, the Union made it abundantly clear throughout the proceeding that it considers vaccination to be eminently reasonable and that it fully supported and encouraged it on a voluntary basis. In my view, the lack of a compelling objective basis for declining to be vaccinated makes the employee interest less significant in weighing the balance of interests. As Arbitrator Stout said, these vaccines have been found to be safe. There is, as he found, no

significant safety risk. Moreover, the evidence of their safety has been proven by their widespread adoption and acceptance. According to Health Canada, approximately 70,000,000 doses of the Pfizer and Moderna vaccines have been administered in Canada. Approximately 517,000,000 doses have been administered in the United States according to www.statista.com and over 10 billion vaccines of all types have been administered worldwide according to Bloomberg.com to prevent the spread and the severity of COVID-19. Objectively, there are overwhelmingly reasonable grounds as to why the vast majority of Canadians have determined to become vaccinated voluntarily, many doing so eagerly, to maximize their own safety and the safety of those around them including those with whom they work.

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

95 Further, I do not agree with the Union that the allegedly undemocratic nature of the decision is truly relevant to the issue of reasonableness. However, Arbitrator Stout in ESA seems to have accepted it was when he said:

However, it is for the democratically elected governments to address general public health issues, not employers. At this point there is no government mandate that all ESA employees must be vaccinated

96 In my view, the role of government is a red herring issue within a genuine debate about reasonableness. The law has been clear for decades that an employer can make reasonable rules in the exercise of its management rights subject to the other requirements as set out in the *KVP* case. Leaving aside for the moment that the issue is a red herring, in my view, there is nothing fundamentally undemocratic about an employer making health and safety rules for its workplace, especially in the context of a dangerous pandemic. OHS places a positive duty on an employer under section 25(2)(h) to "take every precaution reasonable in the circumstances for the protection of a worker". It is not a defence open to an employer for that failure to take action to protect employees in the workplace from the spread of the virus that while some measures such as testing are necessary and permissible, other equally or more important measures that impinge upon an employee's right to bodily integrity and privacy, such as vaccination, cannot be contemplated under the legislation because that is within the sole purview of the Government of Ontario. It is no answer to the claim that a workplace is unsafe that this is a public health matter within the purview of government alone. Indeed, in response to the Union argument that these are decisions that must be left to the Government in order to be democratic, it is my view that in Ontario, aside from long term care, the Government has explicitly left it to individual employers to determine in the context of their individual workplaces whether mandatory vaccination should be implemented. The Government has not in any way prohibited or discouraged that process and knows it is taking place. The policy of the Ontario Government to leave the matter largely to individual employers to determine in the circumstances of their individual workplaces is consistent with democratic principles and the Government of Ontario is accountable to the electorate for that policy. The Government of Canada took a different view which is also democratic. There is no inherent limitation (leaving aside an explicit provision to the contrary in a collective agreement) on an employer in a unionized workplace in Ontario subject to provincial jurisdiction introducing a rule that mandatory vaccination is required in its workplace, except for the limitation that the rule must be reasonable and comply with the *KVP* criteria.

97 I agree with Arbitrator Stout that the reasonableness test in *KVP* "fits neatly" with the requirements for reasonable measures to be taken under section 25(2)(h) of OHS. In *Hazel Farmer*, 2020 CanLII 104942 (ON LRB), I described the substance of the obligation under section 25(2) (h) as distilled from the decisions of the Courts and the Ontario Labour Relations Board in the following terms:

36. I have distilled the scope of section 25(2)(h) from the jurisprudence of the Courts and the Board to be that the Act is public welfare legislation and is to be broadly interpreted in accordance with its purposes. Section 25(2)(h), in particular, is sweeping in its scope and potentially goes beyond and in

addition to any specific regulation because it is not possible to anticipate every circumstance in the wide variety of workplaces through Ontario. The purpose of the section is not to eliminate hazards but to take reasonable precautions to protect workers from them. A generous approach to interpretation of the Act in line with its purposes does not, however, justify a limitless interpretation of the provision. There cannot be a complete absence of risk and danger and the Act is not aimed at achieving an impossible standard of a risk-free workplace. Ultimately, what the Act requires is a balance between the risk of harm, and the ability to carry out necessary public and private functions. It is not every precaution that must be taken but every reasonable one. This involves balancing what is to be gained in light of all the factors and circumstances including potentially the cost, the effect on efficiency, the severity and magnitude of the risk and the likelihood or frequency of its occurrence. And while it is not possible for all risk to be eliminated, it does not follow that the obligation of employers is to the minimum required in a regulation as there may be specific safety measures particular to a specific workplace that are required in addition to specific regulations: *R. v. Timminco Ltd./Timminco Ltée*, 2001 CanLII 3494 (ON CA), 54 O.R. (3d) 21; *Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc.*, 2011 ONCA 645 (CanLII), 107 O.R. (3d) 763; *Blue Mountain Resorts Ltd. v. Ontario (Ministry of Labour)*, 2013 ONCA 75 (CanLII), 114 O.R. (3d) 321; *Ontario (Labour) v. Quinton Steel (Wellington) Limited*, 2017 ONCA 1006 (CanLII); *Ontario Public Service Employees' Union v. Ontario (Ministry of Transportation)*, 2006 CanLII 10956 (ON LRB); *Glencore Canada Corporation*, 2015 CanLII 85298 (ON LRB); *Sgt. Mark Radke v. Ontario Provincial Police*, 2017 CanLII 56938 (ON LRB).

37. In the specific context of the COVID-19 pandemic, section 25(2) (h) gives effect to the precautionary principle that there is an obligation to take all reasonable measures in the circumstances to protect the health and safety of workers. In the context of an epidemic caused by a new and previously unknown virus, the precautionary principle was given voice to by Mr. Justice Campbell following the SARS crisis in Ontario and was as described by Justice Morgan in *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (CanLII) as follows:

An important recommendation of the Commission of Inquiry chaired by Justice Archie Campbell in the wake of the SARS outbreak of 2003 -- an outbreak of a virus related to COVID-19 - is that the precautionary principle is to be put into action in order to prevent unnecessary illness and death. As explained by Justice Campbell, this principle applies where health and safety are threatened even if it cannot be established with scientific certainty that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions against the as yet unknown.

See also: *Inovata Foods Corp. supra*; *Ste Anne's Country Inn and Spa, supra*.

98 In my view, this Employer is justified in introducing the compulsory vaccination rule because it has a duty to take every reasonable precaution in the circumstances under Section 25(2) (h) of OHSA. The Union strongly resists this conclusion and argues that there is no scientific evidence that vaccination, in addition to masks, physical distancing, and other measures will make any difference to health and safety in the workplace. It says there is nothing before me that shows that if masking protocols, social distancing, and working from home together with other appropriate hygiene practices and protocols are properly enforced, the unvaccinated present any greater risk to others than the vaccinated. It says the vaccinated clearly can get and transmit the virus as well and likely asymptomatic people transmit it more than they did previously.

99 While there may be no scientific study showing that masking, distancing, and other measures are not as effective as vaccination, or no study that shows vaccination adds significantly to the protection those measures alone bring, in my view the Union's argument does not take account of the fact that it has been shown that vaccinated individuals can reduce their risk of acquiring COVID-19 infection by 60% compared to those who are unvaccinated. The protection is greater for people with two doses in respect of the other variants, some of which may still circulate, and the effectiveness of the vaccine with more than two doses to reduce severe disease is even greater.

100 The virus mostly transmits indoors, and this virus is much more transmissible than anything that has come

before. The Union cannot offer any scientific evidence that its theory that testing, masks, and distancing alone without vaccination will work as well indoors against the most transmissible of viruses thus far, as compared to vaccination together with testing, masking, and physical distancing. All the experience thus far with testing, masks, and distancing indoors has been with the Delta and earlier variants and it is simply unknown whether masks and physical distancing will be successful in preventing the transmission of what is known to be a far more transmissible virus than Delta or any of the other viruses thus far. On the other hand, there is evidence that vaccinated people are less likely than unvaccinated people to become infected with Omicron; it is reasonable to project, therefore, that unvaccinated people are more likely to spread the virus because they are more likely to get the virus. The more likely unvaccinated employees are to become infected with Covid-19, as opposed to a vaccinated employee with two or more doses, it is only logical that the more likely it is they will transmit the virus because they have it. Of course, vaccinated employees with breakthrough infections will also transmit the virus, but nonetheless lower vaccination rates logically lead to higher transmission because more people will be at risk of infection than otherwise. In those circumstances to not require vaccination is just to risk more disease, hospitalization, and severe outcomes, without sufficiently cogent reasons to engage in that risk. The interests of employees in their bodily integrity and privacy in these particular circumstances do not outweigh the concern for the health and safety of all the employees, or the need to protect the Employer's essential operations.

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

102 Of course, that conservative approach to preserving employee health and safety cannot be applied unreasonably every time there is doubt about the extent of the danger and the risks in order to justify any preventative measure. In this case, however, the operation of that principle together with the facts that we do know weighs in favour of vaccination. We know that this is an extremely transmissible virus, that it is rampant in the community, and we know that it has potentially serious health consequences to those infected. We do not know whether masking, distancing, and testing together with other public health measures are sufficient to protect workers in indoor spaces without vaccination. We do know that the unvaccinated are at greater risk of getting the virus and therefore of transmitting the virus. We know that the vaccinated also spread the disease, but that their risk of acquiring the disease is reduced. We know the vaccines are safe. Using the precautionary principle in these circumstances given the facts leads to the conclusion that overall concern for the health and safety of all the employees must prevail over the interests of a small minority of employees who wish to remain unvaccinated.

103 Section 25(2) (h) of OHSAA explicitly recognizes that there is an interest all the employees in the workplace have in the safety of the workplace, although that interest is obvious even without the statutory duty. Any consideration of the reasonableness of the mandatory vaccination rule must take into account as a fundamental consideration the duty owed by the Employer to all the employees, vaccinated and unvaccinated, to take every precaution reasonable in the circumstances to keep everyone safe. The Employer can legitimately draw on that interest of the employees in a safe workplace in advancing that the rule is reasonable. Of course, it is the Union which is the exclusive bargaining agent for all the employees in the workplace and it is its responsibility to weigh the interests of the collective of employees in determining its position and to speak, as it has, for the collective -- certainly, a difficult task in the midst of a pandemic. But determining health and safety in the workplace is not a matter of majority vote. Even younger and healthy workers may themselves be at risk, and in any event, all employees are entitled to be concerned about the impact of their bringing the virus home from the workplace and possibly affecting their family including potentially vulnerable populations in their families, such as the immunocompromised, elderly individuals, those with medical comorbidities or those who cannot be vaccinated because of medical exclusions or not vaccinated yet due to age. This is why most Ontarians have chosen to be vaccinated to protect themselves and their families, and why it is not in my view unreasonable for them to wish their fellow workers to also be vaccinated to reduce the risks. Unvaccinated employees have a right to privacy and bodily integrity, but those rights are not absolute, and they also share with their colleagues an obligation to keep the workplace safe and not to risk harming their colleagues. Requiring the booster dose to decrease the incidence of

severe disease is patently reasonable for those who have already had two shots, and getting three doses is reasonable for those who haven't had any.

104 Further, I do not accept the Union's characterization that the threat to Elexicon's business interests if one of its unvaccinated employees winds up in hospital as a result of the transmission of this virus is remote and more remote than at any time in the pandemic. The data shows that between November 2021- the date of the issuance of the ESA award - and January 17, 2022, hospitalizations across Canada increased many fold. Individuals with at least two doses of vaccine are significantly less likely to contract COVID-19, be hospitalized for COVID-19, or be admitted to the ICU, compared to those who are unvaccinated. In Ontario, 204 of 441 patients in ICUs were unvaccinated as of January 28, a disproportionately high number. That number is not a single day event but represents a consistent pattern. Public Health Ontario has said the risk of severe disease, particularly amongst unvaccinated individuals, is moderate with a moderate degree of uncertainty. The fact that the risk is characterized as moderate and not even as low is significant. In its totality, these are not risks that are remote, or for that matter risks that need to be taken given the availability of safe vaccinations to attempt to mitigate the risk. In my view, Elexicon's policy is reasonable in this context.

105 Another important factor that justifies a mandatory vaccination rule as reasonable in these particular circumstances is the fact that Elexicon is providing a critical essential service and it must take steps to ensure it can provide that service during a pandemic when there are real threats to the health and availability of its workforce. The fact that there have been no operational issues before the introduction of the policy is of little significance since the circumstances surrounding the spread of the virus changed so dramatically with the arrival of Omicron. The prior experience with and before Delta has very little significance now and one does not need to experience adverse outcomes before one knows there is a reasonable risk of adverse outcomes occurring. Previously 88% of the workforce were vaccinated with two doses and that core of employees were well protected against infection by the Delta and other earlier variants. That is not the case to the same degree as with Omicron where breakthrough infections of the already vaccinated are more likely and the rates of transmission overall in the community are very high. Elexicon has already seen a much greater incidence of Omicron in a few weeks than it has for almost 22 months previously. Elexicon already has experienced with Omicron a situation where an entire crew had to be removed from duty because of the virus spreading to all of them and such outbreaks among large numbers of workers are possible in the near term. It had seven employees in operations and lines unable to work as of the date of its submissions on January 20, 2022. Therefore, requiring already twice vaccinated employees to have the booster or third vaccine is critical to Elexicon ensuring, to the extent it can, that it has sufficient staff to service all its customers. Similarly, it is an important interest to require the unvaccinated employees to have the three shots for that reason as well.

106 I also find that the operational concern of the employer that the absence of vaccination will lead to more and longer absences and paid leave for which it is responsible is valid but only at a theoretical level. Unvaccinated employees are required to remain isolated and off work for 10 days and not 5 and it does appear reasonable that the employer should not bear these additional costs when the employee could have chosen to be vaccinated. However, there are relatively few unvaccinated employees, and this factor might be different if the numbers of unvaccinated were more significant. Here the potential added operational cost alone would not lead me to find the policy was reasonable, However, in my view, a policy where the employer was not responsible for the *additional* five sick days unvaccinated employees have off work after infection as opposed to vaccinated employees would not be unreasonable (although it might violate other provisions of a collective agreement). If accommodations are made for unvaccinated employees in some instances in the future, this concern that the Employer should not be liable for the additional five days if the employee becomes infected might be taken into account in that context.

107 The Union submits that the situation at Elexicon is not different from the situation in the *ESA* case. I do not agree. The entire context of the pandemic has altered rapidly. The virus became dramatically and massively more transmissible than it was previously. What occurred at Elexicon mirrored what was happening elsewhere. In twenty-two months Elexicon had 8 confirmed cases of the previous strains of the virus. In less than a month of Omicron, it had 27 cases. The speed and scale of the increase were a "game changer". Moreover, here the entire overall

context changed. The spread of the disease not only became so rampant that cases could no longer even be counted but hospitalizations and deaths also climbed precipitously, the province shut down again, 3.7 times more employees at Elexicon became ill in less than a month than became ill over the prior 22 months. The threat to the availability and viability of Elexicon's workforce was neither speculative nor overstated. All of Elexicon's employees, vaccinated and non-vaccinated, become more exposed to the disease. Albeit the disease is likely not as severe as Delta, it nonetheless presents a significant operational risk to the availability of Elexicon's workforce and therefore its ability to provide essential services. This justifies a different approach than was taken in the *ESA* award.

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

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

110 Further, I do not agree with the Union that the fact that most other electrical power utilities have not introduced mandatory vaccination policies demonstrates that Elexicon's policy is unreasonable or unnecessary. Each of these institutions has its own operations, experience, culture and relationship with its employees and the Union, and different governance structures. The public health questions and the balancing of interests are difficult ones and different employers with different resources and varied interests will weigh the balance differently. I do not consider that adding up the number of electrical power utilities that have opted for mandatory vaccination as opposed to those that have not assists me in my analysis or my assessment of the reasonableness of the balance in this particular case.

111 Elexicon partially justified the policy of mandatory vaccination because in its absence it has had to take a large number of other steps to contain Omicron such as the continuation of the work at home policy, the one person to a vehicle policy, and the other new measures it has taken to reduce the spread of the virus. I do not accept that argument. In my view, these measures were all taken to combat the spread of Omicron and are likely necessary in any event given the number of breakthrough infections. In my view, the company cannot leverage these measures that it took to combat Omicron and seek to use them to justify vaccination. The extension of the working at home policy for those employees who can do so exclusively is necessary because of the threat of the spread of Omicron from all employees and is not in place just because some employees are unvaccinated. The same is true for the one person to a vehicle policy. The majority of employees who are vaccinated are subject to breakthrough infections and could infect each other if there were more than one person in a vehicle.

112 The Employer also has other operational concerns which are not compelling in support of the reasonableness of the policy, at least at this time. For example, at this time, the Employer's desire to return to the workplace and cease working remotely some or all of the time is mostly irrelevant in the face of many office employees not being required to work in the office until April in any event. That Employer interest will have to be considered if and when it becomes relevant and necessary to do so. The cost of added trucks for the one person to a vehicle policy is also

not material because the policy would be required even if everyone was vaccinated because of the risk of the spread of the infection by vaccinated employees. I do not foreclose the possibility that these concerns might be of greater significance at a later time.

113 Finally, the Union has suggested that upholding the policy now is potentially relatively useless as there is some evidence the spread of Omicron will decline as rapidly as it emerged, that the spread of Omicron has reached a plateau and is declining, and that given the length of time it will take to become vaccinated, the spread of the virus will likely be over before the vaccinations can take effect. At the same time, there are reports of a successor to Omicron beginning to circulate and general confusion over how and when the pandemic will end and how quickly Omicron may dissipate as a threat or spike upward again. I cannot predict the future, but I fully agree with Arbitrator Stout that the situation is extremely dynamic and what is reasonable is the circumstances can easily change such that what is reasonable today may be unreasonable in the future, and the converse also applies. Such is the reality of the pandemic and arbitrators can only deal with the facts before them and must be wary of prognosticating into the future without the expertise to do so.

Caveats on the Application of the Policy

114 I agree with the Union that if the objectives of a policy can be accomplished through other lesser intrusive means reasonably, those should be considered, and vaccination should not be imposed unnecessarily on those who do not wish it if there are other reasonable options. I have, however, expressed the view that as things stand, compulsory testing is not at the moment a viable alternative to compulsory vaccination, although it may be required in addition. I have determined, however, that the compulsory vaccination policy will not apply in the following aspects:

- (i) The policy is not reasonable as it applies to three unvaccinated customer service representatives working from home.

These employees have been working remotely since March 2020 and will continue to do so until at least April 2022. In my view it is unreasonable to require employees who can perform all of their duties from home to become vaccinated when they do not need, at the moment, to return to the office. Whether or not the Employer will require the employees to work in the office at some time in the future, or whether it will require them at that time to be vaccinated is unknown and uncertain. The situation is dynamic, and it should not be assumed the situation will remain as it is currently. The issue of the applicability of the policy to these individuals can be renewed subsequently if necessary.

- (ii) The policy should not apply to employees who work entirely outside or who can be reasonably accommodated to work entirely outside. Working outside does not engage the same risks of transmission of the virus that apply to employees working indoors. This caveat essentially applies to linespersons but not the forepersons of linespeople in the bargaining unit who, as I understand it, must work in an office as well as outdoors. I understand that linespersons currently are required to be in garages at the beginning and end of shifts, but I remit the matter to the parties to discuss whether there can be accommodations of that aspect of the unvaccinated linespersons responsibilities. There are a number of ways that might be addressed, and the parties should explore them such that the unvaccinated linespeople do not have to enter Elexicon's indoor premises including the Belleville garage. If the parties cannot resolve this matter, I will remain seized to do so.

115 The parties were unclear about the number and nature of possible entries linespeople will have to make inside premises such as hospitals or long term care homes, (or other premises) where all who enter must be vaccinated, and whether accommodations can be made in this regard for the unvaccinated linespersons, (and others) if they have to enter these spaces as part of their regular responsibilities. For clarity, in my view, the Employer must be able to service all of its customers in both normal and emergent situations, and in my view, the company's anticipation that many customers will require that only unvaccinated employees enter their premises is likely correct. In saying this, I do not intend to foreclose that there may still be reasonable accommodations made.

116 For clarity, in my view, employees who work inside, even some of the time, are required to become vaccinated and subject to the policy. In the current circumstances, with a highly transmissible virus and where vaccinated employees are less likely to be infected than if they are unvaccinated, the policy must apply to them. This includes the current recommendation for a third dose or booster which also applies to the employees who are only vaccinated with two doses.

117 I will also remain seized if necessary to consider the circumstances of the P&C classification. The parties did not explain the circumstance adequately for me to determine the matter.

Caveats on discipline and unpaid leave

118 The policy states employees not complying with the requirement to be vaccinated will be restricted from entering Elexicon property and worksites and will be placed on an unpaid leave of absence. Depending on the circumstances, the policy states an employee may also be subject to disciplinary action up to and including termination of employment. Any such discipline will remain subject to arbitral review. The Employer made clear it was not rushing to discipline anyone. Further, the Union argued strongly that accommodations and alternatives had to be looked at for individual employees for the policy to be reasonable in its application to them. I have found above examples of how the policy would be unreasonable if it applied in certain circumstances such as to employees who have been working exclusively from home (at this time) or persons who worked exclusively outside. There may be other circumstances where reasonable accommodations can be made prior to persons being disciplined. The Union has indicated that it was more than willing to work with the Employer on that basis and I am sure the parties will conduct themselves reasonably. The arbitral process remains in place where the parties cannot agree.

119 In respect of who should bear the cost of testing including the cost of the test itself but also whether the time to perform the test should be paid for, both Arbitrator Murray and Arbitrator Stout provided that the costs of the tests required by the Employer should be borne by the Employer, but employees should be required to have the rapid antigen testing done prior to coming to work and that time should not be compensable.

120 Those situations differed from the circumstances here. In neither of those cases was there a mandatory vaccination policy in issue and therefore the cost of testing was going to be an ongoing issue for employees who chose to remain unvaccinated. In this case, where there is a mandatory vaccination policy which I have upheld, the employees who now comply will not need to pay the cost of rapid testing. If they do not comply and are placed on unpaid leave or disciplined, they will not be working, and a rapid antigen test will not be required from them presumably. Or, if an accommodation between the parties is worked out for particular employees where some retain unvaccinated status and need to be tested, the cost of testing and who would bear it would fairly be part of the discussions between the parties. Accordingly, I have decided that a ruling by me is likely irrelevant at this time but, if necessary, the parties can ask me to deal with the issue.

121 I remain seized to deal with all matters arising out of this award or that were put before me but not dealt with herein.

DATED at Toronto this 4th day of February, 2022.

C. Michael Mitchell