

# **Toronto District School Board v. Canadian Union of Public Employees, Local 4400 (PR734 COVID-19 Vaccine Procedure Grievance)**

Ontario Labour Arbitration Awards

Ontario

Labour Arbitration

Panel: William Kaplan (Sole Arbitrator)

Heard: March 8 and 10, 2022 by videoconference.

Award: March 22, 2022.

**[2022] O.L.A.A. No. 82**

IN THE MATTER OF an Arbitration Between The Toronto District School Board, and CUPE, Local 4400 (Re: PR734 COVID-19 Vaccine Procedure)

(76 paras.)

## **Appearances**

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**For the Employer:** Stephen Shamie, Sean Sells, Jordynne Hislop, Hicks Morley, Barristers and Solicitors.

**For the Union:** Tim Gleason, Rebecca Glass, Dewart Gleason, Barristers and Solicitors.

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## **AWARD**

### **Background**

**1** The Toronto District School Board (the TDSB) is one of the largest and most diverse school boards in Canada. It serves approximately 247,000 elementary and secondary students along with more than 130,000 life-long learners in its Adult and Continuing Education programs at almost 600 schools. It is also one of Toronto's largest employers with more than 16,000 permanent teachers, some 6000 occasional teachers, and almost 15,000 employees represented by CUPE, Local 4400 working in a wide range of classifications across the system (the union).

**2** As is well known, on March 11, 2020, the World Health Organization (WHO) declared that the Novel Coronavirus -- COVID-19 -- outbreak was a pandemic. The next day, the Minister of Education issued an order requiring that every school in the province be closed on March 14th (and they remained closed for the remainder of the academic year). The province declared its first state of emergency on March 17, 2020 (the second was on January 12, 2021, and the third was April 7, 2021). Prophylactic measures followed to contain the spread of COVID-19 across Canadian society. The measures at the TDSB are outlined in an agreed statement of facts.

**3** Schools reopened in September 2020 and mask guidelines were introduced (and soon made mandatory). At the TDSB, 500 air filters were also installed at the highest risk schools and other measures implemented such as physical distancing and daily screening. Nevertheless, in the weeks and months that followed, schools closed and opened and closed and opened again in response to outbreaks and the emergence of new variants.

**4** Indeed, by December 2020, COVID-19 cases were increasing at an alarming rate. The province instituted a lockdown. All elementary schools in Southern Ontario -- including at the TDSB -- were closed until January 11,

2021, and Secondary Schools, also in Southern Ontario -- again including at the TDSB -- closed until January 25th. The second provincial state of emergency was declared on January 12th and accompanying it was an order that in-person instruction in Toronto not begin until February 10th, later extended to the 16th. Eighteen TDSB schools were closed in March and April 2021 because of COVID-19 outbreaks, and the third state of emergency declared on April 7th with schools across the province shuttered. There was no return to in-person learning for the remainder of the academic year.

5 In the meantime, in early December 2020, Health Canada approved two vaccines for use in Canada. On April 12, 2021, education workers supporting students with special needs, along with those who lived and worked in neighbourhoods declared COVID-19 "hot spots," became eligible for priority vaccination. A triaged vaccine roll-out followed in the spring and summer of 2021 with increasing numbers of Canadians becoming eligible to receive the vaccine. In May 2021, individuals aged 12-17 became eligible for vaccination (students aged 5-11 became eligible at the end of October but there is still no vaccine for students under the age of 5). In mid-August 2021, the provincial government announced a vaccination status disclosure (VSD) requirement for all employees working at publicly funded school boards. The Ministry of Education issued an implementation guide several days later. Around this time, the City of Toronto announced a mandatory COVID-19 vaccination policy -- it required all city employees to receive both doses of an approved vaccine. Toronto's medical officer of health recommended that local employers do likewise. Soon enough -- on August 25, 2021 -- and with the strong and public encouragement of the Chief Medical Officer and Toronto's Medical Officer of Health, TDSB trustees voted unanimously to begin development of a mandatory vaccination procedure for TDSB employees (and this was clearly done in anticipation of a return to in-person learning scheduled to begin on September 8, 2021). Consultation with affected employee groups -- including the union -- was part and parcel of this process. The VSD was implemented first and the TDSB's policy -- the subject matter of this proceeding -- followed on September 14, 2021: PR734 (the Policy).

6 The provisions of the Policy relevant to this proceeding required all employees with direct contact with staff or students at a TDSB workplace be fully vaccinated against COVID-19. That meant two doses of an approved vaccine (fully vaccinated). Employees were required to provide evidence of this by November 1, 2021 or establish that they had a valid medical or *Human Rights Code* (the *Code*) exemption. Students and their families -- as discussed below -- were not subject to the Policy. Employees who did not disclose their vaccination status by the prescribed deadline (and it was extended to provide further compliance opportunities) and employees who did not become fully vaccinated within prescribed timelines were to be placed on non-disciplinary leaves of absence without pay.

7 In October 2021, CUPE wrote the TDSB's Director of Education requesting reconsideration of the mandatory vaccination requirement, suggesting instead that its members be accommodated through frequent testing and other measures. The TDSB declined the request noting: "Data shows that being fully vaccinated significantly reduces the risks of the most serious outcomes of COVID-19 and, as children under 12 -- the large majority of our students -- are ineligible to be vaccinated at this time, we must work together to protect them and each other."

8 In November 2021, CUPE again asked the TDSB Director of Education to reconsider the Policy, pointing out the hardship unpaid leaves of absence would cause to its members and observing as well that compulsory vaccination was unnecessary: The Minister of Education and Ontario's Chief Medical Officer had not called for mandatory vaccination, and other school boards had not implemented policies requiring it. The TDSB declined the request: it did, however, grant temporary exemptions to approximately three hundred CUPE members because of staffing requirements.

9 An assessment process was established -- the Decision Matrix -- to determine, among other things, if the staff member could be readily replaced, whether alternatives to employing that unvaccinated staff member were available, whether the particular need for that staff member outweighed the risks to employee and student safety, and whether an unvaccinated employee would be able to work with COVID-19 safety measures in place; in particular, testing. The answers to these questions determined whether an unvaccinated employee was allowed to

attend at work (with testing). In addition, a smaller number of unvaccinated employees remained at work, with testing obligations, pending determination of some medical but almost entirely creed exemption requests under the *Code*.

**10** Contemporaneous with these events was the emergence, in December 2021, of the first cases of the highly transmissible Omicron variant; it quickly became the dominant variant in the province. In-person learning scheduled to begin in January 2022 was delayed. The union continued to insist that the employees placed on non-disciplinary leave of absence without pay -- approximately 200 -- be reinstated forthwith. Numerous grievances were filed then and since.

**11** There is no dispute between the parties -- and they invited me to take notice of this -- that across the country, various restrictions of different degrees have been imposed by all levels of government to control the spread of the virus. Likewise, there is agreement that contracting COVID-19 may cause serious illness requiring intensive care including mechanical ventilation and can result in death. Contracting COVID-19 may also lead to long-term health consequences. In addition, both parties agree that COVID-19 vaccines are safe and effective although vaccines, like all medical treatments, are not without risk including, at one end of the spectrum, relatively minor transitory symptoms and, at the other, more serious side effects such as myocarditis.

**12** Moreover, and as set out in its brief, the union agrees that COVID-19 poses a serious threat to public health and safety, including the safety of its members. Indeed, the union has encouraged its members to become vaccinated. As of January 2022, 96.8% of TDSB staff members were compliant with the Policy. Various steps were implemented to promote vaccination among students.

**13** Mention must also be made of the fact that on March 10, 2022 -- in the evening following the second and final day of these proceedings -- the TDSB Board of Trustees passed a resolution rescinding the Policy effective March 14th. This occurred after the Ministry of Education advised school boards that they were no longer required to have the VSD in place. These proceedings were, in any event, already circumscribed, dealing only with the Policy up to the date of hearing.

**14** Finally, I take notice of the fact while reasons undoubtedly vary, employees who have decided not to become fully vaccinated have strongly and sincerely held views about the vaccine -- strongly and sincerely held views that have informed their decision even in the face of its clear economic consequences.

### **Issues in Dispute**

**15** More than sixty policy, group and individual grievances were filed. By agreement of the parties, two principal issues are to be determined: First, whether mandatory vaccination infringes Section 7 of the *Charter of Rights and Freedoms* (the *Charter*) and, if so, whether it is saved by Section 1 (with any Section 1 review to proceed later if necessary). And second, the overall reasonableness of the Policy including especially vaccine attestation and the requirement that employees be vaccinated to attend at work with the placing of non-compliant/unvaccinated employees on non-disciplinary leave without pay. The individual and group grievances, for example concerning whether an employee's individual circumstances -- medical/creed -- justify exemption from the Policy, may proceed later in a process and before an arbitrator already agreed upon. The testing regime put into place for unvaccinated employees is not at issue.

### **Expert Opinions**

**16** Both the union and the TDSB called expert evidence and both experts were cross-examined about their reports. Dr. Raywat Deonandan is an associate professor at the University of Ottawa and an accomplished epidemiologist. Dr. Mark Loeb holds the Michael DeGroote Chair in Infectious Diseases at McMaster University and also has a clinical practice with a speciality in infectious diseases.

**Dr. Raywat Deonandan**

**17** Key conclusions of Dr. Deonandan's report are as follows:

1. Rapid Antigen Tests (RATs) -- they can be quickly self-administered by lay persons -- detect COVID-19 only where there is a sufficient amount of the virus to render the host infectious. RATs are distinct from Polymerase Chain Reaction Tests (PCRTs) that can detect minute quantities of viral genetic presence. Accordingly, RATs detect infectiousness. PCRTs detect infection.
2. Vaccination is highly encouraged. Vaccination is the preferred method for keeping schools COVID-safe when combined with other mitigation measures including mask-wearing, proper room ventilation, physical distancing and symptom checks.
3. Vaccination is the single best and most effective tool for keeping infection out of schools. Vaccination was highly effective in reducing the chances that a breakthrough infection will be a serious case requiring hospitalization. Serial testing using RATs offers no such protection for unvaccinated individuals.
4. The advent of Omicron in December, 2021, has challenged the effectiveness of being fully vaccinated in preventing transmission. However, a third dose is associated with renewed efficacy. A booster is restorative. Fully vaccinated should be redefined as having received three, not two doses.
5. Testing -- using RATs -- is a powerful tool -- second only to vaccination -- in objectively reducing the risk of introducing infection as was demonstrated through research and modeling: In a given work week, assuming a consistent incubation period of 48 hours and a single test sensitivity of 64%, 3 tests evenly spaced throughout the week should render at minimum a 95% chance of detecting an infected person, should one be present.
6. A three-times a week testing program for unvaccinated TDSB employees would result in seven new infections a week. RATs were, therefore, highly effective and comparable to mandatory vaccination in terms of the number of new infections allowed to enter the schools. Vaccination, however, was the single best and most effective tool for keeping infection out of the schools.
7. RATs appear to have reduced sensitivity in the early days of symptomatic Omicron infection, rendering a higher than expected rate of false negatives. The utility of a RAT as a reassurance test in the Omicron era was "compromised."

**Dr. Mark Loeb**

**18** Key conclusions of Dr. Loeb's report are as follows:

1. Existing evidence establishes that vaccination is the most effective method of limiting transmission of COVID-19.
2. COVID-19 mRNA vaccines are highly effective in preventing infection, hospitalization and severe illness. A highly vaccinated workplace can prevent infection by reducing the potential for transmission.
3. The effectiveness of being fully vaccinated is reduced against Omicron, but significantly increases with a booster dose.
4. Mandatory vaccination policies reduce transmission in two ways: first, by reducing the risk of infection, and thereby reducing the risk of transmission to someone else; and, second, in contrast with RATs, compliance uncertainty is eliminated.

5. RAT accuracy is highly variable when used by asymptomatic individuals. Results can be compromised if swabbing is not done correctly. Compliance can be subverted. In the case of Omicron, there is evidence that individuals may be infectious for several days before positive detection. There is an absence of evidence that RATs reduce transmission in workplaces or other settings. RAT accuracy studies cannot assess whether antigen tests can differentiate between those who are infectious and those who are not because there is no reference standard for infectiousness. Daily RAT is not an effective alternative or substitute to mandatory vaccination in preventing or reducing workplace transmission.
6. Unvaccinated individuals have a significantly higher risk of hospitalization and severe illness as compared to vaccinated individuals
7. Vaccination with mRNA vaccines may reduce transmissibility since viral load in those infected -- and fully vaccinated persons can still be infected -- is lower than in unvaccinated persons.
8. Unvaccinated persons are a potential source of infection and may spread infection to others.
9. COVID-19 vaccines are safe. The mRNA of these vaccines does not integrate into human DNA.
10. Adverse impacts following immunization occur at an incidence of 0.06% or 61.0 per 100,000 doses. Of the reported adverse events, 94.5% were non-serious. The risk of myocarditis, for example, has been estimated at an additional 6.3 cases per million. A small number of people experience severe symptoms requiring hospitalization. Serious illness and death are possible.
11. The benefit of vaccination greatly outweighs any risks.

**19** In summary, both experts agree that full vaccination was the preferred and most effective method of keeping COVID-19 out of schools. Both experts agree that mRNA vaccines are highly effective at preventing infection, hospitalization and severe illness. Both experts agree that full vaccination reduces the risk of infection and transmission. Dr. Deonandan described himself as a vaccination "evangelist." Both experts agree that the effectiveness of being fully vaccinated is reduced -- not eliminated -- against Omicron. Both experts agree that a third shot or booster dose substantially restore the ability of earlier administered vaccines to stave off infection. Both experts agree that RATs do not prevent infection to any degree whatsoever; they test for it. Both experts agree that RATs have reduced ability to detect Omicron in symptomatic and asymptomatic individuals. Both experts agree that the results of RAT self-testing can be compromised if swabbing is not correctly performed. Both experts agree that RAT compliance can be subverted.

**20** Where the two experts disagree is whether RAT reduces transmission in the workplace and whether RATs are an effective substitute or alternative to vaccination. Dr. Deonandan says yes, while Dr. Loeb says no.

### **Union Submissions**

**21** The union agreed: vaccines were safe and effective. In fact, the union was on record encouraging its members to vaccinate and almost all had. What the union took issue with was the Policy: and its requirements of vaccination status disclosure and mandatory vaccination together with the placing of some but not all unvaccinated employees on non-disciplinary unpaid leave.

**22** In the union's view, its expert's evidence was clear. RATs were effective in reducing the likelihood of introducing infection into a school setting if the Policy's testing protocol was followed (the one being used by unvaccinated employees either because they had been given a staffing exemption or while awaiting determination of their medical/creed exemption requests). RATs were extremely effective if other mitigation protocols were also followed. Omicron clearly presented challenges. Notably, being fully vaccinated was not effective against Omicron making the entire Policy questionable at best since it was never amended to require a booster. In the union's words, even if the Policy was once defensible, that was no longer the case.

## The Charter of Rights and Freedoms

**23** The union began by observing that it was not disputed that the *Charter* applied and that the TDSB's actions were subject to *Charter* scrutiny. Under Section 7, everyone had the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. The fact of the matter -- and numerous authorities were carefully reviewed -- was that the right to bodily integrity and autonomy was foundational to the protection offered by Section 7 including the right to make fundamental personal decisions without interference from the state. Section 7 protected both the physical and psychological integrity of the individual. And it was, therefore, axiomatic -- and confirmed by the cases -- that enforced medical or surgical treatment was an invasion of physical integrity. Simply put, the right to bodily autonomy and to freely choose what medical treatments one undergoes was integral to the protections offered by Section 7. And that meant that any infringements of those rights had to be in accord with the principles of fundamental justice. Notably, in *St. Peter's Health System v. CUPE, Local 778*, (106 LAC(4th) 170) (*St. Peter's*), the arbitrator concluded that:

... suspending employees (non-disciplinary) for refusing to undergo medical treatment is a violation of their common law sec. 7 charter rights. Virtually all the court cases, including Supreme Court of Canada and Ontario Court of Appeal, find that enforced medical treatment ... is an assault if there is no consent (69).

**24** It was true enough, the union agreed, that the courts have held that the *Charter* does not protect economic rights; nor does it protect the right to pursue a particular profession. That was not, however, this case. This case was about whether the TDSB could compel employees to become vaccinated against their will or face the loss of their livelihood for an indefinite period as the consequence for not doing so. Unvaccinated employees were not asserting they had a right to a job or a paycheque. What they were saying was that they had a constitutionally protected right to choose what drugs were injected into their bodies and they should not be denied that fundamental right simply because they were employed at the TDSB when a testing regime could permit them to attend safely at work. The Policy was coercive leaving employees with no choice, in contrast, for example, to some earlier influenza vaccine cases involving nurses who were given the option to vaccinate or to mask.

**25** This infringement, the union continued, did not accord with the principles of fundamental justice. State actions are restrained under the *Charter* if they are arbitrary, overbroad or have consequences that were demonstrably disproportionate to their objectives. The Policy was arbitrary because there was no rational connection between it and the limit that it imposed on the life, liberty and security of the person. Put another way, the Policy exacted a constitutional price without furthering the public good that was said to be its objective: it was constitutionally offside. The Policy was overbroad because it went too far. The Policy was disproportionate: its negative effects on individuals were disproportionate to the stated objectives. The union expanded on these submissions.

**26** The Policy's failure to accord with the principles of fundamental justice was apparent in a number of respects. In not requiring a booster, the Policy made no sense given the expert evidence on point that effectiveness of full vaccination was reduced as against Omicron. It made no sense that hundreds of unvaccinated employees were allowed to work because of staffing requirements. It made no sense that employees awaiting determination of their medical/creed exemption requests were allowed to work. In these cases, a RAT regime was in place. How could a RAT regime be satisfactory and safe for some employees and not others? These and other inherent contradictions established that the Policy could never pass *Charter* muster: it was, on the facts, arbitrary.

**27** To repeat, this arbitrariness was amply illustrated by the following example: unvaccinated employees were allowed to come to work when it suited management but were not allowed to do so when it did not suit management. This also established that the Policy was overbroad as it purported to prohibit unvaccinated employees from coming to work and then allowed for an end run for some of them to be able to do so. And the Policy was demonstrably disproportionate. The medical evidence was clear, at least until very recently with the advent of Omicron, that a RAT regime was highly effective in reducing the spread of COVID-19 by excluding persons who tested positive. The expert evidence of Dr. Deonandan was clear, categorical and compelling. The

union urged me to find that Section 7 of the *Charter* had been breached and to schedule a Section 1 proceeding as quickly as possible.

### **The Policy Was an Unreasonable Exercise of Management Rights**

**28** The Policy, the union argued, failed to comply with the governing test set out in *KVP & Lumber/Sawmill Workers' Union 1965 CarswellOnt 618 (KVP)*. *KVP* requires that a management rule or policy

1. Not be inconsistent with the collective agreement
2. Not be unreasonable
3. Be clear and unequivocal
  4. Be brought to the attention of employees before the employer can act upon it
  5. Affected employees must be notified that breach could result in discharge if the policy was being used as foundation for discharge
6. Must be consistently enforced

**29** In applying *KVP*, the union observed, arbitrators generally sought to achieve a reasonable contextual balance between the rights of employees and the rights of the employer. In making this determination, arbitrators generally consider the nature of the interests at stake, whether there are less intrusive measures available to achieve the Policy's objectives, and the effect of the Policy on employees. In this case, the interests at stake were enormous: the ability of employees to keep on working and making a living in face of an intrusive demand that they disclose their vaccination status and become fully vaccinated. There was no choice here, at least not a genuine one. There was an artificial choice between submitting to an unwanted medical procedure and maintaining one's livelihood. In addition, the Policy violated various seniority and leave provisions of the collective agreements by imposing requirements found nowhere in any of the collective agreements.

**30** Making matters worse, the evidence established, in the union's opinion, that there were less intrusive methods available to reduce COVID transmission in the schools. Many of these measures had been in place since the WHO first declared the pandemic, but others like the RATs were of more recent vintage but were associated with a high degree of effectiveness, as was evidenced by the fact that so many unvaccinated employees were allowed to come to work under a RAT regime. Notably, these particular employees were largely school based with the closest contact with co-workers and students. In this context, it made no sense that the TDSB did not require students to attest to vaccination status and, if unvaccinated, submit to RATs on the same terms as set out in the Policy. The union insisted for reasons that it explained that the TDSB had the legal right to take these actions. It was also completely inconsistent with *KVP* for the employer to continue to rely on two-dose vaccination as full vaccination when the evidence was that even if once true, it was no longer as a booster was now required to restore maximum effectiveness, as both experts testified. For all these reasons, and others, the union argued that the Policy was completely unreasonable, was not clear and unequivocal and had been inconsistently applied. It may have been appropriate in November 2021, but it clearly no longer was. Accordingly, the union sought an order requiring the TDSB to revoke the Policy and to return to work and fully compensate all affected employees.

### **TDSB Submissions**

**31** The TDSB began its submissions with some general observations. Its paramount responsibility was ensuring healthy and safe schools for its employees and students. Students between 5 and 11 only became eligible to receive vaccines in October 2021 and those under the age of 5 remain ineligible. Vaccines were highly effective in reducing transmission -- transmission to co-workers and transmission to students. The vaccines, together with other measures, allowed schools to safely reopen, a matter of public interest. Seen in this context, the Policy was by all

measure a success. There was, the TDSB submitted, no *Charter* breach and no violation of the governing principles in *KVP*.

**32** It was true enough that the TDSB did not institute a vaccination policy for its students; it had absolutely no legal authority to do so. (COVID-19 vaccination was not included in the *Immunization of School Pupils Act* while the *Education Act* required students to attend school unless they fell within a specified exception, not applicable here.) It was also true enough that some employees were allowed to return to work unvaccinated -- but only where their positions were essential -- critical in fact -- to the reopening of the schools and the provision of in-person learning. A nuanced balancing of interests had to take place, which was exactly what was done, including a careful review of whether, given the positions at issue, a RAT regime would sufficiently protect all the interests at stake. In the case of employees who had asserted a medical or creed exemption, the TDSB was complying with its obligations under the *Code* and doing so could hardly serve as a basis for any claim, even a misguided one, that the Policy was being inconsistently applied.

**33** Likewise, the TDSB took the position that in introducing and enforcing the Policy, it was giving effect to the *Occupational Health and Safety Act* (incorporated into the three collective agreements) and its prime directive that employers take every precaution reasonable in the circumstances for the protection of a worker. This was a positive duty, and it was no answer to that obligation for the union to say that other employers or governments had taken different steps or introduced and/or were satisfied with other precautions. Workplace health and safety was a statutory obligation that the TDSB took extremely seriously. Keeping employees (and students) safe was what the Policy was designed and intended to achieve. Vaccination reduced the risk of both contraction and transmission, and while some students were compromised because of individual health issues, a huge number -- those under the age of 5 -- were not in the fall of 2021 (and since) even eligible for the vaccines and the protection that they provided. The experts were agreed that vaccines were the preferred method of keeping schools and the people in them safe. Vaccination was in accord with the precautionary principle which required the TDSB to do whatever it could to protect the safety of employees, and students, even if the scientific evidence continued to evolve. However, between the time when the Policy was first introduced, and these proceedings, that meant a fully vaccinated requirement.

### **The Charter of Rights and Freedoms**

**34** To succeed in establishing a breach of Section 7, the TDSB argued that the union had to show that the Policy's vaccination requirement violated an individual's right to life, liberty or security of the person and, if so, that the denial or limit on the right was contrary to or inconsistent with the principles of fundamental justice. In the TDSB's view, the Policy did not engage or violate either part of the Section 7 test.

### **No Violation of an Individual's Right to Life, Liberty or Security of the Person**

**35** In the TDSB's submission no one's right to life, liberty or security of the person was limited or negatively impacted. No non-consensual medical treatment was imposed. No one was required to get vaccinated without their consent. Employees had a choice: vaccinate or not. In *ATU v. TTC* 2021 ONSC 7658, an injunction case where the issue of so-called mandatory vaccination was addressed, the court readily concluded:

In my view, NOWU has mischaracterized the harm at issue. The harm which the employees may suffer is being placed on unpaid leave, or being terminated from employment, if they remain unvaccinated. They are not being forced to get vaccinated; they are being forced to choose between getting vaccinated and continuing to have an income on the one hand, or remaining unvaccinated and losing their income on the other.

...

Because I have concluded that the harm in this case is not the alleged violations of informed consent, bodily autonomy or the reasonable probability of personal injury from being coerced into becoming



vaccinated, the expert evidence proposed by the parties with respect to the safety of vaccines is not relevant, and I need not address it, nor consider whether the experts ought to be qualified. No one is forced to get vaccinated.

...

Fundamentally, I do not accept that the TTC's vaccine mandate policy will force anyone to get vaccinated. It will force employees to choose between two alternatives when they do not like either of them. The choice is the individual's to make. Of course, each choice comes with its own consequences; that is the nature of choices (50, 52, 57).

**36** In *Lavergne-Poitras* (2021 FC 1232), the Federal Court also denied an injunction request in similar circumstances -- exclusion of unvaccinated persons from the workplace -- concluding that the exercise of the choice to vaccinate or not did not violate Section 7.

**37** Indeed, the TDSB pointed out that when the Policy was rolled out, the union provided its members with some FAQs about it, including questions and answers about employee choice and constitutionality. At that time, the union went on record indicating to its members that they could choose not to be vaccinated and the employer could choose not to let unvaccinated employees come to work. The union stated that "there is no constitutional right to a specific job or pay ... If you refuse to comply with these policies, you take a big risk that you could lose your job."

**38** It was also clear from the authorities that Section 7 did not protect economic interests including an individual's right to maintain a chosen profession or occupation. The union had, in its FAQs, conceded as much. What Section 7 protected was an individual's personal autonomy and the right to make decisions of fundamental importance free from state interference. Accordingly, the liberty interest was engaged when state compulsions or prohibitions affected important and fundamental life choices. There was, simply put the TDSB argued, no part of the Policy that constrained individuals: they were perfectly free to choose to vaccinate or not, as they wished. The fact that financial consequences, including loss of employment, could result from a decision did not engage the provision. In fact, in this case, no one's employment was terminated; employees were placed on a non-disciplinary unpaid leave. There was nothing in Section 7, the TDSB argued, that insulated employees from the economic impacts of their decision not to vaccinate and any such conclusion would be contrary to a long line of authorities that unequivocally concluded that Section 7 does not protect economic interests.

**39** Indeed, in the TDSB's submission, none of the cases the union relied on were applicable; they were all distinguishable for reasons that it outlined. Certainly, none were on all fours. *St. Peter's*, for instance, was decided on the basis that employees did not have a choice about whether to be vaccinated. That was not this case. Moreover, the Section 7 analysis in that case was limited at best. As well, having found a Section 7 breach, the arbitrator did not conduct a Section 1 analysis. Not surprisingly, the reasoning and analysis in that case has not attracted any following whatsoever, a result that the TDSB urged here.

### **Principles of Fundamental Justice**

**40** The TDSB also argued that the Policy did not violate the principles of fundamental justice. There was no denial or limit imposed that was contrary to or inconsistent with the principles of fundamental justice. The Policy was not arbitrary -- far from it. The nexus between the objective of the Policy and its provisions was clear. The Policy was passed to deal with an international health emergency that had caused the death of multiple millions and severe, and in some cases continuing, illness to countless more. The Policy was based on the best science, science that established that vaccines were safe and effective and prevented the transmission of disease. More recent science about the limitations of full vaccination against Omicron and the restorative benefit of a booster did not change that fundamental and continuing fact. The Policy was passed to protect the health and safety of employees and students. The Policy's objective was to ensure schools were as safe as possible. Both experts agreed that vaccination was the single best tool for keeping infection out of the schools. Before the vaccine was introduced,

TDSB schools were bedeviled by school closures in response to outbreaks. As a result of vaccination, a return to in-person learning was possible. In these circumstances, it would be impossible to conclude that the Policy was arbitrary. There was most definitely a rational connection between the object of the Policy and the reasonable limits that it imposed. The fact that other school boards had chosen a different path did not establish that this Policy was arbitrary.

**41** The TDSB further argued that there was no overbreadth. There was a direct connection between the Policy and the mischief being addressed. Vaccination reduced infection and transmission. Vaccination protected employees and students. The Policy was considered and appropriately nuanced. This was reflected in the exemption protocol put into place. The Policy was proportionate. The very fact that individuals seeking a medical or creed exemptions that were protected under human rights legislation demonstrated that the TDSB did what it could to ensure that vital individual interests were protected (pending determination of individual claims). The Policy went no further than necessary to achieve its objective.

**42** It could also not be said, in the TDSB's submission, that the Policy was so grossly disproportionate, on its face, to its effects on an individual's life, liberty and security of the person that it could not be rationally supported. To establish this the seriousness of the deprivation must be totally out of sync with the objective of the measure. That was not this case. The consequences that arose from the Policy -- a non-disciplinary leave of absence without pay - were completely proportionate with the overriding objective of protecting the health and safety of employees and students. The attestation and vaccine requirements were essential to preventing transmission in schools and keeping them open for in-person learning. Vaccination reduced community transmission. Return to school was safely possible in large part because of vaccination. Masking requirements, screening and social distancing and RATs were collectively unable to provide this high degree of protection and reduction in infections. A non-disciplinary leave of absence without pay was obviously a significant consequence for an individual, but it was proportionate to the larger objective of providing safe schools. A non-disciplinary leave of absence without pay was not a deprivation that could be fairly characterized as totally out of sync with the larger safe school's objective instituted on behalf of tens of thousands of employees and hundreds of thousands of students.

**43** For all of these reasons, and others, the TDSB asked for a finding of no *Charter* breach.

### **The Policy Was a Reasonable Exercise of Management Rights**

**44** The TDSB had a right to introduce rules and policies. That was settled law. The only limitation on that right was if it was prescribed by law, prohibited by a negotiated term of the collective agreement or contrary to the governing principles of *KVP*. In the TDSB's view, the Policy was actually authorized by law, permitted by the collective agreements and in full compliance with *KVP*.

### **The Attestation Requirement**

**45** In each of the governing collective agreements the union had recognized the TDSB's right to exercise the regular and customary functions of management and to direct its work force. The attestation was required by law and the cases confirmed that employers were entitled to seek disclosure of an employee's vaccination status to the extent necessary to administer its vaccine policy and protect other employees especially to the extent that the information was secured and protected from unnecessary disclosure. No health information privacy concerns, the TDSB noted, had been raised in this case. Overall, the requirement, imposed by the province, for the disclosure of information was clearly communicated to employees and was also subject matter of discussions with the union. Quite clearly the consequences of non-compliance with the attestation requirement were brought to the attention of employees and this part of the Policy was, thereafter, consistently enforced. As importantly, the disclosure requirement itself was completely non-intrusive and furthered the goal of ensuring a safe workplace.

### **The Vaccination Requirement**

**46** An employer was, the TDSB submitted, fully entitled pursuant to its management rights, to make reasonable rules, and the full vaccination requirement was one of them. Vaccination of employees protected them from contracting COVID-19 and prevented them from transmitting it to other employees and to students. The medical evidence was categorical, and from both experts: vaccines were safe and effective and the best means of protecting employees from COVID-19 and from transmitting it to others. Equally clear was the TDSB's entitlement, indeed obligation, to do whatever it reasonably could to protect its workforce and the hundreds of thousands of students it served.

**47** The Policy was not contrary to the collective agreements, in the TDSB's view. The application of the seniority and leave provisions had nothing to do with this Policy or its implementation. There was no collective agreement provision impeding the TDSB from enacting the Policy; there was, however, a statutory basis for the decision that was made, namely, the governing provisions of the *Occupational Health and Safety Act* and its requirement that an employer take every precaution reasonable in the circumstances for the protection of a worker. The Policy was not unreasonable. For obvious reasons, the risks of transmission in a school setting -- notwithstanding efforts made to impose social distancing and other precautions -- was extremely high. Employees and students were in close proximity all day long. At the same time, the population of vulnerable individuals -- those who had no access to vaccination -- was extremely large throughout and that remained the case as illustrated by the large number of ineligible students under the age of 5. A vaccination requirement was, therefore, both reasonable and necessary. Educating students -- COVID-19 led to significant learning disruptions over two school years exacerbating educational inequities and child development -- and opening the schools was essential. The means had to be found to safely do so -- not after outbreaks leading to school closures and work refusals (which had taken place) -- but to help prevent them in the first place. The full vaccination requirements of the Policy -- together with other precautionary measures -- was that means, and it was an effective and reasonable requirement when contextually considered. It was also fully in accord with the decided cases and the application of the precautionary principle.

**48** To be sure, the TDSB acknowledged, the science has evolved since the advent of the pandemic. But the whole point of the precautionary principle was to take steps now against the unknown to prevent unnecessary illness and death rather than await often elusive scientific certainty that may or may not arrive in the future. The Policy gave effect to that principle. On the other hand, a RAT regime was no substitute for vaccination. First, vaccination was safe and effective. It was the very best means available to prevent contraction and spread. Second, vaccination was more effective than RATs in preventing spread, as set out in Dr. Loeb's report. RATs had serious limitations ranging from reliability to compliance. Unlike vaccines, they did not provide any protection against contraction. And, as the Science Table made clear in its February 23, 2022 Brief, the sensitivity of a RAT was lower for Omicron than the predecessor variants. As Dr. Loeb testified, vaccines prevent infection while a RAT identifies it (subject to certain limitations). A highly vaccinated workforce assists in reducing both infection and the potential for transmission. While vaccinated persons could contract and spread COVID-19, they were less likely to do so. In these circumstances, concern for the safety of employees and students -- including especially the need for students to return safely to school where many of those students were ineligible for vaccination -- prevailed over the individual interests of a very small number of employees who wished to remain unvaccinated yet still attend work.

**49** No one was forced to accept vaccination, the TDSB noted. All that had occurred was that a small number of employees who decided not to do so were temporarily excluded from the schools (with reasonable carefully curated exceptions for truly essential employees and a very small number who were seeking a medical and mostly creed exemption). The union was consulted. Employees were clearly told -- by both the TDSB and the union -- of the requirements to attend at work and of the consequences should they decide not to attest and vaccinate. They were provided with ample, and extended, opportunity to make their decisions. Being vaccinated was a necessary qualification to work at a TDSB school. And that was, the TDSB argued, entirely reasonable. In fact, this was not a matter of first impression. The cases were largely consistent that if an employee refused to provide a vaccination attestation or be vaccinated where it was a necessary precondition for attending at work -- the circumstances of this case -- he or she could be appropriately placed on a non-disciplinary unpaid leave of absence.

**50** The TDSB frankly acknowledged that it provided exemptions to the Policy to certain essential workers -- following determination that staffing needs left it no other choice and safety measures could be put into place, together with a small group of employees whose exemption requests were said to be based on protected human rights grounds. Providing exemptions did not mean that the Policy had not been consistently applied, a *KVP* requirement. The authorities were clear that provided exemption requests were made on a case-by-case basis for valid and rational reasons that could not lead to a conclusion that an impugned policy was being inconsistently applied. In fact, the rigid application of a rule -- the exact opposite of what actually took place -- would probably lead to a conclusion that a policy contravened the governing principles of *KVP* for being, by definition, arbitrary and unreasonable.

**51** In the TDSB's view, the operational exemptions for essential employees were reasonable: in fact, they were necessary to facilitate the reopening of the schools and allow for the safe return of employees and students, many of whom were unvaccinated. The service being provided -- education for hundreds of thousands of students -- was essential. And the TDSB had to do whatever it reasonably could -- the Policy -- to provide this critical service. That meant exemptions for essential unvaccinated staff after a rigorous review of possible alternatives followed by the putting into place of measures to make their return as safe as possible. Even a cursory examination of the process that the TDSB employed through its Decision Matrix made it abundantly apparent how seriously the TDSB took this important task. Exemption requests were examined case by case and granted only to the extent necessary. Notably, employees who were exempted were still required to complete the vaccination attestation and fully cooperate with the RAT regime (again, not an issue in these proceedings). The fact that relatively limited exemptions were provided following a thorough and searching process to determine whether any alternatives were available, and consistent with the best safety regime available in the circumstances, did not, and should not, the TDSB argued, open the door to a conclusion that the Policy itself was being inconsistently enforced. That would, in two words, be absurd.

**52** Accordingly, and for all these reasons and others, the TDSB asked that a declaration be issued confirming that the Policy was a completely permissible exercise of management rights and not contrary to any part of *KVP*.

### **Decision**

**53** Having carefully considered the evidence, authorities and arguments of the parties, I conclude that the Policy is not contrary to any part of Section 7, and that therefore no Section 1 analysis is required. I further conclude that the Policy was a reasonable exercise of management rights.

### **Discussion of the Expert Evidence**

**54** It is quite clear that the experts are largely agreed. Vaccination is the best way of keeping people and workplaces safe from infection. As Dr. Deonandan wrote in the *Ottawa Citizen* on February 15, 2022, less than one month before these proceedings:

The more people who become vaccinated, the more community immunity we have ... every person who accepts full vaccination is a bulwark against transmission penetrating into the community ... the unvaccinated are 'dry tinder' for the runaway fire that is COVID-19 ... some studies have found that the unvaccinated pose a higher infection risk directly to the vaccinated ... the unvaccinated raise the risk of infection for the vaccinated by a factor of more than six ... Those who wish to frame this debate as one around personal choice are not incorrect to do so, in the broadest sense. But they are wrong to suggest that the actions of those who choose not to vaccinate do not affect the rest of us. Quite the contrary.

**55** Vaccinations are safe and effective. While RATs have their usefulness, they have serious limitations as well. I accept the evidence that a third dose, the booster -- not required by the Policy -- may be needed for full vaccination in the Omicron age. It is also correct, and agreed upon by both experts, that whatever the usefulness and value of

RATs once was, they also become compromised in the Omicron age. However, in considering Section 7 of the *Charter*, whether being fully vaccinated as was required by the Policy (i.e., no booster), or whether RATs are effective against Omicron, are not the matters to be determined. What is in issue is whether the Policy -- when introduced, rolled out and in place up to the second day of hearing -- violates Section 7 of the *Charter* (and if so whether it is saved by Section 1).

**56** As just noted, the experts -- and this is set out in detail in this award -- were agreed on almost everything. Where they disagree, I prefer the evidence of Dr. Loeb. I accept Dr. Loeb's evidence that while modeling is an important epidemiological tool, it is secondary in evidentiary value to randomized clinical trials which was the evidence largely, albeit not exclusively, relied on by Dr. Loeb. Obviously, the scientific situation evolved and the best evidence to deal with the pandemic came from a variety of sources. Modeling has been integral to understanding the progress of this disease. However, using the assumptions relied upon by Dr. Deonandan -- and Dr. Loeb described those assumptions as "questionable" -- Dr. Loeb found that mandatory vaccination would lead to the introduction of one infection per week, while reliance on RATs for unvaccinated employees would lead to seventy-five (in contrast to the seven forecast by Dr. Deonandan based on a variety of assumptions outlined in his report).

**57** Dr. Deonandan's view that RATs can be an appropriate substitute for full vaccination is rejected. Dr. Deonandan's op-ed characterization of the unvaccinated as "dry tinder" bears mention. As Dr. Loeb concluded, there is an absence of evidence that RATs reduce transmission in workplace or other settings. Frankly, it is not immediately apparent to me -- in a process informed by the precautionary principle -- why the TDSB would accept RATs as an alternative to vaccination, especially in congested workplaces like schools, where the expert evidence is clear that vaccination is safe and more effective than RATs in reducing the risk of becoming infected and spreading COVID-19. The fact of the matter is that many students -- those under the age of 5 -- were not and are not eligible for vaccination and the protection it offered. Absent some compelling justification that would lead to providing certain employees with exemptions -- discussed below -- it is challenging to understand why the TDSB would agree to the union's proposal of a RAT regime substituting for full vaccination.

**58** It was not hard for Dr. Loeb to conclude that RATs were not a very good alternative to vaccination, a conclusion that I accept based on his evidence, and on the evidence of both experts that there was no way of ensuring the integrity of the self-administered testing process. I reject the suggestion by the union that compliance in this process could be monitored to ensure compliance. The union in cross-examination of Dr. Loeb pointed to the possibility of "workplace interventions" by TDSB officials such as having a nurse present to ensure the tests were properly administered. While just an observation, it seems to me that this would be extremely burdensome and might even constitute undue hardship. Accordingly, it is my finding, agreed to by the experts, that vaccination is the best way of preventing transmission in schools. It is also my finding that whatever the value of RATs, they do not provide the same level of protection to staff and students and should only be relied on in cases of absolute necessity such as to facilitate essential and otherwise justified exemptions.

### **General Observations**

**59** The important contextual evidence need not be repeated other than to say that the pandemic has claimed the lives of more than six million people. Many millions more have become sick, some of whom continue to suffer from the impacts of the disease. The TDSB, like all employers was forced to deal with a rapidly evolving situation and clearly chose to do so based on the best evidence available: Science that established then, as it does now, that full vaccination was safe and effective and the very best way to prevent transmission in the schools. Prior to the development of vaccines, schools were able to open and close and open and close again under various safety protocols. I do not, however, conclude that those protocols were immutable.

**60** Once the vaccines arrived, and were determined to be safe and effective, the paradigm shifted. The rules were appropriately revised when the scientific situation changed; namely the unequivocal evidence that full vaccination

provided the best available protection against contraction and submission. The Policy gave effect to this conclusion. With this new evidence, past practices were revisited. It would have actually been derelict to ignore the vaccines and the benefit of full vaccination and pretend that they were not a real gamechanger in giving effect to the TDSB's statutory obligations. The precautionary principle requires that employers like the TDSB -- subject to their constitutional obligations -- do whatever they reasonably can. And that is what it did in the Policy.

**61** The TDSB clearly had no statutory authority to impose vaccination on students -- the union's suggestions to the contrary are unsustainable based on the governing legislation -- but it could take steps to protect them. Students aged 5 to 11 only became eligible for vaccination in October 2021, after the Policy was enacted. Students under the age of 5 remain ineligible. In these circumstances, and to protect its employees and students, the Policy was put forward. It is completely immaterial to any relevant legal analysis that other schools board followed different mitigation strategies. What matters is the reasons why the TDSB followed this one and whether it passes muster under the *Charter* and *KVP*.

### **The Charter of Rights and Freedoms**

**62** Section 7 of the *Charter* protects an individual's right to decide: whether or not to be vaccinated. The Policy does not require mandatory vaccination. The Policy does not violate anyone's life, liberty or security of the person. It does not mandate a medical procedure or seek to impose one without consent. If it did, the outcome of this case would certainly be different. The Policy had an impact on TDSB employees who decided not to attest and/or get vaccinated, but there is no basis to conclude that life, liberty or security of the person is in any manner impaired by the Policy and by the choices individuals make. Employees are not prevented in any way from making a fundamental life choice.

**63** The law is settled: Section 7 does not insulate a person who has chosen not to be vaccinated from the economic consequences of that decision. Simply put, and as the union acknowledged in its FAQs made available to its members, Section 7 does not protect economic interests. Individuals have no *Charter* right to pursue or maintain a chosen profession. Nothing about the Policy interferes with anyone's right to make a decision of fundamental importance: to be vaccinated or not. The *St. Peters* case, relied on by the union and the only arguably comparable case where a Section 7 violation was found, is of no assistance whatsoever in resolving any issue present here. The best that can be said about that award is (i) it predates the COVID-19 pandemic, (ii) the facts present there are completely distinguishable from those present here, (iii) it is inconsistent with governing principles and settled authorities and (iv) no attention whatsoever was given to Section 1. Understandably, *St. Peters* has not been adopted or followed in any other case, including this one.

**64** While the analysis of a Section 7 breach could end here, there has been no violation of the principles of fundamental justice. The Policy is not arbitrary. The fact that it is no longer in force is, in my view, immaterial to this conclusion. From inception until it was rescinded the Policy sought to protect the health and safety of employees and students. It did so in the midst of a world-wide pandemic where schools previously had to open and close and open and close. It did so in circumstances where students aged 5 to 11 only became eligible for vaccination in October 2021, and many students -- those under the age of 5 -- were not eligible for vaccination. There was a clear connection between attestation and full vaccination and the achievement of the stated objective. What is meant by full vaccination has very recently changed, but during the term of the Policy full vaccination facilitated a return to safe and sustained in-school learning. The medical evidence is completely persuasive; full vaccination is the best means available to prevent contraction and transmission. The Policy cannot be fairly described as arbitrary. It is the exact opposite of that.

**65** The Policy was not overbroad. In fact, it was tailored and nuanced. The best evidence of this, paradoxically, is in the exemptions and the process for arriving at them. Instead of a blanket rule uniformly enforced, the TDSB, through the Decision Matrix, considered individual circumstances, both to allow it to employ essential workers, and to safeguard the interests of employees asserting a human rights claim. This process demonstrates the Policy only

went as far as necessary to achieve its objectives. The Policy did not lead to impacts that had nothing to do with its objectives. It led to safer schools -- again both experts agreed that full vaccination was the best way to keep schools and the people in them safe -- and it did so in a manner that acknowledged that in achieving this objective some compromise was necessary. RATs would have been a less restrictive means, but they do not, on the evidence achieve the overriding objective. RATs can hardly be said to be an alternative to full vaccination. That is the evidence.

**66** Finally, there is nothing disproportionate about the Policy. To establish this, the union would have had to show that the Policy was so grossly disproportionate in its effects on an individual's life, liberty or security of the person that it cannot be rationally supported. The union has not demonstrated this. Again, the opposite is true. The consequences of non-compliance are purely economic and they are proportionate to the objective of preventing the transmission of COVID to employees and students in TDSB schools. The consequences of non-compliance are proportionate to the objective of opening schools and keeping them open.

**67** As there has been no Section 7 *Charter* breach, there is no need to reconvene to consider the applicability of Section 1.

### **Was the Policy a Reasonable Exercise of Management Rights?**

**68** In making this determination, the question must be considered in context: and that that context is the situation as it existed when the Policy was passed and rolled out up to the second date of the hearing.

**69** The union in this case, as have unions in other cases, took the position that all the TDSB's legitimate objectives could be met with RATs and other measures. This argument has found some favour in some cases. To the extent those cases -- rightly or wrongly -- concluded that a RAT regime allowing unvaccinated individuals to attend at work was sufficient to keep employees in particular workplaces safe, and to keep those employers compliant with the *Occupational Health and Safety Act*, that cannot be so in workplace settings like schools, especially schools where a significant percentage of the population was ineligible for vaccination.

**70** In this situation -- and context does matter -- vaccination was clearly necessary to protect extremely vulnerable populations. The evidence establishes without contradiction that the Policy has played an important role in reopening TDSB schools and then keeping them open. The scientific evidence that I have accepted establishes that a RAT regime, even one accompanied by other measures, could not achieve this same outcome as effectively. As Arbitrator Burkett in *Canada Post & CUPE* (unreported decision dated November 30, 2021), concluded following his review of expert evidence called by the union and the employer:

... it is clear on the evidence that the most efficacious means of accomplishing the necessary health and safety objectives is through mandatory vaccination ... (at 6-7).

**71** The fact that the advent of Omicron has made RATs even less effective than was previously the case is a factor worth bearing in mind. Circumstances and public health measures have changed, and this had led to the repeal of the Policy. That does not, however, mean that the Policy, while in force, was an unreasonable exercise of management rights. And for the reasons that follow, I conclude that the Policy, while in force, was a reasonable exercise of management rights.

**72** The starting point, of course, is the *Occupational Health and Safety Act*. It requires an employer to take every precaution reasonable in the circumstances for the protection of the worker. Obviously, what is reasonable is open to general debate, but in this specific case that assessment must be made in light of the expert evidence. And that expert evidence is that vaccination was the number one and best method of reducing the contraction and spread of COVID-19. In these circumstances it is impossible to conclude that requiring employees to be fully vaccinated is not a precaution reasonable in the circumstances. The attestation requirement, albeit mandated by law, was a necessary corollary of this and, as earlier noted no complaint has been raised that personal information has been

anything but properly safeguarded and protected. This part of the case could be decided on the basis of the TDSB having appropriately complied with the *Occupational Health and Safety Act*.

**73** The same conclusion, however, also results from an application of the principles in *KVP*. The TDSB is allowed to promulgate rules and policies. There is nothing in any of the applicable collective agreements that fetters this management right. The union pointed to leave and seniority provisions, but respectfully, they have nothing to do with the issues at hand and with the employer's urgent need to introduce a policy to protect employees and students in the midst of this worldwide pandemic, one that was causing so much havoc in the education system and preventing the stable introduction of in-person learning. Reference may usefully be made to one of the conclusions of the Ontario COVID-19 Science Advisory Table:

The physical, emotional, and developmental health of children and youth has been deeply impacted by the COVID-19 pandemic and restrictions placed on schools. School disruptions, including school closures and implementation of education models that have reduced direct interaction between children, their peers, and their teachers (e.g., online learning), have led to significant learning disruption, exacerbated educational inequities and deprived children of other supports and activities available through schools including food programs, physical activity and sports and clubs and teams.

**74** The Policy was not unreasonable. It was, based on the medical evidence, reasonable. As was noted in one of the cases, "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" (*ESA & PWU*, unreported decision of Stout dated January 4, 2022 at para. 71). The two experts who testified agreed: being fully vaccinated was the best means of reducing contraction and transmission in the schools -- schools where employees and students are always in close proximity with each other. Being fully vaccinated, therefore, was a reasonable rule and appropriate condition of employment for employees who wished to attend at work especially when compared to the self-evidently fallible RAT regime proposed by the union.

**75** The Policy was clear and unequivocal. The TDSB explained it to employees and so too did the union. There is no evidence that anyone was under any misunderstanding about what the Policy required in terms of vaccine attestation and becoming fully vaccinated. The TDSB and the union also made it perfectly clear what would happen to employees who chose not to become fully vaccinated. And finally, the Policy was consistently applied. For the reasons already provided, I conclude that by introducing a regime to allow for exemptions for essential workers -- memorialized in the Decision Matrix -- and by allowing employees with human rights claims to continue to work under a testing regime -- the Policy was not being inconsistently applied but was, rather, being applied in a careful and nuanced fashion where the TDSB agreed to accept less than its desired outcome of full vaccination so as to allow the schools to reopen and while awaiting the future determination of human rights claims. This is not an inconsistency of the kind arbitrators have found voids a management policy under *KVP*.

## **Conclusion**

**76** Accordingly, I conclude that the Policy does not violate Section 7 of the *Charter*. I conclude as well that the Policy was, while in force, an entirely reasonable exercise of management rights (subject of course to any individual claims respecting requested medical/creed exemption requests should they proceed).

DATED at Toronto this 22nd day of March 2022.

William Kaplan, Sole Arbitrator