

***IN THE MATTER OF THE ONTARIO LABOUR RELATIONS ACT, 1995
AND A GRIEVANCE ARBITRATION***

BETWEEN:

Canadian Union of Public Employees, Local 543

(“the Union”)

- and -

City of Windsor

(“the City”)

RE: Vaccination Policy

BEFORE: M.G. Mitchnick - Sole Arbitrator

Counsel for the Union:

Stephen Krashinsky

Ben Katz

Counsel for the City:

John Saunders

Victoria McCorkindale

Hearing held by videoconference March 27th, 2024

PRODUCTION ORDER

1. In this matter the Union is challenging the action of the City in invoking a mandatory Vaccination Policy in September of 2021, requiring employees to be fully vaccinated (meaning two doses at that time) by November 15th of that year. Employees not in compliance would at that point be put on unpaid leave (or, as the Union characterizes it, suspended). On November 18th employees were further advised that if by February 15th they were not fully vaccinated, those not having a valid basis for an exception would be terminated. That policy was further revised in December to advise employees that, given the lapse of time needed for two vaccine doses to be effective, the employees on unpaid leave who did not show proof of vaccination with at least one dose by January 4th, 2022, and a second by February 1st, would be terminated. In the end a substantial number of employees of the City were terminated in accordance with these announced policies. Ultimately the City came to rescind the mandatory Vaccination Policy, and took the further step of offering re-instatement to all of its employees who had been dismissed under it.
2. This matter first came on for hearing in the Fall of 2022, and by that time there had been a bevy of “Vaccine Policy” cases litigated across the province, and a number of them decided. Given the known facts around how this emergency situation around COVID had developed, it was a common practice, in order to shorten the litigation and obtain an early determination of a Policy’s propriety, for the parties to submit much of the necessary evidence by way of an agreed statement of facts and documents. In the present case, however, the Union made it plain that it was not agreeing to ANY facts, and was putting the City, in meeting its burden of showing that it at all relevant points was acting reasonably, to the strict proof of all of the facts upon which it relied.
3. That is how the matter has proceeded. The City called as its first witness Vincenza Mihalo, its Executive Director of Human Resources, and the individual

who spearheaded the formulation of the City's COVID-response policies for the staff until her departure on medical leave in September 2022 (not having returned until March of 2023, Ms. Mihalo was not part of the deliberations ultimately leading to the withdrawal of the Policy, and the attendant offers of re-instatement.) As part of her evidence in chief Ms. Mihalo identified large quantities of internal reports, medical updates/pronouncements and other documents pertaining to the pandemic that were available to the City through the relevant period leading to the impugned decisions, and that formed the basis on which City Council, under the guidance of Ms. Mihalo, came to the decisions on the Policy and subsequent terminations that it did.

4. Having now reached the point of cross-examination of Ms. Mihalo, the Union has formally filed a request for further and better production. The Union acknowledges the fact that the City has made broad disclosure and production to date, but at the same time asserts that it is not solely up to the employer to pick and choose what documents it wishes to bring forward as relevant. Accordingly the Union sets out its request in the following terms:

The Union seeks production of all documents that are arguably relevant to the issues in dispute in this case that are in the possession or control of the Employer. Without in any way limiting the foregoing, the Union seeks production of all documents that are responsive to the following categories:

1. all documents either created or considered by the Employer, including Ms. Mihalo, in any way relating to the creation of the COVID vaccination policy (the "Policy"), including, but not limited to, email, text messages, notes of meetings or conversations, medical reports, memoranda to or from City Council, presentations to City Council, presentations from medical advisors, memoranda or notices from government officials or medical officers of health;
2. all documents either created or considered by the Employer, including Ms. Mihalo, in any way relating to the decision to amend the Policy to terminate any employees who were not in compliance with the Policy, including, but not limited to, email, text messages, notes of

meetings or conversations, medical reports, memoranda to or from City Council, presentations from medical advisors, memoranda or notices from government officials or medical officers of health;

3. all documents either created or considered by the Employer, including Ms. Mihalo, and/or Mr. Rayner, in any way relating to the decision to rescind the Policy, including, but not limited to, email, text messages, notes of meetings or conversations, medical reports, memoranda to or from City Council, presentations from medical advisors, memoranda or notices from government officials or medical officers of health;
4. all documents either created or considered by the Employer, including Ms. Mihalo, in any way relating to the decision and terms and conditions of reinstating the employees who were terminated for non-compliance with the Policy, including, but not limited to, email, text messages, notes of meetings or conversations, medical reports, memoranda to or from City Council, presentations from medical advisors, memoranda or notices from government officials or medical officers of health;
5. all documents relating to the creation, circulation, receipt of and analysis of the staff survey regarding vaccine hesitancy and any results of the survey, including, but not limited to, emails, meetings notes, draft surveys, raw data results, analyzed results, draft and final reports circulated to management and/or City Council;
6. all records or documents relating to the City Council meetings held on September 16, 2021 and November 15, 2021 [now expanded to specifically include the Council meeting of April 11, 2022, as well as the Council meeting at which the decision was ultimately made to rescind the Vaccination Policy] and/or any other City Council Meeting where the Policy was discussed , including in-camera sessions, including, but not limited to, minutes of meetings, recordings of meetings, all notes electronic or otherwise made by all attendees including City Councillors, copies of any presentations provided to City Council by any representative of the Employer or any other participant at such meeting and any correspondence relating to the meeting between members of management of the Employer and/or with City Councillors including any and all emails and/or text

messages created by or received by City Councillors in any way touching upon the Policy including emails and text messages between/among City Councillors;

7. all documents and records of communication received by the Employer relating to employees expressing concerns about the vaccination policy, including, but not limited to, employees expressing concern about:

- a. being required to receive the vaccine; and
- b. working with other employees who were not vaccinated.

8. all documents relating to the Employer's decision to implement a mandatory attendance in the office policy or procedure, including, but not limited to, any emails between managerial staff regarding the policy or procedure, any draft policies or procedures relating to attendance in the office, any reports, memoranda, and/or news reports, relied on in relation to the creation or implementation of a mandatory work from the office policy.

5. The Union in support of its requests refers to a number of cases, stemming from what for a lengthy period of time has served as a leading arbitral authority on matters of production, being the principles enunciated by Arbitrator Shime in the *Toronto District School Board* case, (2002) 109 L.A.C. (4th) 20. These the Union notes are captured in the more recent decision of Arbitrator Crljenica in *Greater Essex County District School Board and CUPE Local 1348*, 2012 CanLii 51446 (ON LA), as follows:

1. Anything which can assist in the preparation and presentation of a party's case, the refining of issues, the facilitation of settlement and a fair process should be encouraged. Arbitration by ambush should not be condoned.
2. Once a general request for production is made every document relating to any matter in issue that is or has been in the possession, control or power of a party must be disclosed and that includes documents for which privilege is claimed.

3. All documents which are arguably or seemingly relevant or have a semblance of relevance must be produced. The test for relevance for the purposes of pre-hearing is a much broader and looser test than the test of relevance at the hearing stage. A board of arbitration, at the pre-hearing stage, is simply not in a position, and ought not to lay down precise rules as to what may be relevant during the course of the hearing.

4. The primary onus to produce documents rests with the party who has or who has had possession, control or power of the documents.

5. The burden lies on the party who resists disclosure to justify their refusal to disclose.

6. A party seeking production of documents cannot be expected to be fully aware of each other's internal affairs. Given the general purpose for producing documents, where the knowledge of those documents lies, coupled with the minimal pre-hearing procedures in the arbitration process, and after considering where the onus to produce documents lies, while a request for particular documents may be helpful, the request for particulars should not be scrutinized too carefully for precision. To require a party who has not had possession, power or control over the documents, or who may not be completely aware of the documents or the contents to identify them with any precision or particularity seems contrary to common sense.

6. In a similar vein the Union notes *University Health Network and ONA*, 2023 CanLII 18005 (Price). The seminal issue in the case, the Union notes, is: Was the Policy reasonable? For the arbitrator to decide that, he or she needs to know fully what the City took into account; and be satisfied that none of the factors considered were irrelevant or in bad faith. With respect to the Council meetings, the Union notes that Ms. Mihalo has come forward to say what SHE considered in arriving at her recommendations -- but she was not the decision-maker. Rather, the Union is entitled to know exactly what was said to the Councillors, and what they considered. The reason the Councillors supported this, the Union emphasizes, is the nub of this case, and the arbitrator must determine whether the basis on which they acted was reasonable and in good faith.

7. For its part, the City sees no problem with at least parts of the request, and has undertaken to conduct the consequent search and disclosure. Items 1 and 2 are

the most contentious areas, and I will leave those aside for the moment. In terms of Ms. Mihalov herself, she was not present for Items 3 and 4, and I leave those for later comment as well. As for Item #5, the City simply notes that the correct title of the staff survey is “Employee Vaccine Survey”, and has undertaken to produce all of the material requested, whether or not it was “circulated to management”.

8. As for Item 6, pertaining to the meetings of Council, the City agrees to produce all documents that were produced or considered at the meetings, including aspects of the meetings that were held *in camera*, and any Minutes of those meetings. The portions of the meetings that were not *in camera* were open to the public and recorded, but the City believes it is not necessary to provide such recordings. The City also objects to producing any notes taken by members of the Council at the meetings, including the meetings *in camera* (Ms. Mihalov was in attendance, but took none), or any texts, emails or other communications that may at some point have passed between them. The City states that the Council members are not its employees, and that it has no authority over them.

9. As for Item #7, communications from employees expressing concerns about the vaccination policy, the City notes that it is well known that some employees had problems with the requirement to be vaccinated, and that on the other side there were myriad queries from employees as to the application of the policy in various circumstances. The City is, notwithstanding, prepared to provide a sampling of the types of communications that were received.

10. As for Item #8, which clearly is aimed at the movement of the City from an emergency “work from home” policy to a requirement to attend work in the office, the City has responded by agreeing to the following:

all documents relating to the Employer's decision to end the Work from Home in the Event of an Emergency Procedure and implement a mandatory attendance in the office policy or procedure, including, but not limited to, any emails between managerial staff regarding the policy or procedure change, any draft policies or procedures relating to attendance in the office,

any reports, memoranda, and/or news reports, relied on in relation to the creation or implementation of a mandatory work from the office policy.

11. The City's big problem is with Items #1 and 2. The City indicates that it has done a word search using all possible variations of "vaccination", and that, for Ms. Mihalo alone, a search of the 13 month-period from the beginning of 2021 to the end of January 2022 yielded something in the neighbourhood of 19,000 emails. For the law firm at various levels to review those to see whether any portions need redacting as involving unrelated matters or raise issues of privilege, the City calculates the cost as something in excess of \$70, 000. The City views the demand as wholly disproportionate in the circumstances here, given the precise issues in the case and the extent of the production already made. The City submits that it has made full disclosure of the material the City had reference to in formulating its policies, and that any further search demanded at this point amounts to a "fishing expedition", and should only be required if the Union is willing to pay for it (which it has made clear it is not). The City asserts that its production to date has been a good-faith attempt to bring forward to the hearing the material on which it acted, and that it has in fact made disclosure to the Union going beyond what it ultimately included in its Document Books as relevant to its decisions. With respect to making the further searches and production, the City makes clear, it is not saying "no" to the Union, but is simply trying to put some reasonable parameters around the task it is being asked to undertake.

12. In that regard the City notes that the availability of masses of data stored digitally did not exist in the past, and requires fresh thinking on what can be reasonably asked or expected. The City submits that the jurisprudence has evolved and continues to evolve to the point where the *Toronto District School Board* approach has now been significantly tempered by considerations of practicality and, in particular, "proportionality", as well as proscriptions against "fishing expeditions", especially where the "ask" is a massive one.

13. The City refers, to begin with, to another seminal case in this line, *West Park Hospital and ONA* (1993) 37 L.A.C. (4th) 160 , wherein it states Arbitrator Knopf

recognized the importance of a clear basis for a production request, and the rejection of fishing expeditions:

20. However, where the disclosure is contested, the following factors should be taken into consideration. First, the information requested must be arguably relevant. Second, the requested information must be particularized so there is no dispute as to what is desired. Third, the Board of Arbitration should be satisfied that the information is not being requested as a "fishing expedition". Fourth, there must be a clear nexus between the information being requested and the positions in dispute at the hearing...

14. In the digital age, the City submits, the principles around unlimited production of documents, even where "arguably relevant", are being updated accordingly. In *City of Ottawa and CIPP*, for example, (2010) 191 L.A.C. (4th) 62, the City raised both the "fishing expedition" and the proportionality defence. As Arbitrator Brown sets out:

7. In support of the argument about proportionality, employer counsel relies upon a draft report of The Sedona Conference Working Group 7 also known as Sedona Canada. The Sedona Conference is an American think tank devoted to the advanced study of complex litigation. Sedona Canada was comprised of the organizers of The Sedona Conference, lawyers and judges from across Canada and a representative of the United States federal judiciary. The draft report of Sedona Canada, entitled *The Sedona Canada Principles*, was issued for public comment in 2007. Counsel referred us to the summary of principles found at page (iv) of the report. For present purposes, the pertinent ones are:

1. Electronically stored information is discoverable.
2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account

- (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake;
- (ii) the relevance of the available electronically stored information;
- (iii) its importance to the court's adjudication in a given case; and
- (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information. ...

5. The parties should be prepared to disclose all relevant electronically stored information that is reasonably accessible in terms of cost and burden.

6. A party should not be required, absent agreement or a court order based on demonstrated need and relevance, to search for or collect deleted or residual electronically stored information. ...

9. During the discovery process parties should agree to, or if necessary, seek judicial direction on, measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data. ...

12. The reasonable costs of preserving, collecting and reviewing electronically stored information will be borne by the party producing it. In limited circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by either agreement or court order.

15. Arbitrator Brown noted that the Rules of Civil Procedure in Ontario Courts have now been amended accordingly:

8. Effective January 1, 2010, the Ontario Rules of Civil Procedure will be amended by adding the following provisions incorporating the notion of proportionality:

1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

29.2.03 (1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

- (a) the time required for the party or other person to answer the question or produce the document would be unreasonable;

- (b) the expense associated with answering the question or producing the document would be unjustified;

- (c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;

- (d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and

- (e) the information or the document is readily available to the party requesting it from another source.

(2) In addition to the considerations listed in subrule (1), in determining whether to order a party or other person to produce one or more documents, the court shall consider whether such an order would result in an excessive volume of documents required to be produced by the party or other person.

Section 30.01(1) defines a document to include "data and information in electronic format."

16. Arbitrator Brown next sets out the paragraph from *West Park Hospital* above, and then moves on to cite the decision of Arbitrator Nairn in *City of Toronto and Canadian Union of Public Employees*, 182 L.A.C. (4th) 232:

12. In *City of Toronto* the grievor contended her application for a job had been rejected due to discrimination on the basis of sex. Arbitrator Nairn ordered the employer to produce all documents related to the job competition. She declined to order production of other materials sought by the union: (1) prior job postings for the same position over the last decade, the list of applicants in those competitions and the sex of the successful applicant in each case; (2) organizational charts; and (3) certain training programs and opportunities offered to women. Rejecting this request, the arbitrator wrote:

This material is arguably relevant to the claim of discrimination. However, the union has not particularized its allegations in that regard *and the request at this stage more resembles an attempt to determine whether it has a case*. While the reasons for any denial of a posting are within the employer's knowledge, the onus remains on the union. Certain of this information is available in some form to the union through the exercise of its own investigative activities.

(para 33; emphasis added)

17. The City notes similar comments set out at paragraph 23 by Arbitrator Brown from the award of Arbitrator Burkett in *Canada Post Corp. and Canadian Union of Postal Workers* (1994), 43 L.A.C. (4th) 285. In the next paragraph Arbitrator Brown considers the case of *Bell Canada v. Communications Workers of Canada* (1980), 25 L.A.C. (2d) 200 (P. Picher) wherein the Union, pursuing a grievance on behalf of an employee terminated on the basis of attendance, sought production of a large number of other employees' files to ensure that the grievor's was not a case of discrimination. The request was rejected by Arbitrator Picher, Arbitrator Brown noting her comment that:

In this vacuum the union is, in essence, asking the Board to require the company to locate 320 attendance records and bring them to the hearing

solely on the grounds that the records might in fact show dissimilar treatment in similar circumstances. Although the Board agrees ... that some measure of "discovery" can be permitted through the use of a subpoena duces tecum, the Board is of the view that in the context of grievance and arbitration procedures, to put the company to the task of isolating documents out of employees' files, the union should at least be able to point to someone whose record it has reason to believe will substantiate a claim of discrimination. This the union has not done. It is neither unfair nor unreasonable to expect the union to do the amount of investigation necessary to enable it to point to certain individuals whose records it expects would support its claim of discrimination and thereby justify the subpoena's assistance. (para. 18)

Or as Arbitrator Brown summarized it:

In short, the employer was not required to produce the attendance records of other employees because the union lacked reasonable grounds to believe that discrimination had occurred.

The City notes as well that Arbitrator Brown in paragraphs 36-39 adopts the notion that cost is a factor in “proportionality”, although with an onus on the respondent to demonstrate that cost. In the end Arbitrator Brown ordered what was effectively a sampling of the material being sought, without precluding the Union from requesting further information as circumstances might arise.

18. The award of Arbitrator Stout in *TTC and ATU, Local 113*, 2016 CanLII 87623 (ON LA) provides a similarly comprehensive review of how the law has evolved on this question of production. There the Union argued for the historical “Shime” approach to the issue, while the TTC argued for a more restrictive approach now manifested in the changes to the Civil Rules of Procedure. As Arbitrator Stout sets out:

27. The TTC points out that Arbitrator Shime relied heavily on the Ontario Rules of Civil Procedure (the “Rules”). The TTC submits that the Rules relied upon by Arbitrator Shime were changed in 2010. In particular, the requirement to produce documents “relating to any matter in issue” was replaced by a stricter test of requiring only the production of documents

“relevant to any matter in issue.” (see Rule 30.02.) In addition, the Rules also now require that the principle of proportionality be applied when making orders and giving directions. (see Rule 1.04).

28. The TTC invites me to apply a more stringent test for the production of documents based on relevance and proportionality in a manner similar to the current Rules. The changes in the Rules were in response to the Civil Justice Reform Project Report authored by the Honourable Coulter A. Osbourne Q.C. It is helpful to set out the concern raised by Justice Osbourne and the rationale for the changes:

The “semblance of relevance” test applies to discovery questions, in the same ways it applies to production. Relevance under these rules is a much broader and looser test than is applicable at trial, and has led some to observe that trial by ambush”, the original concern, has been replaced by, “trial by avalanche”. ... I agree with these views. The “semblance of relevance” test ought to be replaced with a stricter test of “relevance”. This step is needed to provide a clear signal to the profession that restraint should be exercised in the discovery process and, as the Discovery Task Force put it, to “strengthen the objective that discovery be conducted with due regard to cost and efficiency.” In keeping with the principle of proportionality, the time has come for this change to be made, which I hope in turn will inform the culture of litigation in the province, particularly in larger cities.

19. Arbitrator Stout goes on to note the adoption of this more constrained approach amongst British Columbia arbitrators, based on similar changes to their own Court rules, as well as in Ontario arbitration awards such as *West Park Hospital* and *City of Ottawa*, set out above. He concludes:

37. I agree and adopt the approach of Arbitrator Knopf in *West Park, supra*, with the added element of proportionality, which I believe is essential to providing the parties with a fair and efficient hearing.

In the result Arbitrator Stout rejected the form of Summons submitted by the Union, without prejudice to their ability to re-issue such in, it would appear, another form.

20. In a similar vein the City notes *Capital District Health Authority and Nova Scotia Government and General Employees Union*, (2008), 171 L.A.C.(4th) 93 (Richardson); and *Northern Youth Services and OPSEU, Local 601*, wherein Arbitrator Carrier adopts the “updated” approach accepted by Arbitrator Richardson. And on the question of proportionality, the City commends to me as well a line of cases emanating from the Ontario Labour Relations Board, noting that while “arguable relevance” continues to be the starting point, the mere meeting of that test may, in some cases, be over-ridden by considerations of practical proportionality: *Aecon Construction Group*, Board File #1002-16-R, decision dated March 7th, 2019. The City notes in particular the recitation by the Vice-chair at paragraph 35 of this decision that he had suggested to the Union during oral argument that if the extended production was so important to its case, it ought to be willing to pay for it.

21. That off-hand remark aside, it is instructive to see how the Courts themselves are viewing this issue, in the era of unlimited electronic document storage. The “problem” is neatly captured by Justice Dunphy in an application for costs arising in the *Windsor-Detroit Bridge* case (a.k.a., the Gordie Howe Bridge), Court File # CV-17-585866-00CL, 2018 ONSC 3592, wherein he writes:

[8] *Costs of collecting and producing documents*

It is no exaggeration to observe that the business of documentary discovery has evolved into a whole industry unto itself these days. The electronic era has vastly expanded the scope and volume of things that are recorded and preserved on a routine basis. As the costs of storage approaches zero, the volume of things stored approaches infinity.

And with respect to the very high costs claimed by a respondent for a search which produced only a limited number of added relevant documents, Justice Dunphy observed:

[13] I cannot agree that such costs are to be ascertained by an artificial narrowing of the inquiry to some notion of the costs of collecting only the precise documents actually produced rather than the costs of looking at the thousands of documents that had to be examined, considered and eliminated

in order to identify them. If the applicants demanded the production of three needles located in haystacks stored in a barn full of hay, they can hardly claim that the costs of producing those needles is restricted to the costs associated only with the one or two bales in which the needles were actually found. Modern electronic discovery routinely demands the review of the entire barn to find needles.

22. More germane to the present issue, however, is *Farris v. Staubach Ontario Inc.*, a decision dated September 1st, 2006, in Court File # 03-CV-259605CM, in which Master Hawkins in response to a request for extensive email searches noted, at paragraph 24:

The further searches which the plaintiff seeks will be very onerous and expensive, to say nothing of the cost of reviewing the search results for relevance and privilege.

The Master at paragraph 22 had already noted that the ability to delegate such a review is limited:

I do not see how the task of reviewing the search result documents for relevance and privilege could be delegated to a law clerk or clerks. A lawyer or team of lawyers would have to do that review. How long that review would take and how many billable hours would be involved one can only guess. I am confident that the resulting expense would shock all but the most jaded of litigants.

23. Master Hawkins continued in paragraph 24, in words similar to those of Arbitrator Picher in *Bell Canada* above:

For her part the plaintiff feels that the requested searches will disclose more relevant documents but does not proffer direct evidence of the existence of any relevant document which TSC has but has yet to produce.

And thus:

[26] Weighing all of these factors, but particularly the certainty of heavy cost to TSC against the uncertainty of material benefit to the plaintiff, I decline to order that TSC carry out the requested searches.

THE PRODUCTION REQUEST - CONCLUSION

Item #5, the Staff survey – Production is agreed

Item #6, the meetings of City Council – In the spirit of transparency the City has agreed to the production of everything presented or considered by Council in making decisions on the Policy at its various stages. *Including* the sessions held *in camera*, so that no time need be spent on the question of “privilege” addressed by the Union’s cases. Whether or not the main meetings were public, if there are recordings of the proceedings in existence, they are to be produced. As for notes taken by Council members, or electronic communications they were part of ahead of or during the meeting, I cannot accept the City’s position that it has no control over those. The elected representatives *are* the City when acting in this capacity, and their notes or communications, to the extent that they exist, should be produced.

Item #7, communications from employees about the mandatory Vaccination Policy – There are a myriad of communications from employees asking questions about the Policy’s application, and they are of no apparent probative value. The City’s offer of a sampling is therefore at this point sufficient. Communications to management resisting or objecting to vaccination are the root source of why we are here, and the Union has its own access to those through the affected employees if they wish to make a point. The City’s offer of a sampling is therefore again acceptable, although the full exchanges in such samples, as the Union requests, are to be part of that production.

Item #8, the movement to mandatory office attendance – The City has indicated an understanding of what is being looked for, and I find their stated undertaking in regard to this to be acceptable at this point. This is obviously a major component of the Union’s case, and I leave it open to the Union to revisit this item as necessary once the production has been made or further evidence has been heard.

Item #1, every written communication, including by email or text messaging, to which Ms. Mihalov or any other member of management is a part that in any way relates to the creation of the Vaccination Policy – This is the kind of massive request to which many of the above cases have spoken. In my view the Courts of the province provide the appropriate lead on this, and in light of modern storage capacities, I consider it necessary to look at proportionality as measured against obvious probative value. The Union has made clear that it is agreeing to *nothing* in this case, as is its right. But this issue does not arise in a societal vacuum. In the face of the pandemic employers everywhere have had to grapple with the issue of carrying on their activities in a way that responds to the issue of safety. Not all employers, even within the same type of sector, have arrived at the same place on that, and the only question is whether where a particular employer has landed has been done on the basis of considerations that are reasonable and in good faith. The City, as the author of the Policy, has accepted its onus in demonstrating that, and, to the point where Ms. Mihalov herself was involved, has laid out its case. In line with the cases noted above, if the Union is intending to show that the City in its deliberations was motivated by something other than safety concerns, it needs to be able to point to something to put that motivation clearly in question. Pressed on what in the Union’s view constituted “bad faith” in the introduction of the employer’s Policy here, the best the Union could come up with was the submission that “looking at the PUBLIC interest is bad faith; an employer considering an employment policy can only look at how the policy will affect its *employees*”. That is an astonishing argument to make with respect to *any* employer, but all the moreso in the case of a municipality, as Ms. Vincenzo readily testified, acting out of concern not only for its employees and their families, but also the citizens that it serves. Nor does that suggestion show any recognition of the many lines of cases seeking a balance, for example, between employment rights and the right of an employer to respond, from a public point of view, to situations of criminal charges, or matters of dress or other personal appearance. Without something more credible and concrete from the Union, I do not find it

appropriate to order the City to undertake the massive search the Union has asked for under Item #1.

Item #2, the City's decision to amend its policy to call for the termination of the unvaccinated – This one stands on a different footing from Item #1 in that there is not in the events of the day the same *prima facie* explanation for why the City at this juncture chose to go the route that it did. I accordingly find the Union's request in Item #2 to be a justifiable attempt to inquire further into the basis on which the City acted, and direct the City to make its best efforts to search for and produce all documents either created or considered by the Employer, including Ms. Mihalo, in any way relating to the decision to amend the Policy so as to terminate employees who were not in compliance with the Policy, as described by the Union in its request #2.

This lattermost order is obviously the most burdensome for the employer, and I direct the City, unless some other timeline is agreed to between the parties, to conduct the above searches and convey the results to the Union by Friday, June 28th. The matter, I recognize, is scheduled to resume on July 4th, for one day in that week. Given the manner in which the case is being litigated, it will take many more days than are currently scheduled to complete the matter, and if the parties mutually agree to adjourn the hearing set for July 4th, there will in the circumstances be no cancellation fee.

The parties can advise.

Dated at Toronto this 5th day of June, 2024

A handwritten signature in black ink, appearing to read "MGP Matthei", written over a horizontal line.

Sole Arbitrator