COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Purolator Canada Inc. v. Canada Council of Teamsters,* 2026 BCCA 3

Date: 20260109
Docket: CA50492

Between:

Purolator Canada Inc.

Appellant
(Petitioner)

And

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

Respondents
(Respondents)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated January 30, 2025 (*Purolator Canada Inc. v. Canada Council of Teamsters*, 2025 BCSC 148, Vancouver Docket S240143).

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Place and Date of Hearing:	Vancouver, British Columbia September 16–17, 2025
Place and Date of Judgment:	Vancouver, British Columbia January 9, 2026

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Edelmann

Summary:

This appeal arises from a petition for judicial review of a labour arbitration grievance award. Purolator, the employer, appeals the reviewing judge's finding that the arbitrator's award was reasonable in the administrative law sense. The arbitration concerned a mandatory COVID-19 vaccination policy in place at Purolator's unionized workplace from January 2022 to May 2023. The arbitrator found that it was reasonable to implement the policy, but continuing the policy was unreasonable as of June 30, 2022, based primarily on his conclusion that there was scientific consensus by that date that vaccination did not provide statistically significant protection against infection, and thus maintaining the policy ceased to be reasonable under the KVP/Irving balancing of interests. HELD: Appeal allowed. The arbitrator's decision was unreasonable because he held Purolator to a standard of correctness in how it interpreted and applied competing public health and scientific evidence amidst the pandemic.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The issue on this appeal arises out of a judicial review of a labour arbitration grievance award. The arbitrator found that a COVID-19 mandatory vaccination policy imposed on a unionized workforce by its employer (Purolator Canada Inc.), which remained in place between January 1, 2022, and May 1, 2023, was unreasonable as of June 2022: *Teamsters Local Union No. 31 v. Purolator Canada Inc.*, 2023 CanLII 120937 (CA LA) ("Award"). The employer's petition for judicial review was dismissed on the basis that the Award was reasonable in the administrative law sense: *Purolator Canada Inc. v. Canada Council of Teamsters*, 2025 BCSC 148 ("Review Decision").

[2] The Award is lengthy and deals with many issues, some of which are contested on appeal by Purolator. In my view, there is one central issue which is determinative of the appeal, regardless of whether other aspects of the Award are reasonable. If the arbitrator's decision on that issue is unreasonable, then a critical pillar in the analysis falls away and the Award as a whole is unreasonable.

[3] The fundamental point raised on this appeal, in my opinion, is that the arbitrator is alleged to have applied a "correctness" standard to key aspects of his

determinations in upholding the grievances. Purolator contends that by engaging in a determination of the "correct" scientific conclusion, rather than the reasonableness of maintaining the policy, the arbitrator applied the wrong legal test, resulting in an unreasonable decision. Rather than ask whether the policy was reasonable, the arbitrator made factual findings about the scientific efficacy of reducing transmission and infection rates through vaccination and then measured the policy against those findings. In doing so, Purolator argues, he applied the wrong legal test and placed an onus on Purolator to be scientifically correct in its policy decision.

[4] For their part, the union argues that assessing the reasonableness of a mandatory and unilaterally imposed vaccination policy requires that the arbitrator make findings of fact in the balancing of relevant interests. Here, the record included evidence about the effectiveness of vaccination in preventing transmission and infection after June 2022. The arbitrator was entitled, it submits, to reach factual conclusions about that evidence and to apply those conclusions in assessing the reasonableness of the policy. The respondents say the arbitrator reached a reasonable conclusion about Purolator's policy, as that term is understood in the administrative law context, and the appeal should be dismissed.

[5] Two introductory comments are in order. First, whether a unilaterally imposed policy is "reasonable" as a matter of labour law is governed by a test and set of legal principles that have evolved within the industrial relations domain. Whether a policy is "reasonable" as a matter of administrative law is governed by a different set of considerations, as explained in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*]. The two should not be confused. Second, the parties agree on the standard of review on an appeal of a petition for judicial review. It is well established that we ask whether the reviewing judge identified and applied the correct standard of review. Here, the judge identified the correct standard of review: reasonableness. When it comes to analysing whether that standard was applied correctly, we put ourselves in the shoes of the reviewing judge and directly assess the underlying decision. We are not required to defer to the reviewing judge's analysis. I adopt that approach in these reasons.

[6] For the reasons that follow, I conclude that the Award was unreasonable in the administrative law sense. In reaching that conclusion, I focus principally on one critical aspect of the Award: namely, the arbitrator's treatment of the advice given over time by public officials about the effectiveness of vaccination to protect against infection of the Omicron variant of the COVID-19 virus. I acknowledge that the Award dealt with several other important issues. Purolator challenged the reasonableness of the Award respecting those issues. However, as I shall explain, it is not necessary to deal with them as the central issue I have identified is dispositive of the appeal.

Background

[7] At the heart of the arbitrator's Award was his conclusion that, by June 2022, it was no longer reasonable for Purolator to continue with a vaccine mandate because the policy requiring employees to attest, by early January 2022, that they were fully vaccinated was effectively useless to protect against the transmission of the then dominant Omicron strain of COVID-19. While the policy was reasonable up to June 2022, it was not thereafter. Other factors engaged in balancing the interests at stake were also relevant to his decision, such as the weight he gave to considerations of privacy and personal autonomy, and those factors are also raised by the employer on appeal. The critical point on appeal, in my view, is the basis of his conclusion that it ceased to be reasonable to continue the policy given medical opinions by an important public health officer on preventative efficacy, and the implications of that conclusion for his overall analysis.

[8] To bring this key issue into proper focus, it is necessary to set the context for assessing employer policies and to provide the relevant factual background.

[9] First, there is a well-established approach that labour arbitrators take to the unilateral imposition of mandatory workplace policies. The leading cases are: *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co*. (1965), 1965 CanLII 1009 (ON LA), 16 L.A.C. 73 (Robinson) [*KVP*], and *Communications, Energy*

and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34 [*Irving*].

[10] The *KVP* test requires consideration of several factors. The one relevant to this appeal is that an employer's unilateral rule or policy that has not been negotiated with its union must "not be unreasonable": *KVP* at 85. The *Irving* decision requires a balancing of interests, including the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy impact on employees' interests, in determining whether a policy was reasonable: *Irving* at para. 27.

[11] In this case, the arbitrator applied the "balancing of interests" test and considered employees' rights to personal autonomy and bodily integrity in the analysis, which he found are akin to rights which attract constitutional protection. In that assessment, the arbitrator weighed the affected employees' rights of personal autonomy and bodily integrity, and economic loss of livelihood, against the employer's reasons for implementing and maintaining the vaccination mandate: Award at paras. 62–69. Whether those interests were appropriately engaged by the policy is a point of contention between the parties. This aspect of the Award is not considered further in these reasons.

[12] For current purposes, the focus is on the whether the implementation and maintenance of the policy, viewed on a standalone basis, was reasonable and what considerations properly inform that analysis. If the arbitrator's analysis of that standalone issue does not meet the *Vavilov* standard, then the Award falls away because the overall balancing of interests to determine whether the policy was reasonable is critically undermined. A stool cannot stand if one of its legs is removed.

[13] I turn now to the second of the contextual features of the case, the factual background.

[14] Purolator is an integrated freight, package and logistics solutions provider with operations across Canada. It is federally regulated with respect to labour relations and employment.

[15] The Canada Council of Teamsters holds bargaining rights for the employees and owner/operators of Purolator. These employees include drivers and depot workers across Canada. The Council has constituent Local unions, including the Teamsters Local Union No. 31 ("Local 31").

[16] On September 15, 2021, in the face of the global COVID-19 pandemic and the rapid development of available vaccines, Purolator introduced a mandatory vaccination policy called the COVID-19 Safer Workplace Policy (the "SWP"). The SWP was in place between January 1, 2022, and May 1, 2023.

[17] The SWP required every Purolator employee and owner/operator to attest to being fully vaccinated against COVID-19 by January 10, 2022. Any employee who did not so attest would be placed on a leave of absence. The SWP did not require that employees have booster shots or in any other way maintain their fully vaccinated status after January 10, 2022. This matters because a key issue in the arbitration was the extent to which the effectiveness of vaccination to protect against the transmission of COVID-19 waned over time. The arbitrator concluded that, as a matter of fact, after 25 weeks full vaccination no longer protected others against infection: Award at para. 25.

[18] Between December 23, 2021, and January 31, 2022, Local 31 filed several individual grievances and one group policy grievance challenging the reasonableness of the SWP in British Columbia. Evidence was led over 23 days between September of 2022, and September of 2023. The arbitrator had before him a substantial body of evidence, including evidence about public health pronouncements and policies, as well as expert evidence from Shirin Kalyan, PhD, Local 31's expert, who is a "translational immunologist" and Dr. Gabriel Rebick, MD, Purolator's expert, who is a physician with specializations in infectious diseases and internal medicine.

[19] As noted, the arbitrator found that the SWP was reasonable up until June 30, 2022, but unreasonable thereafter.

[20] The arbitrator considered the four reasons Purolator advanced in support of the reasonableness of the SWP (Award at para. 22):

> 1) Allowing unvaccinated workers into the workplace endangered other workers already there because they are more likely to be infected and then pass it on to other workers.
> 2) Third-party and customer requirements for Purolator employees especially couriers, attending their premises to be vaccinated render the policy operationally necessary.
> 3) Vaccination provides protection against serious illness if infected, so unvaccinated workers bring with them into the workplace an increased risk (for them) of serious illness.
> 4) Unvaccinated workers are more infectious once infected than vaccinated workers.

[21] The arbitrator concluded that by the end of June 2022, the first and second reasons no longer existed: Award at paras. 25–26. Excluding unvaccinated workers from the workplace after June of 2022 did nothing for their safety or for the safety of others, and the third reason was therefore an unreasonable and disproportionate safety measure: Award at para. 27. The fourth reason remained valid in the late spring of 2022, but was thereafter of “questionable validity” and was “inadequate to justify excluding unvaccinated workers form the workplace with its attendant loss of livelihood”: Award at para. 28.

[22] The arbitrator acknowledged a significant body of arbitral jurisprudence that balanced relevant interests and upheld as reasonable employer policies protecting the safety of workers by protecting them against infection by unvaccinated workers. He determined, however, that by the late spring of 2022, it had become the prevailing medical opinion that two-dose vaccination after 25 weeks provided insignificant protection from infection. He described it as “effectively useless”: Award at para. 25. By then, he concluded, it was an incontrovertible fact that two-dose vaccination after 25 weeks provided statistically insignificant protection against infection. As a result, the precautionary principle no longer had any application with

respect to protection against infection: Award at para. 225. The precautionary principle is engaged in circumstances where it is uncertain whether certain risks will materialize in the future, hence taking steps to prevent them materializing is a justifiable response: Award at para. 222–223, citing *R. v. Michaud*, 2015 ONCA 585 at para. 102.

[23] The arbitrator's conclusions were rooted both in his assessment of prevailing medical opinion at various times and his own findings of fact about whether vaccination protected against infection. He found the SWP was unreasonable because it was, in fact, ineffective to prevent infection.

Arbitrator's Conclusion on Reasonableness

[24] The arbitrator explored the context of the COVID-19 pandemic. He noted the success of the effort to develop vaccines. He noted that by approximately December 2020, new vaccines were being distributed which "contributed to some level of containment of the spread of the disease, in the case of the Alpha and Delta variants of concern": Award at para. 9.

[25] He then observed that "once Omicron was developing into the dominant variant of concern, beginning in the fall of 2021, there was an unexpected and dramatic rise in the number of infections in highly vaccinated countries. Vaccination did not seem to be winning. It was not containing the rapid spread of Omicron": Award at para. 10. The arbitrator accepted, however, that at the date the SWP was implemented, prevailing medical opinion continued to support vaccination as the best protection against infection. This underlay his conclusion that when it was implemented, the SWP was reasonable:

> 113. As is explained elsewhere in this award, workplace safety was the dominant purpose of the SWP, and in the light of prevailing medical opinion as of the date when it was implemented, I have found that the implementation of the SWP was reasonable, applying the *KVP* and *Irving* tests. …
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> …
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> 221. Secondly, the initial implementation of the mandate was driven by a belief that allowing unvaccinated workers into the workplace endangered workers already there. I have found elsewhere that this belief was

> reasonable, and the application of the precautionary principle given the uncertainties surrounding the evolution of the virus and vaccine science at the time, was reasonable. …

[26] The arbitrator reviewed changes in the "prevailing medical opinion" over time: Award at para. 114. As he acknowledged, it took time for data to become available that allowed a scientific assessment of the continuing effectiveness of vaccination to protect against infection. In the face of uncertainty, it continued to be reasonable for Purolator to rely on public health authority statements about effectiveness, even if, as a matter of objective fact, vaccination had ceased to be effective to prevent infection. This is illustrated in para. 136 of the Award, dealing with an order issued by Dr. Bonnie Henry, the Provincial Health Officer for British Columbia (the "PHO"), dated February 16, 2022:

> 136. Despite the fact that the union's expert witness Dr. Kalyan questioned whether there was any data at that time to support the statements regarding effectiveness against infection, I accept that there was insufficient data from all readily accessible sources at that time to conclude that it was unreasonable for the employer to accept the guidance indicated in this preamble. Uncertainty and the precautionary principle still operated in favour of continuing the mandate as of February 16, 2022.

[27] In the arbitrator's view, by late spring of 2022, this uncertainty had evaporated as sufficient data came available. Commenting on public health studies and analyses of the effectiveness of vaccination to protect infection, he observed:

> 12. These studies over time cumulatively revealed, by the spring of 2022, a massive drop in 2 dose vaccine effectiveness against infection which occurred with the fading of Delta and the advent of the Omicron variant. It was discovered that within a relatively short time after vaccination, levels of protection against Omicron infection waned. The waning effect for 2 dose vaccination was dramatic, dropping to an average effectiveness percentage across the main vaccines of 9%, after 25 weeks (they ranged from 17% to zero depending on the vaccine).

[28] I will return later to the significance of the arbitrator's finding that the average effectiveness of vaccination dropped to 9% and his conclusion that this was "statistically insignificant" and demonstrated that vaccination was effectively useless.

I note here, however, that the arbitrator did not explain anywhere in his reasons why an average 9% effectiveness was insignificant. The arbitrator went on:

> 13. It took some time for this pattern to emerge as an incontestable fact no longer justifying the precautionary principle which had been a key element in the reasonableness of vaccine mandates, as data had to be gathered and cohorts of vaccinated and unvaccinated individuals infected with Omicron had to be identified in order for there to be anything to analyze.

[29] The finding that it was an incontestable fact that vaccination against COVID-19 ceased to be effective against infection by the Omicron variant was rooted in the arbitrator's own assessment of the state of scientific research, as well as his interpretation of the consensus view of researchers at the time. He reasoned as follows:

> 180. The word "*significant*" appears twice in the above passage. However, Dr. Rebick does not quantify what he means by this. In all the studies to which I have been referred, two-dose vaccination after 25 weeks has a range of effectiveness against the Omicron variants in play around the spring of 2022, somewhere between zero and 17%. Averaged out for all three major vaccines the effectiveness is 9%. There is no ambiguity about the conclusion to be drawn from the overwhelming volume of data provided in Dr. Kalyan's report.
>
> 181. It is the effectiveness of the vaccines after 25 weeks which is at issue in this case, because it is fundamental to the employer's position that the mandate remained reasonable until May 1, 2023. …
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> …
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> 185. I found nothing else in the report or oral evidence of Dr. Rebick to undermine the overwhelming data reviewed and the conclusion arrived at, in Dr. Kalyan's report, that a two-dose vaccination series was discovered to be effectively useless for protection against infection by, at the latest, the spring of 2022. …

[30] This conclusion was restated several times:

> 25. Reason number one [protection against infection] is gone by June 2022. While there were some marginal dissenting voices, the overwhelming medical opinion by the spring of 2022 was that a two-dose vaccination after 25 weeks was effectively useless to protect against Omicron infection. All the vaccinated workers at Purolator would have completed their two dose vaccinations at least 25 weeks prior to the end of June 2022. Thus, by that time unvaccinated workers presented no more threat of infecting others than 2 dose vaccinated workers.

[31] I note here that the reference to "some marginal dissenting voices" refers, presumably amongst some others, to Dr. Bonnie Henry, the PHO. He stated his conclusion more than once:

> 38. …My final finding, which asserts that there was no workplace safety value at all was arrived at by careful analysis, and I acknowledge that it is somewhat counter-intuitive.
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> …
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> 225. This has led to the application of the precautionary principle and in most cases the application was reasonable. However, based on the evidence presented in this case, as well as FCA, there was, by the late spring of 2022 no longer any scientific uncertainty about the fact that two-dose vaccination after 25 weeks provided statistically insignificant protection against infection. The precautionary principle no longer had any application with respect to protection against infection. Insofar as any of the awards continued to apply the principle to the risk of infection after the spring of 2022, they were persuaded by expert evidence quite different from the evidence heard in this case.
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> …
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> 561. The primary reason was the danger to others in the workplace caused by introducing unvaccinated workers who were more likely to get infected and pass it on. That danger dissipated during the early part of 2022 and was eliminated in terms of any statistical significance by the late spring of 2022.
>
> [Emphasis added.]

[32] An important part of the arbitrator's analysis involved what could properly be taken from some of the public health messaging in 2022. He noted, accurately, that most messaging shifted away from vaccination protecting against infection to encouraging booster shots and vaccination as a means of reducing the seriousness of illness, hospitalizations, and the risk of death. The arbitrator's analysis is encapsulated at para. 32, and elaborated on elsewhere in the Award:

> 32. The employer relied heavily on support and encouragement from all these sources in favour of vaccination generally as producing a desirable public health outcome. But when statements and information from these sources are examined closely, they do not, after about March of 2022, assert that a two-dose vaccination after 25 weeks was of any value in protecting against infection. Many public health and government sponsored agencies provided statements and reports which made it very clear that 2 dose vaccination after 25 weeks provided no meaningful protection against infection and devoted their messaging to encouraging booster shots and emphasizing the value of vaccines in protecting against serious illness. Reliance on these sources does not exonerate the employer from its failure to

> focus on the ineffectiveness of the two-dose regime it was mandating via the SWP and take steps to end the mandate by late June 2022.
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> …
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> 124. I will now proceed to review some of these government and public health communications. In the course of doing so it is important to keep in mind certain limitations. The first of these is that while vaccination confers a general public health benefit, this is not at all times to be equated with a specific workplace safety benefit, or justify compulsion of any kind. The role of public health authority guidance is to inform, educate, persuade, and advise the general population to make good choices, beneficial to their health and safety. Care must be taken not to treat that guidance indiscriminately as justifying employer measures compelling their employees to adhere to that advice. In circumstances where that advice if taken significantly enhances workplace safety, there is at least arguably a strong correlation between the two. But when that advice amounts to a recommendation about lifestyle choice, and/or 24/7 personal protection, then that correlation melts away.
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> 125. The second related limitation, based on an important conclusion I have reached, expanded on at length in another section of the award, is that while increased levels of protection from infection confer a specific workplace safety benefit which could arguably justify a mandate, increased levels of protection from serious illness, hospitalization and death, do not generally justify a vaccine mandate.
>
> 126. The third limitation is that when public health authorities speak of the benefits of vaccination generally, these statements should not be taken as specific endorsement of 2-dose vaccination after 25 weeks as providing meaningful protection against infection, after the spring of 2022.
>
> 127. There is one exception published in September 2022 which I will review specifically later.

[33] The exception referred to is a public health order published by Dr. Henry.

[34] It is apparent that the arbitrator relied on his own assessment of the scientific evidence to reach a conclusion about the effectiveness of vaccination to protect against transmission after 25 weeks (Award at paras. 118–154), and his conclusion was that it had become incontrovertible, by June 2022, that vaccination was effectively useless to prevent infection. This, he concluded, was the consensus among public health officials and it was unreasonable for Purolator to have taken a different view.

[35] An issue that the arbitrator had to address was whether there was indeed a public health authority consensus, by June 2022, that vaccination did not prevent infection after 25 weeks. This was important for two reasons. First, Dr. Henry issued

orders dated January 20, 2022, February 16, 2022, and September 12, 2022 (the "September Order"), which, on their face, suggested that vaccination continued to protect against infection. The September Order stated, for example (Award at para. 149):

> People who are unvaccinated are a greater risk to other people than vaccinated people. The reasons for this are that unvaccinated people are more prone to carry SARS-CoV-2 compared with vaccinated people, can be infectious for a longer period of time, clear the infection more slowly, and are more likely to have symptoms which spread the virus than a vaccinated person. The result is that an unvaccinated person is more likely to become infected than a vaccinated person and is more likely to transmit SARS-CoV-2 than a vaccinated person.

[36] The second reason is that Purolator argued that it relied, in part, on these orders in deciding to continue the SWP. Although the arbitrator was critical of some of the reasons relied on by Purolator for continuing the SWP, he accepted that Purolator had relied on the public health orders, particularly the September Order, in continuing the SWP after June 2022. As I read the Award, the arbitrator found that the SWP could not be justified as reasonable based on the September Order, because the PHO's opinion as reflected in the September Order was scientifically incorrect, and, consequently, it could not function as a plank capable of supporting the SWP.

[37] After an extensive discussion, outlined above, of changing statements by some public health authorities about the waning effectiveness of vaccination in preventing infection, and the abolition of vaccination mandates by some public authorities (including the Federal Government, whose implementation of a mandate, in the fall of 2021, had been a principal reason why Purolator imposed one itself), the arbitrator turned to deal with the implications of the September Order. This is what he said:

> 148. I should not leave this review of public health authority guidance without referring to the Order of the Provincial Health Officer for British Columbia dated September 12, 2022. The employer claims it relied on this public health authority guidance in continuing to maintain the SWP. The comments made in the Order about the value of vaccination to protect people from serious illness or hospitalization and death are not controversial. I make no further comment about them.

> 149. But there are also observations in that Order, at paragraph Q of the preamble which run entirely contrary to the overwhelming prevailing medical opinion which had crystallized no later than the spring of 2022, that the risk of infection for vaccinated and unvaccinated persons is the same, or at best statistically insignificant. I have already reviewed much of the data and studies confirming this. At paragraph Q the PHO states:
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> > People who are unvaccinated are at greater risk to other people than vaccinated people. The reasons for this are that unvaccinated people are more prone to carry SARS-CoV-2 compared with vaccinated people, can be infectious for a longer period of time, clear the infection more slowly, and are more likely to have symptoms that spread the virus than a vaccinated person. The result is that an unvaccinated person is more likely to become infected than a vaccinated person and is more likely to transmit SARS-CoV-2 than a vaccinated person.
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> 150. In the light of all the evidence, data, and expert opinion I have received in the hearing of this matter I conclude that this statement is an outlier. It is wholly inconsistent with the preponderance of material I have been presented with. Dr. Kalyan specifically refuted it and I find her position on this to be credible and persuasive.
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> 151. The employer at paragraph 265 of its submissions states that it was entitled to and indeed required to follow this Order. It provided public health guidance that "vaccination remained the most effective tool against the spread of COVID-19." I note that not even the employer's expert Dr. Rebick agrees with that proposition. He accepted that vaccination "did not provide good protection against infection". This has to refer to effectiveness "against the spread of COVID-19". He recognized and accepted that prevailing medical opinion and public health guidance all pivoted by the spring of 2022, if not earlier, to supporting and encouraging vaccination as providing good protection against serious illness, hospitalization and death while protection against infection was no longer referred to as a benefit of vaccination.
>
> 152. Accordingly, I find that this isolated and contrarian message from the PHO does not constitute an adequate plank on which to salvage the employer's assertion that the SWP remained reasonable in the fall of 2022 when this PHO message was circulated.
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> [Emphasis added.]

[38] What is important about this reasoning is that the arbitrator accepts that the PHO is asserting, as late as September 2022, that vaccination protects against infection. However, he proceeds to render this conclusion of no consequence by treating the PHO's assertion as inconsistent with assertions by other public health authorities. He concludes that the assertion is incorrect and wholly inconsistent with the preponderance of the material he has reviewed. He finds it to be an "outlier" and "contrarian": Award at paras. 150, 152. On this basis, he concludes that it cannot

support the reasonableness of Purolator continuing the SWP. The arbitrator's conclusion about the contextual value of the PHO's assertion rests, at least in part, on his view of the science surrounding the effectiveness of vaccination in preventing transmission and infection. He asserts that he is factually right about the risk of transmission and infection based on the evidence he heard, and the PHO is wrong.

[39] The arbitrator's conclusion that the PHO's statements conflicted with advice from other sources is not insignificant. Elsewhere in his reasons, he accepted that, in the face of "scientific uncertainty", it was not unreasonable for Purolator to implement and maintain a mandatory vaccination policy. Clearly, as of September 2022, there was apparently on the record still some disagreement about the effectiveness of vaccination on transmission and infection. The arbitrator did not interpret the various recitals in the September Order as referring to something other than protection against infection. He did not resolve any apparent conflict between the PHO's statements and other public authority statements. Instead, he removed the PHO's statements from consideration by classifying them as "outliers" and then concluded there was, in fact, an incontrovertible consensus amongst public health authorities: Award at para. 151. The evidence before him and his treatment of it indicated the contrary.

[40] Having concluded that vaccination was effectively useless to protect against infection after 25 weeks, the arbitrator was then able to conclude that the precautionary principle could have no application after June 2022, because there were no risks that could materialize that should be guarded against: Award at para. 225. The circumstances that had existed before, when it was not yet clear whether vaccination protected to some extent against infection after 25 weeks, and which justified vaccine mandates up to June 2022, had evaporated.

[41] The arbitrator also dealt at some considerable length with the science underlying Purolator's reason #4 for the continuation of the mandate: that unvaccinated individuals were more infectious than vaccinated individuals once infected and therefore more likely to transmit the virus. The arbitrator engaged in a

detailed review of the scientific evidence bearing on this claim that covered multiple pages, ultimately concluding:

> 214. The net message from Dr. Kalyan's and Dr. Rebick's evidence was that the possible vaccination benefit of reduced infectiousness was not clearly established. Whatever the benefit, the effectiveness of the vaccines waned noticeably along with protection against infection. It was not listed by the health authorities as a reason to get vaccinated. It was also insufficiently established to cross a reasonable threshold over which to activate the precautionary principle.

[42] I highlight this analysis to demonstrate the extent to which the arbitrator undertook his own analysis of the medical evidence to determine what he considered to be the correct scientific facts and then relied on those findings to determine whether the SWP was reasonable. This is a clear application of a correctness standard to a determination. Ultimately, the arbitrator concluded that, because the SWP did not align with his factual conclusions on the efficacy of vaccination after June 2022, Purolator's choice to maintain the SWP was unreasonable.

[43] In reviewing the arbitrator's reasoning on this point, I acknowledge that he was critical of a number of Purolator's reasons for continuing the SWP in June 2022, as revealed in evidence surrounding discussions between Purolator representatives regarding their rationale for continuing it: Award at para. 256. Those criticisms do not, however, detract from the key issues I have been canvassing.

***Vavilov* Standard**

[44] Before bearing down on whether the Award is reasonable, it is worthwhile to say something about the lens through which this issue must be addressed.

[45] Reasonableness review concerns both the decision-making process and its outcomes, requiring a "reasons first" approach in examining the decision: *Vavilov* at para. 84. We must begin our inquiry by examining the reasons provided by the arbitrator to understand his underlying reasoning process. His reasons need to justify the Award. It is not enough for the Award to be objectively justifiable; the path

taken to reach that decision also matters. An otherwise reasonable outcome cannot stand if it was reached on an improper basis.

[46] The Court in *Vavilov* identified two types of “fundamental flaws” indicating that an administrative decision is unreasonable: (a) a failure of rationality internal to the reasoning process; and (b) a failure of justification given the legal and factual constraints bearing on the decision: at para. 101.

[47] A failure of rationality in the reasoning process arises if a decision is not rational or logical. A decision is unreasonable if: (a) the reasons, read holistically, fail to reveal a rational chain of analysis; and/or (b) the conclusion cannot follow from the analysis undertaken: *Vavilov* at para. 103. For example, a decision’s internal rationality may be called into question if the reasons exhibit logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations, or an absurd premise: *Vavilov* at para. 104.

[48] In contrast, a failure of justification in light of legal and factual constraints arises if a decision is not “justified in relation to the constellation of law and facts that are relevant to the decision”. The legal and factual context “operate as constraints on the decision maker in the exercise of its delegated powers” and is contingent on, among other things: the governing statutory scheme; the relevant statutory and common law provisions; applicable precedents; the evidence; and the submissions of the parties. These factors “are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context”: *Vavilov* at paras. 105–106.

The Reviewing Judge’s Conclusion that the Award was Reasonable

[49] The reviewing judge undertook a detailed and careful review of the Award and the arguments advanced by Purolator on the judicial review petition. Since we do not defer to the judge but assess anew whether the Award is reasonable, it would serve little purpose to explain the judge’s reasoning in detail. The judge found the Award to be reasonable on the key issue because he concluded that it was open to the arbitrator to conclude, as a matter of fact, that it was incontestable that

vaccination was ineffective to prevent infection after June 2022, and, accordingly, that the precautionary principle did not apply. He deferred to the arbitrator's conclusion that the SWP was unreasonable because Purolator could not establish that it prevented or reduced the consequences of the problem in the workplace: Review Decision at para. 96. The judge also concluded that, while public health documents are admissible because they are inherently reliable and trustworthy, the arbitrator was entitled to place little weight on them as a specific endorsement of two-dose vaccination after 25 weeks as providing meaningful protection against infection after the spring of 2022: Review Decision at para. 144.

[50] The reviewing judge also disagreed with Purolator that the arbitrator had imposed a standard of scientific certainty on it, reasoning:

> [150] The Arbitrator was required to hold Purolator to a standard of reasonableness, not correctness or perfection. I do not agree with Purolator that the Arbitrator's consideration of the expert evidence demonstrates that he held it to the higher standard. The Arbitrator's findings regarding the expert evidence before [*sic*] the him cannot be viewed in a vacuum without regard to the Arbitrator's conclusion at para. 225 of the Decision, where he finds that it was not reasonable for Purolator to maintain the policy after June 2022, due to the evidence available to it about the effectiveness of a two-dose primary vaccine against infectiousness to Omicron.
>
> [151] The Arbitrator was entitled to conclude that the SWP was not then a reasonable response to COVID-19 based on the information that was available to Purolator.
>
> [Emphasis added.]

[51] As I shall explain below, I take a different view to that of the judge.

Analysis

[52] In my view, the Award is unreasonable within the meaning of *Vavilov*.

[53] The arbitrator accepted that, in principle, it is reasonable for an employer to rely on advice from public health authorities about the nature of health risks that may be prevalent in a workplace. He also accepted that it is reasonable to rely on public health advice in the face of uncertainty about whether and the extent to which vaccination protects against transmission and infection. It was on this basis that the

arbitrator concluded the SWP was reasonable when first implemented, and continued to be reasonable in February 2022, because sufficient data had not yet become accessible to demonstrate that vaccination was no longer effective to protect against infection, even though, at that time, some public authorities were indicating that vaccination was no longer protecting against transmission or that protection was waning. On these facts, the arbitrator accepted that the precautionary principle was engaged and the SWP continued to be reasonable.

[54] In short, on the arbitrator's own analysis of those circumstances, Purolator did not have to be correct about whether the SWP was objectively effective to protect against infection. It was reasonable to continue the SWP in the face of uncertainty and conflicting advice. In those circumstances, the precautionary principle has application because it is not known whether potential risks will or will not materialize.

[55] The arbitrator's analysis of the situation later adopts a different approach. The arbitrator concludes that the prevailing opinion of the public health authorities, supported by the objective science, had made it incontrovertible, by the spring of 2022, that vaccination was ineffective to protect against infection. As I read the Award, the arbitrator finds both that there was no longer any scientific uncertainty about the effectiveness of vaccines, and that this fact was reflected as the prevailing public authority opinion.

[56] Neither of these conclusions is supportable on the record. The September Order reflects what was presumably a considered view that data supported the conclusion that full vaccination continued to protect against infection. The arbitrator accepted that this was the assertion in the September Order. Other public health authorities took a different view and accepted that the effectiveness had waned. The conclusion that there was no longer any scientific uncertainty reflects the arbitrator's own finding about the efficacy of vaccination, in substitution for the finding of at least one significant PHO to the contrary. It is unreasonable to characterize the PHO as a "marginal dissenting voice": Award at para. 25.

[57] Hence, not only did the September Order support the proposition that there was continuing scientific uncertainty in September 2022, but it also demonstrated the absence of a clear consensus among the public health authorities about whether vaccination would be effective to prevent infection. Indeed, the PHO continued to include identical wording in public health orders well into 2023. It may well be, as the arbitrator suggested, that a predominant view had developed that vaccination was not effective to prevent infection after about 25 weeks. This explains why the federal government considered that it could lift its vaccination mandate. But the arbitrator accepted that the PHO was asserting a different view and was advising the public that the best protection against transmission and infection was vaccination.

[58] On the record, there was no consensus about the effectiveness of vaccination. It cannot be said that it was incontrovertible that there was no scientific uncertainty, unless that reflects the arbitrator's own determination of what he considered the facts to be. In my view, this imposed a correctness standard in reviewing the SWP and demanded that Purolator get it right, not just act reasonably. On the arbitrator's own reasoning, as manifested in his conclusions about the situation in February 2022, the question he was obliged to ask was whether it remained reasonable for an employer to continue a vaccine mandate when faced with contradictory advice between public health authorities: Award at para. 136. In the circumstances, the inference to be drawn was that it remained uncertain whether a vaccine mandate would be effective, at least to some material degree, to limit infection. In fact, the arbitrator himself found a continued "average effectiveness" of 9% after 25 weeks: Award at para. 12.

[59] In argument, it was suggested that the absence of a consensus on these issues and an assertion that an employer could rely on a minority view risked delegating to an employer a decision about what was reasonable. It would be sufficient for an employer to establish reasonableness by pointing to the existence of a contrary opinion and assert that it relied on it. This would undermine the proposition that the implementation of a policy must be objectively reasonable.

[60] I do not think that risk is engaged in the circumstances of this case. The PHO's opinion is not just any opinion. It is the considered opinion of a provincial health officer charged with onerous responsibilities to act in the public interest. Given the status and responsibility of a provincial health officer, their considered opinions cannot be dismissed as contrarian or as a marginal dissident view. As the Ontario Court of Appeal has said in *J.N. v. C.G.*, 2023 ONCA 77 at paras. 26–27:

> [26] Under the public document exception to the hearsay rule, reports of public officials are admissible for the truth of their contents: *R. v. P.(A.)* (1996), 109 C.C.C. (3d) 385 (Ont. C.A.); *A.C. v. L.L.*, 2021 ONSC 6530. While this speaks only to admissibility, and not to what weight a judge must ultimately assign to it, it is important to understand why s. 25 exists and why there is a common-law exception, which speaks not only to the inherent reliability and trustworthiness of records and reports generated by public officials, but also to avoid the inconvenience of public officials having to be present in court to prove them. Consider this passage from *P.(A.)*, where Laskin J.A. wrote, at pp. 389-390, that:
>
> > At common law statements made in public documents are admissible as an exception to the rule against hearsay evidence. This exception is "founded upon the belief that public officers will perform their tasks properly, carefully, and honestly": Sopinka *et al.* The Law of Evidence in Canada (1992), p. 231.
>
> [27] Rand J. explained the rationale in *Finestone v. The Queen* (1953), 1953 CanLII 81 (SCC), 107 C.C.C. 93 (S.C.C.), at p. 95:
>
> > The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy [Emphasis added].

[61] It may be more appropriate to think of the September Order as an opinion, as it is not a report as such. It may also be admissible for its truth without further qualification, though that need not be decided here. What is important about the September Order is the reasonableness of the employer relying on it as a considered opinion of a responsible public officer.

[62] It follows that, based on a reasonable assessment of the record, and again consistent with the reasoning of the arbitrator in other places in the Award, the precautionary principle was, at least in principle, engaged.

[63] The arbitrator did not approach the issue in this way, however. Rather, he decided, according to his own view of the objective facts about the effectiveness of vaccination, that the contradictory advice of the PHO should be discounted as wrong, marginal, contrarian, and an outlier. In substance, he required the employer to reach the same conclusion that he did, recognize and accept that vaccination was ineffective after June 2022, and conclude that it would be unreasonable considering other evidence from experts and other public health authorities to continue the SWP.

[64] I agree with Purolator's submission that one way to look at this issue is to conclude that the Award is unreasonable because the arbitrator imposed the wrong standard to the question before him, in respect of this aspect of the arbitration, by requiring that the employer be correct rather than act reasonably.

[65] Another way of looking at the issue is that there is an internal incoherence or failure of rationality in the arbitrator's reasoning that undermines confidence in the result. On the one hand, the arbitrator accepts that uncertainty may ground an application of the precautionary principle. On the other, he does not apply that reasoning in the face of evidence from a public health authority demonstrating continuing uncertainty as late as September 2022, and into 2023. Rather, he employs a different approach by discounting the materiality of advice from the PHO and marginalizing it because he concludes it was wrong and an outlier.

[66] In my view, a consistent and rational approach to reasoning about the evidence in the record would have been to accept that there was continuing uncertainty about the effectiveness of vaccination as reflected in differing opinions from different public health sources, and then ask, was what this employer did reasonable in the circumstances? Viewed from this perspective, the arbitrator's reasoning depended on an unreasonable premise.

[67] It is, I think, no answer to this problem to say that the arbitrator is a fact finder and that it is within the scope of his discretion or authority to find, as an objective fact, that a particular policy is or is not effective to achieve its objective. Such an approach may be entirely appropriate in other circumstances. In this case, however,

one is dealing with a pandemic of dramatic proportions, causing widespread illness and death, in which the virus wreaking havoc was constantly mutating and the variants were following each other in successive waves. Uncertainty about the behavior of the different variants, modes of transmission, effective means of protection, and steps to mitigate the spread of the disease characterized the situation confronting everyone. In that context, the relevant question is what steps are reasonable, not what steps can be objectively demonstrated to be correct.

[68] This issue plays out in another context. The arbitrator frequently described vaccination as ineffective to control transmission or infection of the predominant Omicron variant after 25 weeks. It is clear on the evidence that there was a general understanding that the effectiveness of vaccination waned over time. But, as noted, the arbitrator's own findings were that vaccines continued to have an effectiveness of between zero and 17% after 25 weeks, with an average of about 9% effectiveness.

[69] At no time did the arbitrator explain why that degree of protection was statistically insignificant or effectively useless, a conclusion of fact that he reached: Award at para. 185.

[70] In my view, it is by no means clear why an average of 9% effectiveness should be treated as either statistically insignificant or render vaccination effectively useless, such that an employer policy seeking to address that risk is rendered unreasonable. The effectiveness of vaccination may well have waned considerably relative to an earlier benchmark, but, equally, it may have remained somewhat effective, as the employer's expert asserted, and offered continued protection against infection. The failure of the arbitrator to explain what he meant by statistical insignificance or why an average 9% effectiveness rendered vaccination effectively useless undermines confidence in the Award.

[71] The respondents attempted to explain the arbitrator's use of the phrase "statistically insignificant" in terms of a statistical analysis of such matters as confidence intervals. In short, the respondents argued that the conclusion was

justified. That may be so. But the issue is not whether the result is justified; the question is whether the result is justified by the reasons provided. Considering the arbitrator's evidentiary conclusion that vaccination remained on average 9% effective to control infection, a rational analysis would need to explain why that degree of effectiveness did not render the SWP reasonable on its own terms in the *KVP*/*Irving* test as a whole. There is nothing in the Award that addresses this point.

[72] I turn to one final point. The arbitrator concluded that the evidence was inconclusive or unproven on the question of whether an unvaccinated person who became infected with COVID-19 was more infectious than a person who had been vaccinated: Award at para. 214.

[73] The arbitrator concluded that this did not provide a ground for the SWP to be reasonable and that the precautionary principle did not apply: Award at paras. 215, 229. Again, I agree with the employer that the finding supports the application of the precautionary principle precisely because it is uncertain, on the arbitrator's findings, whether the risk would materialize. The arbitrator concluded that the precautionary principle did not apply because, on his findings about the science, the alleged benefits were not adequately proven, the evidence was inconclusive, and the benefits too modest. Hence, he concluded that the threshold to consider the possible application of the precautionary principle had not been met.

[74] In my view, this is an unreasonable conclusion based on an accepted understanding of when the precautionary principle is engaged. If the evidence that a harm can be avoided is unproven or inconclusive, the precautionary principle is engaged, even if it does not carry much weight in the face of all relevant considerations.

[75] Moreover, to reach his conclusion, the arbitrator had to undertake a detailed forensic examination of the complexities and minutiae of the various studies. By way of example, the arbitrator deconstructs studies to determine whether the results of studies of prisoners living in close proximity can be applied to the level of contact in a workplace: Award at para. 209.

[76] In my view, it is not reasonable to test an employer's response to studies indicating a potential problem to subject the studies to such a searching level of scrutiny in order to find an employer's response unreasonable. Undertaking an analysis in this way holds an employer to a correctness standard in its decision-making process, rather than asking whether the employer has acted reasonably.

[77] These defects in the reasoning of the arbitrator undermine confidence in the Award. If these defects had not occurred, the analysis of whether the SWP was reasonable, considering all of the relevant factors, might well have been different. The balancing would or could have included attaching weight to considerations the arbitrator discounted entirely. In the result, I consider it unnecessary to address certain other arguments advanced by Purolator. For example, I do not think it would be helpful to address the argument that the arbitrator departed unreasonably from the arbitral common law by considering employee interests in privacy and autonomy akin to constitutionally protected interests. Similarly, it would not be helpful to address the argument that the arbitrator unreasonably neglected Purolator's statutory obligation to provide a healthy and safe workplace. In my view, the reasoning flaws I have already identified require that the Award be set aside and remitted. Accordingly, I think it better that these additional issues be left at large and dealt with in a new arbitration.

Disposition

[78] I conclude that the Award is unreasonable on administrative law grounds. I would set aside the Award, and I would remit the grievance to a new arbitrator. In

my view, given the nature of the deficiencies embedded in the Award, this is a suitable case for fresh eyes.

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Edelmann"