



September 24, 2021

Craig A. Flood *
* Practicing through a professional corporation
Direct Dial: 416-595-2105
Direct Fax: 416-204-2883
cflood@kmlaw.ca

VIA E-MAIL JIMMYHAZEL@TRADESCOUNCIL.COM

Maintenance & Construction Skilled Trades Council
95 Shorting Road, Mezzanine Level
Toronto, Ontario M1S 5B9
Canada

Attention: Mr. Jimmy Hazel

Dear Mr. Hazel:

Re: Legal Opinion regarding TDSB's Mandatory Vaccine Policy

Our File No.: 211473

You have asked us for our opinion in respect of the Operational Procedure PR734 COVID-19 Vaccination Procedure for Employees, Trustees and Other Individuals (the "Policy") recently announced by the Toronto District School Board (TDSB).

In particular, you have asked us whether the TDSB is in breach of the Collective Agreement between the MCSTC and the TDSB or of legislation in enacting the Policy which requires regular testing and/or mandatory vaccination. You have also asked us to provide an opinion as to whether the exemptions under the Policy meet the TDSB's obligations under the *Human Rights Code*, and potential challenges to the possible disciplinary consequences that may flow from the Policy, given the TDSB's expedited enforcement of the Policy.

Overview of the Policy

The Policy was issued on September 14, 2021. In brief, it applies to employees, Trustees, school bus drivers, and other individuals who frequently attend a TDSB worksite (for ease of reference only, this opinion will refer to these individuals collectively as "Employees").ⁱ Notwithstanding that it was only issued on September 14, 2021, the Policy requires all Employees to disclose their vaccination status by September 7th, 2021.ⁱⁱ By November 1st, 2021, all Employees must have completed the full course of vaccination.ⁱⁱⁱ Vaccines accepted under the Policy are those approved by the World Health Organization, including Moderna, Pfizer-Biotech, AstraZeneca, and Janssen (Johnson & Johnson).^{iv}

Up until November 1st, 2021,^v Employees who are not fully vaccinated or who have not disclosed their vaccination status (for ease of reference only, these individuals will be referred to as the "Unvaccinated") must provide verification of negative COVID-19 self-testing results at least two times per week.^{vi} The TDSB will provide the test.^{vii} The Unvaccinated must provide the required negative test results to be allowed access to TDSB workplaces.^{viii}

Employees may be subject to disciplinary action, up to and including termination, for failure to comply with the Policy.^{ix}

Exemptions to the Policy are provided in accordance with the *Human Rights Code*^x for disability^{xi} and/or religion/creed.^{xii}

There are provisions in the Policy restricting the collection, use and disclosure of information collected,^{xiii} and ensuring that such information is kept confidential and stored in a secure location, with limited access and disclosure.^{xiv}

Regular Testing and Mandatory Vaccination

As an exercise of management rights, and as a unilateral employer rule, the Policy must be, among other things, reasonable and consistent with the collective agreement.^{xv} The TDSB's statutory obligation under the *Occupational Health and Safety Act* to take every precaution reasonable in the circumstances for the protection of a worker^{xvi} is likely to play a very significant role in any analysis of the reasonableness of the Policy. As well, the environment in which the Policy is to be implemented is also relevant to its reasonableness; that is, the public education system during a global pandemic where a significant number, if not the majority, of students cannot yet be vaccinated due to their age.

Arbitrators will most likely take note of and apply the *precautionary principle* when assessing the legal enforceability of an employer's COVID-19 vaccination policies. The *precautionary principle* requires that employers take extra steps to protect workers where risk is uncertain:

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

Obviously, we cannot provide a definitive opinion herein on the degree to which vaccines are an effective means of preventing infection and transmission of COVID-19. At present however, there appears to be consistent evidence that the WHO-approved vaccines are highly effective, including against the Delta variant, in not only reducing transmission of the virus but also in terms of reducing severe outcomes such as hospitalization and death.^{xviii} To our knowledge, all public health authorities in Canada continue to recommend vaccination as a safe and highly effective means of preventing infection and transmission.^{xix} However, we recognize that scientific knowledge and opinion with respect to the manner and prevention of the spread of COVID-19 and the efficacy of vaccination against COVID-19 is constantly changing in light of new and emerging scientific evidence and experience, including changes in the transmissibility of the virus itself.

Nonetheless, and regardless of this uncertainty, the *precautionary principle* requires that the TDSB take additional steps to protect the health and safety of its workers in these uncertain times.

In light of the *precautionary principle*, it is our opinion that the Policy's requirement for regular testing of the Unvaccinated is a reasonable exercise of management rights. A requirement for regular COVID-19 testing has already been upheld at arbitration under *the precautionary principle*,^{xx} and it is our opinion that this aspect of the TDSB's Policy would likewise be upheld. The TDSB's commitment to provide the testing is also a factor that will support a conclusion that the Policy is reasonable.

In requiring Employees to provide proof of vaccination, the TDSB will have to comply with all applicable privacy statutes, including those relevant to the collection, use and disclosure of medical records, such as Ontario's *Personal Health Information Protection Act* ("PHIPA").^{xxi} All collection and record keeping must comply with PHIPA provisions including, at a minimum, communicating to the affected workers the nature and extent of the information being collected, for what purposes, where the information will be stored, who it will be shared with, and when and how it will be destroyed. On its face, the Policy appears to comply with these requirements.^{xxii} Any lapse in adherence to such requirements could be the subject of a grievance or complaint, on a case by case basis.

In respect of mandatory vaccination, an individual's bodily integrity is legally afforded a high degree of privacy protection.^{xxiii} Compelling workers to vaccinate is undoubtedly an intrusion into one's bodily integrity and therefore engages issues related to personal autonomy and privacy rights. The case law is clear that an employer steps over the bounds of propriety and reasonableness when it attempts to enter into the private relationship between an employee and his/her physician.^{xxiv}

Mandatory vaccinations are certain to be viewed by an arbitrator as more intrusive than COVID-19 testing. Nonetheless, a mandatory vaccination policy may be upheld as reasonable where the requirement to be vaccinated is sufficiently grounded in the specific circumstances of the workplace and relevant factors, such as health and safety. For instance, in respect of mandatory influenza vaccination, an arbitrator previously held as follows:

The evidence makes clear the policy is designed to meet legitimate and critical objectives of the Employer. The Employer's primary goal is to prevent and contain outbreaks of influenza which have such a serious impact on this fragile population. A critical part of that is to have a sufficient level of immunization to create the "herd" effect to protect the population. Dr. Henry testified that vaccination rates in excess of 80% significantly controls the spread of influenza.^{xxv}

Although this observation was made in a different context – an outbreak of seasonal flu in a health care setting- the same guiding principles apply to a global pandemic, and those working in an educational setting. In other contexts, a mandatory vaccination policy that is properly tailored to the safety concern at issue and the circumstances of the workplace, and that accommodates both human rights and privacy concerns, has been found to comply with the *Human Rights Code*, the *Canadian Charter of Rights and Freedoms* and the *Privacy Act*.^{xxvi}

The Rationale of the Policy includes affirming "the Board's commitment to providing and maintaining a safe work and learning environment for all" and "to advance safety and support local public health units in working with school boards."^{xxvii} The decision to require vaccinations and testing relies on, among other things:

Ministry of Education direction, Ontario's Chief Medical Officer of Health instructions ... the Board of Trustees' Resolution ...the Occupational Health and Safety Policy (P048), Toronto Public Health advice, the *Education Act*, the *Occupational Health and Safety Act* ("OHSA"), and the *Human Rights Code*.^{xxviii}

It is our opinion that these rationales are sufficiently compelling to support a finding that the Policy is "designed to meet legitimate and critical objectives of the Employer". Given this, and the *precautionary principle* as above, it is our opinion that the requirement for an Employee to be vaccinated in order to attend at a TDSB worksite is a reasonable exercise of management rights.

The Human Rights Code

Employers such as the TDSB have an obligation to comply with human rights legislation, and to accommodate employees up to the point of undue hardship, if the employee cannot receive a vaccine because of a medical condition or other grounds that are protected by human rights legislation.^{xxxix} Both human rights tribunals and labour arbitrators will require those seeking an exemption from the vaccine to provide satisfactory evidence of a demonstrated need for accommodation arising from a recognized protected ground, such as a disability as defined in the *Human Rights Code*, as opposed to simple disagreement with the safety or efficacy of the vaccine, or refusing the vaccine "on principle".^{xxx} Notably, the statutory definition of a disability, does not extend to the condition of having received (or not received) a particular medical treatment, such as a vaccination.

The Human Rights Tribunal of Ontario and the British Columbia Human Rights Tribunal have both dismissed complaints which sought to challenge a store's mandatory COVID-19 masking policy on the basis that the complaints failed to establish that a protected ground, such as race or disability, was affected by the impugned policy.^{xxxi} As such, refusal to wear a mask, or, by extension, refusal to receive a vaccine, is not in itself protected under human rights legislation.

On its face, the Policy makes an appropriate exemption for legitimate *Human Rights Code* grounds^{xxxii} However, the application of this aspect of the Policy, and whether the TDSB has given accommodation as required, may be the subject of dispute on a case by case basis. To the extent a worker does identify a *bona fide* human rights ground for objection to and/or exclusion from an employer's COVID-19 vaccination policy, arbitrators can be expected to give such identified grounds due consideration. For instance, in *United Steelworkers Local 2251 v. Algoma Steel Inc. (Concerning Union Grievance 20-0636)*^{xxxiii} the union grieved the application of the employer's quarantine policy during the COVID-19 pandemic, arguing among other things that the application of the employer policy discriminated against the grievor on the basis of family status, which is a ground protected under *the Code*. The arbitrator upheld the grievance, finding that the employer had an obligation to accommodate the legitimate family status concerns of the grievor. Although this situation is somewhat different, it does confirm that if there is a demonstrated basis for human rights protection, an arbitrator will be careful to scrutinize the application of the particular policy, despite the seriousness of the pandemic. This will apply to the TDSB's application of the Policy.

Time frame for the implementation of the Policy

From the information provided to us, this Policy and the specific requirements imposed on the Employees have been introduced and brought to the attention of Employees in a rushed fashion. For instance, the deadline set out in the Policy to disclose vaccination status of September 7, 2021 is prior to the actual promulgation of the Policy on September 14, 2021. According to the standard arbitral jurisprudence, the terms of a unilateral employer policy must be clear and unequivocal, and the policy must be brought to the attention of the employees affected **before** the company can act on it.^{xxxiv}

It is our opinion that, in general, it appears the Policy does not give sufficient time to Employees to allow them the opportunity to comply with the deadlines that have been set, given the time it takes to get two doses of some of the approved vaccines. Under the extraordinary circumstances of the COVID-19 pandemic, the TDSB has a concomitant obligation towards its Employees to act reasonably and compassionately and consider the specific circumstances of each Employee. So long as an Employee is genuinely attempting to comply with the spirit of the Policy, it would be

unreasonable for the Employer to require strict timely compliance with its deadlines, especially given the short and immediate deadlines for compliance set out in the Policy.

Discipline and Expedited Enforcement of the Policy

The Policy specifically contemplates imposing discipline, up to and including termination, for failure to comply with its provisions.^{xxxv} Employees that refuse to comply with the Policy may be subject to discipline for insubordination for defying an employer directive.

In our opinion, this is clearly the most legally controversial aspect of the Policy.

To date, there are no decisions addressing whether an employer may impose discipline under a vaccination policy. It is well-established that, absent express statutory or collective agreement authority, "an employer has no right to **compel** disclosure of personal medical information from an employee, or to **compel** the employee to undergo a medical examination by a physician of the employer's choosing."^{xxxvi} (*emphasis added*)

As set out above the TDSB has the authority under the management rights clause of the collective agreement to enact the Policy, and as part of the Policy has the authority to require Employees disclose their vaccination status, and/or undergo testing or vaccination in order to attend at a TDSB worksite. Further, in our opinion, the TDSB could clearly hold the Employee "out of service", that is refuse to allow them to work, if they cannot demonstrate their fitness to work. A prolonged and continuing refusal to disclose their vaccination status, and/or undergo testing or vaccination, could conceivably result in nonculpable termination by the TDSB, akin to innocent absenteeism, that would likely be upheld at arbitration.

In *NAV Canada and Canadian Air Traffic Control Assn.*, the arbitrator set out this principle, and identified limits to it, succinctly:

However, while it is my view that Article 3 of the collective agreement is broad enough to allow the Employer to refuse to allow an employee to work unless it is satisfied of the employee's fitness, it is not broad enough to permit the Employer to compel release of medical information to or medical examination by a third party. The Employer may request that an employee consent so to do, and if the request is reasonable in all of the circumstances, an employee who does not consent may well suffer the consequences of not demonstrating his or her fitness for duty. But beyond that the Employer cannot go.^{xxxvii}

However, the issue of whether an employer has the right to impose discipline up to and including termination for refusal to submit to testing or undergo vaccination has not yet been clearly determined by either a court or an arbitrator.

There are competing principles at stake. On the one hand, a proper reasonable policy based on health and safety considerations can be enforced subject to the terms of the applicable collective agreement. On the other hand, given the concern with personal autonomy and bodily integrity, an arbitrator might conclude that an employee who refuses to comply is not engaged in culpable misconduct. However, as noted above, even in the absence of discipline, there could be consequences for their present or future employability if they continue to refuse, i.e. temporary or permanent removal from the workforce.

This question of just cause for discipline for refusing to comply with a mandatory testing or vaccination policy will be determined in light of the overall reasonableness of the policy and the particular circumstances of the discipline and workplace, for example whether the employer gave the employee ample opportunity to comply and considered and exhausted all alternatives to discipline. As well, the normal principles of assessing the propriety of disciplinary penalties (seniority, previous discipline, personal circumstance of the employee, for example) will continue to apply.

As stated above, an employer has the authority to promulgate a reasonable policy that places employees who cannot establish vaccination status on an unpaid leave of absence.^{xxxviii} However, it is uncertain whether the TDSB can impose discipline upon an Employee simply for refusing to give consent to disclose whether the Employee is vaccinated, refusing testing and/or for refusing to be vaccinated.

Such a refusal would, in normal circumstances, be seen as an act of insubordination – i.e. the defiance of a lawful employer directive can constitute culpable misconduct. Normally, the "work now grieve later" rule applies in such a situation i.e. the employee is expected to comply with the directive and, if they dispute its propriety, to have an arbitrator determine whether it is valid and provide the appropriate relief.

However, arbitrators recognize certain exceptions to the "work now grieve later" rule such as in circumstances where compliance with the directive could cause health and safety consequences which an arbitrator would not be able to remedy. Given the nature of the dispute – health and safety versus concern for bodily integrity, this might be a situation where the parties might agree (or an arbitrator could be persuaded) that the validity of the directive be determined **before** discipline is imposed. In such a scenario, it would be in the interests of the workplace parties to have an expedited adjudication of the dispute either as a general test case or an agreement that the refusing employee be placed on a paid or unpaid leave until the issue is determined by a neutral third party.

Should the TDSB terminate MCSTC members for alleged just cause because of a failure and/or refusal to be tested, get vaccinated or disclose their vaccination status, there are many arguments that can be made in defence of the member by the Union. For example, the Union could argue that the refusal to get vaccinated and/or disclose private health information, like vaccination status, cannot and should not be viewed as culpable misconduct based on decisions such as, for example, *Nav Canada*. As well, the Union could argue that even if such refusal constituted just cause for discipline, discharge from employment is excessive in the particular circumstances involved.

In summary, we are of the opinion that the Policy would likely be upheld as a reasonable exercise of management authority, subject to concerns that it cannot be enforced in a rushed manner, and that the TDSB can exercise non-disciplinary measures, such as unpaid leaves of absence, to enforce it. The issue of whether the TDSB can discipline simply because of the refusal to disclose whether the Employee is vaccinated, refusal of testing and/or for refusal to be vaccinated is much less certain and is subject to the questions identified above.

We trust this opinion is of assistance to the Union. Please contact the undersigned if you have any further questions or concerns.

Yours truly,

KOSKIE MINSKY LLP



Craig A. Flood
CAF:mi

c Koskie Minsky LLP, Ernie Schirru and Mike Biliski (by email)

ⁱ Toronto District School Board's (TDSB) recently announced Operational Procedure PR734 COVID-19 Vaccination Procedure for Employees, Trustees and Other Individuals (the "Policy"), section 5.0 APPLICATION AND SCOPE

ⁱⁱ The Policy, s. 6.1.1 All individuals subject to this Procedure must disclose their vaccination status by September 7th, 2021 as detailed in section 6.2.

6.2.1 By September 7th, 2021, all individuals covered by this Procedure are required to submit a formal attestation on the "My Vaccination Status" site on the TDSB Health Screen App/Web Portal indicating their vaccination status (full, partial, unvaccinated). Individuals must update their vaccination status if changes occur.

ⁱⁱⁱ The Policy, s. 6.1.2 All individuals subject to this Procedure must have completed the full course of vaccination by November 1st, 2021, and be fully vaccinated within 14 days thereafter, subject to exemptions as indicated below.

^{iv} The Policy, s. 3.0 DEFINITIONS

^v Email of September 14, 2021 from Ryan Bird Re COVID-19 Mandatory Vaccination Procedure for Employees, Trustees & Other Individuals

^{vi} The Policy, s. 6.3.2 Individuals subject to testing requirements must provide verification of negative test results at least two times per week by Mondays and Thursdays.

^{vii} The Policy 6.3.4

^{viii} The Policy, s. 6.3.9 Entry into TDSB workplaces or participation in the TDSB work-related activities will only be permitted for those who test negative.

^{ix} The Policy, s. 6.8.2 Individuals who fail to comply with this Procedure may be subject to administrative or disciplinary action, up to and including termination from their employment.

^x The Policy, s. 6.5.1 The Board recognizes its responsibilities and duties under the *Human Rights Code*. If an individual is unable to be vaccinated due to a protected ground as defined by the Code, the Board will consider requests for exemptions and reasonable accommodation to a point of undue hardship. Such requests must be submitted without delay.

^{xi} The Policy, s. 6.5.5 Medical Condition/Disability Exemption

^{xii} The Policy, s. 6.5.8 Religious/Creed Exemption

^{xiii} The Policy, s. 6.6.3 The Board will only collect, use and disclose information regarding an employee's vaccination status in accordance with the Freedom of Information and Protection of Privacy Policy (P094), Ministry of Education and Toronto Public Health direction, and all applicable privacy laws.

^{xiv} The Policy, s. 6.6.4 Proof of vaccination or other personal information collected will be kept confidential, stored in a secure location, with access and disclosure in accordance with the Municipal Freedom of Information and Protection of Privacy Act, and/or as directed by the Ministry of Education or Toronto Public Health.

^{xv} *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.* (1965), 16 L.A.C. 73 (Ont. Arb.) (Robinson).

^{xvi} *Occupational Health and Safety Act*, s 25(2)(h)

^{xvii} *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (CanLII) at para 78. See also *Participating Nursing Homes v Ontario Nurses' Association*, 2020 CanLII 32055 (ON LA) at para 22.

^{xviii} See e.g. <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html>; <https://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19/vaccines/effectiveness-benefits-vaccination.html>

^{xix} See e.g. <https://www.canada.ca/en/public-health/services/immunization/national-advisory-committee-on-immunization-naci.html>; <https://www.toronto.ca/home/covid-19/covid-19-vaccines/>

^{xx} *Caressant Care Nursing & Retirement Homes v Christian Labour Association of Canada*, 2020 CanLII 100531 (ON LA) (Randall)

^{xxi} *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A [PHIPA]

^{xxii} See the Policy, section 6.6

xxiii *Sunnybrook Health Sciences Centre v. Service Employees International Union, Local 1 Canada (Grievance SB14-06 SER (100 218 468), Attendance Support Program)*, [2016] O.L.A.A. No. 281

xxiv See e.g. *Peace Country Health v UNA*, (2007), 898 CLAS 107 (Ont Arb) (Simms)

xxv *Health Employers Assn. of British Columbia v. British Columbia Nurses' Union*, [2006] B.C.C.A.A.A. No. 167 at para 92

xxvi *Health Employers Assn. of British Columbia v. Health Sciences Assn. (Influenza Control Program Policy Grievance)*, [2013] B.C.C.A.A.A. No. 138

xxvii The Policy, section 1

xxviii *Ibid*

xxix OHRC policy statement on COVID-19 vaccine mandates and proof of vaccine certificates, the Ontario Human Rights Tribunal, September 22, 2021 "While receiving a COVID-19 vaccine remains voluntary, the OHRC takes the position that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the Human Rights Code (Code) as long as protections are put in place to make sure people who are unable to be vaccinated for Code-related reasons are reasonably accommodated. This applies to all organizations." http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates

xxx See also OHRC policy statement on COVID-19 vaccine mandates and proof of vaccine certificates, *ibid*

xxxi See e.g. *The Customer v. The Store*, 2021 BCHRT 39 (CanLII); *Boissinot v. Aiana Restaurant*, 2021 HRTO 280 (CanLII); *Civiero v. Habitat for Humanity Restore*, 2021 HRTO 257 (CanLII); and *The Worker v. The District Managers*, 2021 BCHRT 41 (CanLII).

xxxii The Policy, s. 6.5.1 The Board recognizes its responsibilities and duties under the *Human Rights Code*. If an individual is unable to be vaccinated due to a protected ground as defined by the Code, the Board will consider requests for exemptions and reasonable accommodation to a point of undue hardship. Such requests must be submitted without delay.

xxxiii *United Steelworkers Local 2251 v. Algoma Steel Inc. (Concerning Union Grievance 20-0636)*, [2020] O.L.A.A. No. 172

xxxiv *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.* (1965), 16 L.A.C. 73 (Ont. Arb.) (Robinson).

xxxv The Policy, s. 6.8.2 Individuals who fail to comply with this Procedure may be subject to administrative or disciplinary action, up to and including termination from their employment.

xxxvi *NAV Canada and Canadian Air Traffic Control Assn.*, [1998] C.L.A.D. No. 401 at para 60. See also e.g. *Complex Services Inc. (c.o.b. Casino Niagara) v. Ontario Public Service Employees Union, Local 278 (CAB Grievance)*, [2012] O.L.A.A. No. 409

xxxvii *Ibid* at para 63

xxxviii *Alberta Health Services v. United Nurses of Alberta, Local 301 (Hiob-Mayfield Grievance)*, [2020] A.G.A.A. No. 29