A- 115/06

IN THE MATTER OF AN ARBITRATION UNDER THE
BRITISH COLUMBIA LABOUR RELATIONS CODE

BETWEEN:

INTERIOR HEALTH AUTHORITY
(represented by HEALTH EMPLOYERS ASSOCIATION OF B.C.)

(the "Employer")

AND:

B.C. NURSES' UNION

(the "Union")

Re: Influenza Immunization Grievance

ARBITRATOR:	Emily M. Burke
COUNSEL:	Adrianna Wills for the Employer
	Craig Bavis for the Union
DATE AND LOCATION OF HEARING:	June 19 and 20, 2006 Kelowna, British Columbia
WRITTEN ARGUMENT FILED:	June 30, 2006, July 18, 2006 and July 25, 2006
DATE OF AWARD:	September 15, 2006

I. INTRODUCTION

On January 5, 2005, the B.C. Nurses' Union ("BCNU") filed a grievance alleging the Interior Health Authority's ("IHA") policy on Staff Influenza (the "Policy") violated the Collective Agreement. In particular, the Union maintained the Policy is coercive and violates the Collective Agreement as it excludes non-immunized employees from work without pay during an influenza outbreak. Subsequently, the Union alleged the Policy violates Section 7 of the *Charter of Rights and Freedoms*.

In reply, the Employer maintains the Policy was implemented by the Interior Health Authority and all other health authorities, in response to the direction of the Provincial Medical Health Officer. The Employer says the Policy balances patient health, public and employee health, and employees' perceptions and beliefs about influenza immunization and accommodates employees with medical conditions or religious beliefs. The Policy applies to employees who do not feel comfortable with having a flu shot and refuse to take antiviral medication in the event of an outbreak.

In dealing with this matter, the parties have agreed to hold any individual grievances in abeyance pending the hearing of the grievance.

The case is somewhat more complex due to the necessity of dealing with the Section 7 of the *Charter of Rights and Freedoms.* The parties have however each helpfully provided both thoughtful and thorough written submissions in this case.

II. BACKGROUND

The Policy under review in this matter was promulgated by the Provincial

Medical Health Officer, Dr. Perry Kendall and adopted by the Interior Health Authority. Some time prior to June 29, 2000, Dr. Kendall requested a list of HEABC members from Chris Grant, Senior Advocate at HEABC.

On July 7, 2000, Dr. Kendall wrote to all health care providers, including a recommended draft policy entitled "Facility Immunization Policy and Exclusion of Non-Immunized Staff During an Influenza Outbreak". This was part of an initiative to reduce the spread of influenza among patients in the health-care system through increased health care worker immunization. The following rationale as set out in that letter was:

> Studies show that up to 25% of non-immunized health-care workers are infected with influenza during the winter months. Persons with influenza are infectious even before they become sick and many people with influenza do not know they are infected. These persons still shed virus and spread it to others. Many health-care workers continue to work even when they develop symptoms and, in this way, spread influenza to their patients and co-workers.

Dr. Kendall's letter advised health-care employers they were required "to develop a written policy of influenza immunization for their staff....This policy must include notice to non-immunized staff that they can be excluded from work in the event of an influenza outbreak within the facility. This information should be clearly communicated to all staff before the influenza season begins. The Health Employers' Association will be contacting you shortly with materials to assist you in the implementation of this policy."

On July 11, 2000, the HEABC wrote to the CEOs and administrators of HEABC members referencing Dr. Kendall's materials and providing advice on implementing the Ministry Draft Policy. The HEABC materials included a discussion on labour relations issues arising from sending non-immunized employees home during an outbreak and, offered advice on a "defensible" means for implementing the Policy. In that material, HEABC noted:

> It is the recommendation of HEABC that employees who choose not to be immunized or to take antiviral medication, be excluded from work without pay in the event of an influenza outbreak.....
>
> Employees must be aware of choices and consequences meet the "clear and unequivocal" requirement of KVP. The Employer policy must be sufficiently clear so that employees cannot state they were under the impression that they could work if not symptomatic or weren't aware of the "no pay" aspect of exclusion.

On July 12, 2000, the HEABC also forwarded the same material to the main health-care unions including BCNU. On September 7, 2000, the health-care unions, including the BCNU wrote to the Government and stated their opposition to introduction of the Ministry Draft Policy and HEABC directions to employees. The health-care unions listed a number of concerns including the coercive nature of the Policy; lack of consultation; fear of adverse reactions; lack of informed consent; responsibility for consequences; failure to consider less intrusive alternatives; and the scope of the Policy. The health-care unions also raised a specific objection to HEABC's suggestion that any exclusion from work be without pay. In doing so they noted:

> (a) Coercive Nature of the Policy
> The medical health officer has publicly described the Policy as non-mandatory, because health-care workers are not automatically terminated or disciplined if they do not accept the free vaccine when it is offered in advance of the flu season. Instead, HEABC has proposed that those workers will be asked to stay home <u>without pay</u> at the first outbreak of the flu for a period of time that could last weeks or even months. The Unions take the position that it is absurd to call this Policy voluntary. It simply postpones the imposition of discipline, while creating a very real threat of discipline for those deciding whether or not to accept the vaccine.

As a result of these objections, the Ministry of Health and HEABC held meetings with the health-care unions regarding the implementation of the Ministry Draft Policy. On October 12, 2000, the Government wrote to the health-care

employers to recommend they avoid exclusion without pay whenever possible in implementing the Ministry Draft Policy. It directed health-care employers to adopt an approach "based on increased education and on employees voluntarily agreeing to be immunized." That communication noted:

> However, the health-care unions have indicated they are not supportive of a model that contains provisions allowing for the exclusion of non-immunized employees without pay during a declared outbreak. They have urged the government to adopt an alternative approach based on education and voluntary participation rather than using what they characterize as coercive measures.
>
> The Ministry of Health has listened to the unions' concerns and are of the opinion their approach should be given a chance, during this year's flu season, to see if it works.
>
> We are, therefore, asking you to adopt an approach based on increased education and on employees voluntarily agreeing to be immunized. As part of this approach, we are asking employers to refrain wherever possible from sending non-immunized employees home without pay. Re-assignment options may exist in some instances.

The voluntary educational approach however did not result in sufficient increase in immunization. As a result, on October 1, 2001, Dr. Ballem, the Deputy Minister of Health, wrote to health-care employers and advised the Government now supported implementing the Ministry Draft Policy in a manner which excluded non-immunized employees without pay. The letter indicated:

> During the 2000/2001 season, with an approach based on health-care worker education and voluntary participation, health authorities improved influenza immunization coverage of staff in long-term care facilities from 43% to 57%, but still fell short of the goal of 80%. This year, the Ministers of Health Services and Health Planning clearly support the HEABC in recommending exclusion without pay in certain circumstances. This would apply to health-care workers who are excluded in the event of an influenza outbreak because they have, without valid medical reasons, failed to avail themselves of the protections against influenza.

As Chris Grant, Senior Advocate at HEABC indicated, on October 3, 2001, HEABC wrote to its members, referencing both correspondences from Dr. Kendall and from Dr. Ballem. HEABC reiterated his advice on proper implementation of the portions of the Policy which raise labour relations issues; in particular the entitlement of employers to send employees home without pay in the event of an outbreak.

HEABC also wrote to all the health-care unions including the BCNU, enclosing information with respect to the Policy including advice with respect to sending employees home without pay in the event of an outbreak. The health-care unions were not consulted on this change in approach. Grant testified that similar notifications have occurred in following years including 2002, 2003, 2004 and in 2005. While HEABC communicated the need for health-care employers to explain the immunization policy to their employees, Grant did not have knowledge about particular efforts health-care employers made to communicate those policies to employees. The Policy with some modifications continues in effect.

In October 2003, the Employer promulgated Policy AV1300 Influenza Immunization and Exclusion (the "Policy") based on the Ministry Draft Policy. The Policy is designed to meet the objectives of the Ministry Draft Policy and applies to Employer worksites throughout its geographic area. The Union objects in particular to the following provisions of the Policy:

> STAFF INFLUENZA IMMUNIZATION AND EXCLUSION POLICY
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> ...
>
> 4. In the event of a facility influenza outbreak, staff who are not immunized and who are unwilling to take antiviral medication (Amantadine) will be excluded from work without pay. Staff who choose to take Amantadine instead, do so at their own expense.
>
> EXCLUSION PROCEDURES
>
> A. <u>In the Event of an Influenza A outbreak</u>:
>
> ...

> 5. A staff member who is not immunized will be excluded from work with pay if there are medical contraindications to the influenza immunization and without pay if there are no medical contraindications to influenza immunization.
>
> B. In the event of an Influenza B outbreak:
>
> ...
>
> 5. A staff member who is not immunized will be excluded from work with pay if there are medical contraindications to influenza immunization and without pay if there are no medical contraindications to influence the immunization.

While this Policy was revised in October 2005, the applicable provisions are substantially the same.

Nurses may decide not to be immunized for any number of personal reasons. Diane Moulin, a Registered Nurse who was excluded from work without pay during an outbreak in 2005 at the long-term care facility she worked at, testified she had concerns about the flu shot and Amantadine and its effect on her immune system.

The consequence of refusing to become immunized and refusing to take antiviral medication under the Policy, is that the employee is sent home without pay during an influenza outbreak. Individual factors are not taken into account in deciding to send a non-immunized employee home during an influenza outbreak.

An influenza outbreak lasts for a minimum of eight days and can extend for several weeks. There can also be multiple influenza outbreaks during the influenza season, which runs from October to April. Although the non-immunized employee has a right to take their vacation time when excluded from work, there may not be any vacation time left in her bank or she may have already booked vacation time. It is possible in the event of a lengthy or multiple outbreak, that the period of exclusion would exceed a nurse's vacation entitlement for that year. Non-immunized employees excluded during an influenza outbreak are not permitted access to accumulated sick leave banks or specialty banks. There is

also no provision for reassigning non-immunized employees to work in the facility or another facility during an influence outbreak. The Union does not challenge the right of the Employer pursuant to a declaration by the Medical Health Officer under statutory authority, to exclude non-immunized employees from the worksite during a declared influenza outbreak, provided that there is no loss of pay.

Moulin is employed by the Interior Health Authority at a long-term facility housing approximately 51 residents. In January 2005, the facility excluded Moulin from work without pay pursuant to the Policy. The residents in that facility are classified as having extended, intermediate and special needs. The average age is well over 65; likely 80 to 85. Residents classified as extended care need complete care assistance with all activities of daily living. Those classified as intermediate require significant assistance with activities of daily living. All the residents have some medical conditions; frequently have multi-system illnesses, and meet the definition of "frail elderly". The residents are given influenza vaccine unless they have the capacity to object.

Moulin was not happy when sent home when two residents displayed flu-like symptoms and before the results of swabs returned. In that situation, one patient died and the other recovered. Death by influenza is caused by increasing fluid in the lungs; inability to breathe due to fluid build-up. Essentially, the patient drowns. Moulin agreed influenza spreads by droplets of fluid from persons and on contact. She was unaware however that the virus can survive for several hours on surfaces.

Moulin indicated she would not take the influenza vaccine or the available antiviral medication. She did not want foreign bodies in her system. She described herself as healthy and having maximized her sick leave bank. While she has no medical contradiction for the vaccine, she does not want influenza immunizations and antiviral medications in her body. She is unaware of the number of vaccines distributed in Canada or that there has been a high rate of

success in matching the vaccine to the circulating viruses on an annual basis. She is aware the only medical contradiction identified is an allergy to eggs; the medium in which the vaccine is stored.

Individuals receiving an influenza immunization have the influenza virus injected into their muscle tissue, which then enters the bloodstream. Physical symptoms may include headaches, fever, muscle ache, respiratory problems and ocular irritation which may accompany an influenza injection. The alternative to immunization, antiviral medication may also have physical side effects. Amantadine is an antiviral medication which may cause renal problems if the dosage is not specifically calculated to take a patient's renal condition into account. It may also cause disorientation and lack of coordination. Tamiflu is an antiviral medication which while more effective than Amantadine may cause nausea, headaches, diarrhea and stomach aches.

The physical symptoms of influenza are caused by a virus. Dr. Bonnie Henry, a Physician Epidemiologist of the B.C. Centre for Disease Control, testified about the virus. The influenza virus spreads rapidly and can mutate. It spreads through droplets from coughing and sneezing and from touching surfaces which infectious persons have touched. It causes severe symptoms and can lead to more severe illnesses including pneumonia, other bacterial infections and other conditions. It is the sixth highest cause of death in Canada. Death is caused by drowning with fluid filling the lungs and causing failure to breathe.

Persons exposed to the virus can be infectious but asymptomatic, "shedding" the virus and spreading illness. Influenza vaccine, and isolation of infected individuals is the most important means of preventing the spread of the flu. The contents of the vaccine are determined on an annual basis from a review of circulating viruses throughout the world. The World Health Organization collects samples in approximately 80 locations around the world. The contents of the vaccine for the following season are determined from a review of those

circulating viruses. The vaccine contains two "A" strains and one "B". It is made up of killed viruses and therefore cannot cause the flu. The presence of the dead virus however triggers the formation of antibodies.

Persons who have not received the vaccine, can upon the declaration of an outbreak, take Amantadine, an antiviral medication. As set out earlier, Amantadine does have some side effects, including nausea. More recently, another antiviral medication is available which is effective and has fewer side effects. Those side effects are controllable.

The Policy does not require all health-care workers to be vaccinated although it encourages it. It does not require the exclusion of non-immunized healthcare workers from the workplace, other than upon the declaration of an outbreak as defined under the Policy. Once an outbreak is declared by the Medical Health Officer, staff who are not immunized and who are unwilling to take antiviral medications are sent home without pay. Transfer to other locations at this point is not permitted due to the potential for such persons being infectious but asymptomatic. Staff are required to remain away from the workplace until the outbreak is declared over. Staff who choose to be vaccinated must wait 14 days and be symptom-free before returning to work. Staff who choose to take antiviral medication may be able to return to work within 24 hours of taking the first dose and continuing with the medication until the outbreak is declared over. Staff with medical contraindication remain home with pay until the outbreak is declared over. Those employees may access their sick leave banks.

III. ARGUMENT

The parties have each approached the argument with a different emphasis. The Union's focus is on the alleged *Charter* violation, while the Employer relies on existing jurisprudence establishing similar policies as

reasonable and consistent with the Collective Agreement. I have summarized the respective arguments.

The Union maintains the issue in this matter is whether the Employer can promulgate a policy which coerces employee influenza immunization by threatening exclusion from work without pay in order to achieve a particular target rate of immunization. The Union submits the Policy both violates Section 7 of the *Charter of Rights and Freedom* and is an unreasonable exercise of management rights under the Provincial Collective Agreement.

The Employer characterizes the issue first as whether the Collective Agreement permits the Employer to require employees who do not have a medical contraindication to be immunized, including immunization for influenza. In addition, it maintains it permits the Employer to send employees home without pay that refuse to be immunized and/or refuse to take antiviral medication upon the declaration all that outbreak and to do so without pay. The Employer maintains the Policy is consistent with the Collective Agreement and is reasonable. On the matter of the *Charter of Rights*, the Employer says the Policy is consistent with Section 7 of the *Charter of Rights* and, if not, saved by Section 1 of the *Charter of Rights*.

The Union acknowledges at the outset the Employer disputes the application of the *Charter* and this issue remains outstanding. It argues however the Policy violates the personal protections granted to employees under Section 7 of the *Charter*. In determining whether Section 7 has been violated, it points out the Supreme Court of Canada has mandated a two-step test: first, that there be a finding a deprivation of one of the protected rights to life, liberty or security of the person has occurred; and second the deprivation is contrary to the principles of fundamental justice. (*Duplessis v. Canada* [2000] F.C.J. No.1917 (QL)).

The Union submits the Policy violates the security of person protection of Section 7. It points out the injecting of a foreign substance into a person's body which may cause muscle ache, fatigue or other side effects is invasive. The introduction of the viral material included in the influenza immunization into the person's muscle tissue and then into the bloodstream violates a person's bodily integrity. Canadian courts have consistently found that physical integrity is protected under Section 7 (*Duplessis*, *supra*, para. 37)

The Union maintains the Policy is coercive. It points out the exclusion without pay aspect of the Policy as a consequence for failing to receive the immunization was expressly adopted by the Employer to compel a greater number of employees to participate in the program and assist the Employer in achieving the 80% target participation rate. The Employer is relying upon the potential devastating economic consequences of receiving no pay for several weeks to compel employees to become immunized. If the employee has no vacation time left or has pre-booked vacation time, the employee could well be forced to remain at home without compensation for some time. The Union maintains the economic consequences of failing to become immunized are so severe they effectively deny an individual choice over her body (*Fleming v. Reid (Litigation Guardian)* (1991), 82 DLR (4^{th}) 298). The Union relies on *St Peter's Health Systems and CUPE Local 778* (2002), 106 LAC (4^{th}) 170 where a similar influenza immunization policy and exclusion without pay was found to be a violation of Section 7 of the *Charter* by an Ontario arbitration board. Further, the Union points out the alternative of taking antiviral medication to exclusion without pay does not render the Policy less of a violation. The antiviral medications require ingestion of a foreign substance into the body, which may cause serious though short-lived side effects.

The Union maintains in addition the personal interest at stake could equally fall under the liberty protection of Section 7 of the *Charter* (See *Godbout v. Longueuil (City)* (1997), 152 DLR (4^{th}) 577). The Union maintains the

grievance is not about protecting an economic right to work or receive money while not working; rather it is about the protection of a constitutional right to make a decision as to what goes into a person's body and whether that can be subject to an unfair choice. The Union argues the Policy requires a nurse to make an unfair choice between her physical integrity or her economic well-being. The Union says the requirement to make this unfair choice violates the liberty and security of the person's protection. If the Supreme Court has determined that it is a violation of Section 7 to terminate an employee for not living where her employer wishes, the Union maintains it must surely also be a violation of Section 7 to suspend an employee without pay for not introducing foreign substances into her body.

The Union maintains it has demonstrated that coerced influenza immunization infringes on the security of the person's interest or alternatively the liberty interest. Accordingly, it maintains one must now turn to the issue of whether that deprivation occurred in accordance with the principles of fundamental justice. It argues fundamental justice goes beyond procedural rights to include a substantial component which balances individual with collective rights (See *Godbout, supra*, paras. 74 to 77).

The Union does not dispute the overall goal of the Policy is laudable or that exclusion from the workplace, with pay, may sometimes be justified for non-immunized employees during an influenza outbreak. It maintains however when the contextual analysis is turned to the consideration of whether it is fundamentally just to infringe on the security of the person to achieve a particular target rate of participation in an influenza immunization program, the Union maintains the Employer cannot meet the onus of demonstrating the infringement is fundamentally just. The Union takes this position for a number of reasons including the fact that mandatory immunization is not endorsed or permitted at law; 100% immunization is not required for the Policy's objectives to be met; immunization of health-care workers will reduce, but not prevent, the

transmission of influenza; and the Employer has not demonstrated that other, less intrusive means might achieve the target immunization rate.

The Union points out Dr. Henry testified the Centre for Disease Control has not adopted or endorsed mandatory immunization in respect of any public health-care initiative. There is no statutory power in B.C. which requires an individual to submit to immunization. The Centre also takes no position as to whether exclusion of non-immunized employees should be with or without pay. While the effectiveness of the influenza immunization program depends on reaching a target rate of 80% participation, Dr. Henry's evidence made clear the preventive goals of the Policy could be achieved by having less than full participation through the operation of the "herd immunity" effect, partial resistance to a disease in a population being sufficient to prevent the widespread outbreak of the disease in a population. The vaccine is 70% to 90% effective and in any given year depends on the ability of epidemiologists to accurately predict which strains of influenza will hit Canada in that year. Pursuant to the Employer's statistics, one quarter of non-immunized employees will become infected with influenza. Without immunization, 25% of employees may become infected; with immunization 10% to 30% may still become infected with influenza. The balancing of interests is between a violation of bodily integrity and reduced influence transmission, not the elimination of influence.

The Union also points out the Employer did not call evidence of its attempts to communicate the need for the Policy or to encourage participation in the immunization program to employees. The Union maintains in order for the Employer to meet its onus of fundamentally just infringement, it must demonstrate that mandatory immunization is accepted by society as reasonable and legally permissible; full participation in the Policy is required for it to be effective; the salutary effects of the Policy override the security of the person protection and the Employer has exhausted all other means such as employee education and incentives to achieve the requisite participation rate. It has not

done so in this case.

The Union submits in the event a Section 7 violation is found, there is no need to engage in the Section 1 justification, based on the rationale of the Supreme Court of Canada in the Section 7 analysis in *Godbout, supra*. The Policy does not fall within the ambit of the "most exceptional circumstances", which could justify a Section 7 violation. Additionally, the Union maintains a Section 1 analysis is not required because the impugned aspect of the Policy is not one prescribed by law. Indeed, HEABC is not relying on statutory authority in recommending to health-care employers that they exclude non-immunized employees will work without pay. If actions of government officials or administrators implementing government policy are not specifically prescribed or authorized by law, they cannot be justified under Section 1 (*R. v. Therens*, [1985] 1 SCR 613; *Committee for the Commonwealth of Canada* [1991] 1 SCR 139; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120).

In addition to violating the *Charter*, the Union alleges the Policy violates the Provincial Collective Agreement. The Union acknowledges the Employer has the right to request immunization in circumstances where it can justify the need for a particular immunization and the request is reasonable in that it strikes a balance between employee privacy rights and management rights pursuant to Article 32.02 of the Collective Agreement. The Union does not however agree the Employer has an unfettered right to require any immunization at any time under Article 32.02. The Employer's request for immunization must be reasonable in the circumstances of the request for the particular immunization, ensuring that there is balance between the Employer's interest sought and infringed privacy employee right as reflected in the common law and *Charter* values.

The Union points out all employees have a right to personal privacy that is

not subject to inherent management rights to manage its operations (*Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647* (1978), 20 LAC (2d) 419). The Union points out further even if the *Charter* does not apply directly to the grievance, the grievance must be decided in accordance with *Charter* values. The examination of the reasonableness of the Employer's actions must be assessed in the context of societal values as reflected in the *Charter* which recognizes the autonomy of the individual (*Doman Forest Products Ltd. and IWA, Local 1-357*, 13 LAC (4^{th}) 275). Article 32.02 must be interpreted in a manner which protects employee privacy rights which invokes a balancing of interests. The Union argues there is no greater employee privacy right than the right to control what goes into one's body. As such, it is deserving of greater protection by requiring a higher threshold of justification (See *Esso Petroleum Canada and CEP, Local 614*, 56 LAC (4^{th}) 440). The Union ultimately maintains the Employer cannot justify mandatory immunization for many of the same reasons the Policy does not meet the threshold of fundamentally just under Section 7. These include the Employer's failure to consider alternatives to mandatory immunization; the individual's circumstances and alternatives to exclusion without pay.

With respect to the above, the Union maintains there is simply no evidence the Employer considered alternative programs including a concerted hand washing programs; an initiative to convince employees to voluntarily stay home; limiting access of non-immunized visitors one on employees during influenza season; and no evidence Employer offered incentives for increased immunization. Further, the Union points out the Employer should make a determination on a case-by-case basis as to whether the non-immunized nurses likely to be at risk for spread of influenza prior to excluding that nurse. The Policy does not have a discretion to allow managers to consider factors such as the facility and unit the nurse works on, the patient population and an individual's likelihood to contract influenza prior to excluding that employee. Further, the Union points out it is not seeking a declaration that non-immunized employees

excluded from the worksite be sent home on regular pay during influenza outbreaks. That is an area which only arises in a last resort. The Union's position is that the Employer should consider alternatives which do not require the Employer to incur an additional financial cost by paying individuals for staying at home, such as assigning the employee work which minimizes the risk of transmission; reassign the employee to another facility; or allowing the employee to use accumulated sick banks. Assigned non-immunized employees could do work that does not involve patient care, the assignment to another site or work with patients who have already contracted influenza.

Further, the Union maintains the Employer can allow a non-immunized employee to access accumulated sick leave bank while excluded from work. Sick leave is accumulated over the course of a nurse's employment. It is an earned benefit that she is entitled to take when she can work to do medical reasons such as risk of transmitting or contracting influenza. An employee who contracts influenza is entitled to sick leave benefits while off work. It is a logical extension that those sent home by the Employer so that they do not become sick, should also be entitled to access benefits. Accessing a sick bank is not an additional cost to the Employer. It is drawn from a pool of days the Employer is required to compensate the nurse for. Essentially it depletes the nurse's available sick leave, and is not payment of regular wages.

The Union seeks a declaration the impugned aspect of the Policy violates Section 7 of the *Charter* or, in the alternative, is not a reasonable exercise of the Employer's rights under Article 32.02.

The Employer, as noted earlier, has taken a different view of the case. It commences by noting the onus is on the Union to establish every element of its case (*Board of School Trustees of School District No. 39 (Vancouver)* (1996), 53 LAC (4^{th}) 33; *Re Wire Rope Industries* (1982), 4 LAC (3d) 323). The Employer carries the onus under Section 1 of the *Charter* only if Section 7 breach is

established and it is concluded the *Charter* applies.

The Employer points out in this grievance, the claim is for pay, in a situation in which employees determine entirely whether to take the remedial measures which would permit them to continue to work. The Employer maintains it is the employee's choice which places the Employer in an untenable position during an outbreak; choosing to permit employees to attend at work and expose patients to risk or, send employees home without pay. The Policy addresses those who have medical contraindications. The only issue is employees who simply do not wish to be immunized and, upon the occurrence of an outbreak, do not wish to take the appropriate medication. Having made those decisions and operating in a health sensitive environment, such nurses do not object being sent home during the outbreak. They allege however that they are entitled to be sent home with pay.

The Employer points out Article 32.02 of the Collective Agreement gives health care employers the right to require medical examinations, skin tests, x-ray examination, vaccinations is and other immunization. In considering this provision, the Employer points out the role of the arbitrator is to discover the meaning which the parties mutually intended for the language they have bargained (See *School District No. 36 (Surrey) and Surrey Teachers Association* (July 22, 2004), unreported (Taylor). The Employer submits the bargain struck by the parties is clearly expressed. The Employer has the stated right. There is no necessity to demonstrate it is exercising its contractual right reasonably. All that is required is that the Employer exercise its right under Section 32.02 in good faith and not in a discriminatory or arbitrary manner. In addition, the Employer submits this provision allows the Employer to send those employees home who refuse to be immunized or take antiviral medication upon the declaration of an outbreak and to do so without pay.

In dealing with the Union's argument that the Employer's Policy is not

consistent with the Collective Agreement, the Employer point out first the *KVP* cases do not apply. Those cases addressed unilaterally imposed policies. Here the Employer is relying on the express language in the Collective Agreement. The Employer maintains it has a contractual right to require vaccination and to discipline employees who refuse vaccination. In the case of the influenza vaccine however, the Employer has chosen to make the vaccination voluntary.

If the *KVP* tests do apply, the Employer says as the Collective Agreement expressly permits the Employer to require vaccination, there is no doubt the Policy is consistent with the Collective Agreement. The Employer relies on *Trillium Ridge Retirement Home and SEU, Local 183*, December 18, 1998, unreported (Emrich) to argue that staff are entitled to refuse the vaccine or the antiviral medication. There is however a cost to that decision, mainly removal from work without pay in the event of an outbreak. The Collective Agreement in that case did not contain the express language set out between these parties. Similarly, in *Re Carewest and CUPE, Local 104* (2001), LAC (4^{th}) 240 an arbitrator concluded a similar policy was reasonable and balanced employees privacy concerns with the safety concerns of the Employer. In addition, if the *Charter* applied, the Policy was found not to offend such rights as was justified as a reasonable limit on those rights under Section 1. (See also *Re Chinook Health Region and UNA Local 120* (2002), 113 LAC (4^{th}) 289; *Re North Bay General Hospital and CUPE, Local 139,* (2003), 122 LAC (4^{th}) 366).

The Employer points out the evidence is clear influenza is imported into health-care facilities by visitors and employees who may be infectious and yet have no symptoms. The influenza vaccine is an effective means of reducing the spread of influenza. The spread of influenza is rapid, its effect on patients particularly the frail and elderly can be catastrophic. Moulin testified in the outbreak in which she was involved, one of the two patients died. The Employer also points out that other than for a small portion of the population with an allergy to eggs, the medium for the vaccine, there is little or no side effects. Minor side

effects can be controlled. Further, employees who choose not be vaccinated, can take antiviral medication in the event of an outbreak. That medication may cause only some minor discomfort; not death by drowning as does the flu. The balancing requires employees be sent home. It is not unreasonable that leave should be without pay. The Employer also submits the requirement employees remain at home if they have not been vaccinated and have refused to take the prophylactic antiviral medication does not constitute a layoff (*City of Prince George and CUPE, Local 1048*, October 14, 2004, unreported (Diebolt); *Trail Regional Hospital and BCNU,* May 2, 2003, unreported (Gordon)).

Turning to the *Charter of Rights and Freedoms*, the Employer maintains Section 7 of the *Charter* does not apply as Section 7 does not protect economic rights. The analysis of Section 7 of the *Charter* involves two steps. First, the Court must determine whether there has been a deprivation of the individual's life, liberty or security of the person. If that test is met, the Court must go on to consider whether that deprivation is in accordance with the principles of fundamental justice. (*Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307).

The seminal case from the Supreme Court of Canada on the consideration of whether Section 7 protects economic rights is *Soliciting Reference* [1990] S.C.J. No. 52. In that case, Lamer J., as he then was, considered extensive academic writings and authority on whether the right to liberty and security of the person protects economic loss. He concluded the rights under Section 7 do not extend to the right to exercise a chosen profession. There are numerous cases since then which have also held that Section 7 is not triggered in the context where there is potential deprivation of employment (See *Noyes and the South Cariboo District No. 30* [1985] B.C.J. No. 2741; *Anthony v. Misericordia General Hospital* [1988] M.J. No. 354; *Canada (Attorney General) v. Gill)* [1992] F.C.J. No. 118; *Walker v. Prince Edward Island* [1993] P.E.I. No. 111; *Waldman v. British Columbia (Medical Services Commission)* [1997] B.C.J. No.

1793; *British Columbia Teachers Federation v. Vancouver School District No. 39*, [2003] B.C.C.A. 100; *Mussani v. College of Physicians and Surgeons of Ontario* [2004] 74 OR (3d) 1; *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia* [2003] B.C.J. No. 2107).

These cases all confirm Section 7 does not extend to economic rights. The Employer maintains that is determinative of the issue. The judgment of the B.C. Supreme Court and Court of Appeal are binding on the arbitration board. The Union has relied on the minority judgment in *Godbout*, which does not represent the state of the law in Canada. In addition, the Employer points out *Godbout* precedes by some five years the *British Columbia Teachers'. Federation* case referenced above.

The Employer maintains even if Section 7 applied, which is denied, the Policy would be saved as a reasonable limit demonstrably justified in a free and democratic society pursuant to Section 1 for the reasons set out. The reasoning in *Carewest, supra* is directly on point. Accordingly, the Employer seeks a declaration that it is entitled to require nurses to be immunized other than as per the exception set out in Article 32.02 of the Collective Agreement. In addition, it seeks a declaration that it is not required to assign non-immunized nurses to alternative work. Finally, it seeks a declaration that the Policy is reasonable and does not violate Section 7 of the *Charter* and an Order dismissing the grievance.

IV. ANALYSIS

As indicated earlier, the parties take very different views of this case. The focus of the Union is on what it alleges is a Section 7 *Charter* violation and the unreasonableness of the Policy. With respect to the former, it relies heavily on the case of *St. Peter's Health Systems and CUPE, supra,* and the Supreme Court of Canada's decision in *Godbout v. Longueil, supra*. It points out in that

first case, a similar influenza immunization policy, where the consequence of refusal was exclusion without pay, was found to be a violation of Section 7 of the *Charter* by an Ontario Arbitration Board. In the second case, *Godbout, supra,* the employer, as in this one, framed the issue as to whether the *Charter* protected the right to employment. The Supreme Court of Canada rejected that characterization and found the issue to be whether the employee could be terminated for exercising the constitutional right of liberty to choose her place of residence.

The Employer points out first the case of *St. Peter's Health Systems, supra*, has not been followed and has not dealt with the case law establishing Section 7 of the *Charter* does not protect economic rights, including employment. Secondly, the Employer says the comments in *Godbout* upon which the Union relies, were contained in the minority judgment. The majority in that case specifically refused to consider the application of Section 7 as it raised important questions as to the scope of a provision and its effect on municipalities.

The Employer commences its argument by referencing Article 32.02 of the Collective Agreement. This provision, the Employer says, is clear and gives health-care employers the right to require medical examinations, skin tests, x-ray examination, vaccination, inoculation and other immunization. The express exceptions are rubella vaccination when the employee indicates that a pregnancy is possible and where the employee's physician has advised in writing that such a procedure may have an adverse effect on the employee's health. Accordingly, the Employer maintains the reality is it has the right to require the vaccination. All it must do is exercise its rights under this provision in good faith and not in a discriminatory or arbitrary manner. On this basis, the Employer points out the Collective Agreement permits the Employer to send employees home who refuse to be immunized and or take antiviral medication upon the declaration of an outbreak and to do so without pay. While maintaining it is not necessary because of Article 32.02 to apply this contractual right reasonably, the Employer

replies to the Union's submission on the reasonable application of a contractual right. It relies on a number of cases, set out earlier, which upheld similar policies.

A review of those cases is instructive. In *Trillium Ridge Retirement Home, supra*, the union argued a similar policy was an unreasonable invasion of the griever's bodily integrity and assault or battery. The employer maintained it had implemented directives from the Medical Health Officer regarding preventive measures taken to prevent the spread of influenza during an outbreak in that facility. The employer argued the policy was not mandatory and it had a duty to safeguard residents. The arbitrator in that case referred to *Re St. Mary's Hospital and Hospital Employees' Union* (1997), 64 LAC (4^{th}) 382, which established a hierarchy of protection afforded by the right to the privacy. At the top of the list, are actions by the employer which involved actual bodily intrusions. In her analysis, the arbitrator noted the question was whether the cost of refusal to be immunized rendered the policy arbitrary or unreasonable and a violation of the collective agreement. In addition, the arbitrator considered whether the cost vitiated consent to the vaccine or amantadine administration. In answering that question, the arbitrator took into account any power imbalance and concluded:

> ...Although the Employer is in a position of dominance, this position was not exploited for the self-interested advantage of the Employer and detriment of the staff. The policy objective and means of implementation sought to provide effective protection against viral infection for all. Furthermore, the Employer took reasonable measures to inform the staff of the nature and purpose of the immunization measures required and the effect of the policy to ban non-immunized employees from the workplace during an outbreak.
> (at page 28)

In *Carewest, supra*, the arbitrator found a similar policy met the criteria set out in the *KVP* line of cases. It found the policy recognized legitimate exemptions; only front-line workers were immunized, and only sent home when at risk. In addition, the employer had attempted less intrusive ways to increase the vaccination rate thereby making the rule reasonable. In *Re Chinook Health*

Region, supra, the union as argued here, said refusal was not a real choice as it led to removal from the workplace without pay. The employer, as in the case before me, argued it was a choice with consequences that an employee could make. Once again, the arbitrator posed the question of whether the cost of that choice, in effect vitiated consent. Indeed, the arbitrator found the question once again to be whether the imposition of such a cost rendered the policy arbitrary and unreasonable. In this case, he was persuaded the policy was not unreasonable. In commenting on this he noted:

> Clearly the policy was designed to encourage and provide an incentive to staff to accept vaccination or amantadine. The purpose of such measures was to encourage the widest vaccination of staff and residents possible, while not imposing these measures in the absence of apparent consent. The refusal to permit non-immunized staff to work was not disciplinary in purpose or intent. It was a measure designed to isolate potential sources for transmission of viral infection. There was no disciplinary notation made in the grievors' records, and the evidence indicates no disciplinary intent. On the other hand, the basis of the bargain is that an Employer must pay employees in exchange for their attendance at work. A fundamental obligation of the employee is to attend work and provide productive service. In a long-term care setting such as this, employees must realize that special measures may be needed to safeguard the health and safety of the frail elderly population that they serve. If such employees choose not to be immunized or to refuse an alternative antiviral medication, why should the Employer pay such employees for the balance they strike between their right to bodily integrity and the requirement to be present and fit for work? Where the employee may be unable to accept either the vaccine or antiviral medication for medical or religious reasons, different considerations may prevail and a different balance struck between the competing interests of the parties. Such employees do not really have a choice whether to accept the immunization measures available or may have rights under human rights legislation that could protect their right to refuse these measures. The evidence before me does not establish that any of the grievors fit into this category of employees.
>
> (at page 23)

The arbitrator concluded the policy as adapted by the employer met the criteria outlined in the *KVP* line of cases. He noted also:

> The Employer has not required anyone to take the shots or lose his or her job. The Employer has recognized legitimate medical and religious exemptions. The Employer has not applied the policy to everyone in the facility, but only those persons involved in front-line delivery of health care with daily, frequent and intimate contact with patients. The Employer has not excluded employees without pay for the entirety of the flu season if they are unvaccinated, but only during the periods where the risk of transmission from patient to patient is highest, namely during the outbreaks.
>
> Finally, the Employer did attempt less intrusive ways to increase the vaccination rate education incentives. The results were not acceptable given that less than 50% of employees at the George Boyack Centre voluntarily took the flu shot.
>
> In the result we are satisfied that the rule is reasonable, and that the relatively modest intrusion into the bodily integrity of employees is justified in all the circumstances.....
>
> (at page 24)

The Union distinguishes these cases on a number of basis. First, it says in *Trillium Ridge Retirement Home, supra,* the arbitrator did not correctly apply the balance of interest test as it did not consider alternatives available to the employer which might have accomplished the objective sought prior to adopting the impugned measure. It points out a consideration of alternatives in the balancing of interests test is consistent with *Charter* jurisprudence. Even if the *Charter* does not apply, the Union argues, *Charter* values do. Similarly, in *Carewest* and *Chinook Health Region*, the Union maintains these cases recognize the balancing of interest test includes a determination as to whether the interest at stake can be addressed in a less invasive way, i.e. a highly publicized education campaign with incentives. This is unlike the situation in the case at bar. Finally, the Union distinguishes *North Bay General Hospital, supra,* on the basis it was considering the statutory requirement to be immunized and therefore is not of assistance.

As an aside, I note I am inclined to agree with the Union on the

applicability of *North Bay General Hospital, supra*. The requirement in *North Bay General Hospital, supra,* was specifically set out in a statute. The case is therefore not as helpful as other jurisprudence cited to me.

The one case that does consider the *Charter*, along with the *KVP* line of cases is *Carewest*. In coming to the conclusion that a similar policy did not violate the *Charter*, the arbitrator said:

> Therefore, even if the *Charter* applies to *Carewest* and its policies, which is doubtful, given that the *Charter* applies only to state action, we are satisfied that the adoption and application of the Employer's policy does not in the circumstances offend the Grievors' *Charter* rights or alternatively, is justified as a reasonable limit on those rights under Section 1. With respect to the latter issue, there is a useful discussion in the *Rodriguez* case respecting the necessity of balancing the interests of the state and the individual. This is very much the same type of analysis required in balancing the interests of employers and employees, and referred to in the *Esso* case. With the rule that has been passed by the Employer, we are of the view that the appropriate balance has been struck, for the reasons we earlier set out.
>
> (at page 12)

In considering the question before me I note the majority of jurisprudence cited to me does not favour the Union's position. In only one case is a similar policy found to offend the Collective Agreement. That case is *St. Peter's Health System, supra,* relied upon by the Union. The arbitrator in that case took quite a different approach. The arbitrator approached the matter as a question of assault and battery and forced medical treatment. He did not assess the reasonableness of the policy on the basis of the *KVP* line of cases. Rather, he dealt with the matter on the basis of *Charter of Rights* principles. In commencing his analysis, the arbitrator said:

> In all of the cases cited by the employer, arbitrators balanced the rights as to whether the rule was reasonable or not reasonable. These cases are not comparable to mandatory medical treatment. Here, of course, we are faced with a different proposition, namely

> that the allegation is not whether the rule is reasonable or unreasonable but whether one can commit what the Supreme Court of Canada has said is an assault and forced medical treatment on people that do not give consent.

In response to the argument that the employees were not being disciplined, merely being ordered home so they did not work and affect other coworkers, the arbitrator said:

> In this case, the employees have done nothing wrong and they are not ill with the flu, yet they are being prevented from working unless they undergo medical treatment. There is a distinction between medical treatment and medical testing. Clearly, if someone was contagious and they were sent home, then the sick policy would apply and there would be no issue. The case here is unique in that perfectly well employees are not being permitted to work. In all the cases cited by the Employer, none of the cases involve medical treatment, and even when they involve merely medical reports and medical examinations, they can be conducted by the patient's own doctor which is far less invasive than mandatory medical treatment.
>
> (at page 191)

The arbitrator continued and said prior to balancing, one must look at common law and Section 7 *Charter* rights as to whether it is permissible to enforce medical treatment in the circumstances of the case. He concluded the jurisprudence consistently found enforced medical treatment is an assault if there is no consent. In reaching his conclusion, the arbitrator set out a number of factors including the lack of statutory or regulatory authority for the medical treatment; the hospital could have applied to the Medical Officer of Health to promulgate a regulation making treatment mandatory; patients and visitors did not have to be vaccinated against the flu; the matter was not raised or bargained during collective bargaining; and other unions like the Nurses' Union had bargained a specific clause on this matter for their members. Taking all this into account, the arbitrator found a non-disciplinary suspension for refusing to undergo medical treatment was a violation of common law Section 7 *Charter* rights. He concluded:

> ...Virtually all the court cases, including Supreme Court of Canada and Ontario Court of Appeal, find that enforced medical treatment and I point out that this is not a medical examination but treatment, is an assault if there is no consent....
>
> (at page 192)

This brings the matter to the point argued by the Union and a consideration as to whether this Policy is a violation of Section 7 of the *Charter*. For ease of reference I set out Section 7 of the *Charter of Rights and* Freedoms as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The fundamental argument of the Employer in the case before me is that Section 7 does not apply to economic rights. It maintains the result of the choice of the employee; a number of unpaid days off in the flu season, is simply an economic choice. Accordingly, it maintains Section 7 is not applicable.

As the Union points out in its argument, the courts have consistently held that physical integrity is protected under Section 7. In *Duplessis, supra*, the courts said:

> Turning to the scope of the protection for the "security of the person", the case law provides that both physical as well as mental integrity are covered within the ambit of Section 7: *Rodriquez v. British Columbia (Attorney General)* [1993] 3 S.C.R. 519 at page 588:
>
> > ...There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within the security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.

(at para. 37)

As can be seen from the above, the question of the reality of the choice is an important part of the analysis in this case.

St. Peters Health Systems, supra, unfortunately does not address the case law establishing Section 7 does not protect economic rights, including employment. Rather, its analysis is predicated on the basis of an "assault/battery" case. Further, it does not deal with the question of choice. It commences its analysis on the basis no choice exists; finding this "forced medical treatment". The question of "choice" in the case before me is raised by the economic reality of being sent home without pay for the duration of an influenza outbreak; the deprivation of employment during that time and its impact on the choice to be immunized.

The Employer has set out a significant number of cases which hold Section 7 is not triggered even where there is a potential deprivation of employment. In *Noyes and School District of Caribou District No. 30* [1985] B.C.J. No. 2741, the B.C. Supreme Court dealt with a case of a suspended teacher pursuant to Section 122 of the *School Act* on the basis of a criminal offence. The Court held the teacher's employment did not engage the right to life, liberty or security of person. So too in *Anthony v. Misericordia General Hospital, supra,* where the Manitoba Court found the loss of a doctor's privileges from the hospital was an economic loss but not equated with loss or infringement of liberty. This type of the reasoning has been followed in *Canada (Attorney General) v. Gill* [1992) F.C.J. No. 118; *Walker v. Prince Edward Island* [1993] P.E.I.J. No. 111; *Waldman vs. British Columbia (Medical Services Commission)* [1997] B.C.J. No. 1793. Most recently, this matter was dealt with in *B.C. Teachers' Federation v. School District No. 39* [2003] B.C.J. No. 366.

In response to this line of reasoning however, the Union relies on the

Supreme Court of Canada decision in *Godbout, supra*. Further, it points out the cases relied upon in large part by the Employer, in particular, *Solicitors Reference, supra,* were decided before *Blencoe v. British Columbia (Human Rights Commission), supra,* and *Godbout, supra*. The Union also relies upon the minority opinion in *British Columbia Teachers' Federation, supra*.

It is helpful as a result to examine the comments in these cases to determine whether they are applicable and support the Union's argument.

The Union first disputes that the *Soliciting Reference* case continues to be the seminal case on the scope of Section 7. It quotes the Supreme Court of Canada in *Duplessis v. Canada* [2000] F.C.J. No. 1917 as follows:

> That said, there can be no doubt that the jurisprudence on Section 7 of the *Charter* is developing. I agree with the plaintiff, that there has been an incremental expansion of the rights protected under Section 7. For example, the courts have moved away from requiring direct interaction with the criminal justice system to encompass civil proceedings and most recently in *Blencoe*; the British Columbia Human Rights Commission, with the government as its ultimate source of authority, was upheld by the Supreme Court to be administering a government program that calls for *Charter* scrutiny. The Supreme Court has also incrementally broadened the purview of what is encompassed within the notion of "security of person" and continues to further define notion (See for example the discussion of the protection of "dignity" in *Blencoe*).
>
> (at para. 46)

The Union also points to the comments in the minority judgment in *British Columbia Teachers' Federation v. Vancouver School District No. 39, supra,* at paragraphs 158 and 160 as follows:

> In my view, this case is one of those anticipated by Lamar J. In which s. 7 of the *Charter* arises in an administrative law context in which calls upon the Court to determine to what extent, if at all,

> the boundaries of the liberty interest under Section 7 are to be interpreted to reflect the potential for serious infringements on individual liberties which can arise in the civil law context where the administration of justice is not directly engaged. While the Courts must be wary of pushing the boundaries of s. 7 too far, too fast, it should not treat those boundaries as being fixed and inflexible. The second stage of the s. 7 announces remains available to protect valid societal interests which are found to outweigh the interests of the individual in any particular case.
>
> .....
>
> Thus, the majority of the Supreme Court of Canada has made a conscious decision not to tie the hands of the courts in dealing with novel s. 7 arguments, but to allow the boundaries of s. 7 to be determined, and adjusted, on a case-by-case basis.

In *Godbout*, the Supreme Court of Canada was concerned about the ability of the resident in question to make a choice in a meaningful way about her right to choose where to live. The employee had been dismissed from her position as radio operator on a municipal police force for not complying with the municipality's requirement that its employees live within its boundaries. A minority of the Supreme Court found the municipal resolution requiring employees to reside within boundaries violated Section 7 of the *Charter*. The Municipality argued the resident had been given a choice whether to live outside the city and in signing the declaration had voluntarily waived her right to live where she chose. The minority found the liberty interest protected under Section 7 was sufficiently broad to capture the right to choose where to live. Mr. Justice La Forest found the resident had not waived her right to choose where to live and:

> Indeed, I find the appellant's contentions in respect of waiver to be entirely unpersuasive, inasmuch as they fail to recognize that the respondent had no alternative but to accept the residence requirement if she wanted to assume permanent employment with the municipality. By its very nature, waiver or renunciation of any right must be freely expressed if it is to be effective. Here,

> however, the appellants simply presented the respondent with two possible options -- she could either relinquish her post entirely (or continue only in a temporary capacity), or she could assume the permanent position as long she undertook to maintain her home in Longueuil for the duration of her employment....
>
> (at para. 72)

I note these comments were made by the minority. The majority judgments did not find it necessary to decide whether the residency requirement was also a violation of Section 7 of the *Charter*.

The minority in the *British Columbia Teachers Federation* case cited the above passage when dealing with the question of whether a teacher could choose to undergo a psychiatric exam. It concluded as follows:

> In my view, while ss. 92(2)(b) and (3) can be said to provide teachers with a choice, it is not a meaningful or fair choice. It is not a choice exercised free from coercion. A person who "chooses" not to undergo an examination pursuant to those sections does so at risk of grave economic peril. The compulsion to submit to an examination is overwhelming. *Any apparent consent given to undergo the examination is effectively coerced by the severity of the sanction attached to a refusal to undergo it. In my view, the state cannot take itself outside the protections afforded individuals to be secure against unreasonable search and seizure by the simple expedient of providing the individual with an arbitrary choice between the lesser of two evils.*
>
> Nor, by analogy with *Godbout*, can a teacher who submits to an examination pursuant to this section be said to waive her rights under Section 7 or 8 of the *Charter*. (at para. 92 and 93)

The majority of the Court of Appeal in B.C. in *British Columbia Teachers' Federation, supra,* however came to a different conclusion. As part of its analysis, the majority acknowledged that the application of Section 7 had expanded:

> In early *Charter* jurisprudence, the application of s. 7 seemed to be usually confined to the criminal law context.

> However as recent cases indicate, the application of Section 7 has been over time extended into other areas of the law. In the recent case of *Blencoe v. British Columbia Human Rights Commission*, [2000] 2 SCR 307, the Supreme Court of Canada per Bastarache J. speaking for the majority, extensively canvassed the jurisprudence concerning the reach of Section 7 of the *Charter*....
>
> (at para. 95)

The majority in that decision then quoted paragraphs 46 and 49 of *Blencoe* as follows:

> Section 7 can extend beyond the sphere of criminal law at least where there is "state action which directly engages the justice system and its administration"....
>
> .....
>
> The liberty interest protected by Section 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example when persons are compelled to appear at a particular time and place for fingerprinting (Beare, *supra*) to produce documents or testify (*Thompson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425); and not to loiter in particular areas (*R. v. Heywood* [1994] 3 SCR 761.
>
> .....
>
> In commenting on the security interest under Section 7, the court cited *Blencoe*:
>
> > It is only in exceptional cases where the State interferes in profoundly intimate and personal choices of an individual that state caused delay in human rights proceedings could trigger the Section 7 security of the person interests. While these fundamental personal choices would include the right to make decisions concerning one's body, free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings. (at para. 195 and

200)

The majority of the Court of Appeal went on to note:

> As I noted, *supra*, at the heart of this case is an employment relationship and a grievance proceeding arising out of the terms of a collective agreement. In the recent case of *Waldman v. British Columbia (Medical Services Commission)* (1997), 150 DLR (4th) 405 (B.C.S.C.), affirmed in the result, 177 DLR (4th) 321 (B.C.C.A.), Levine J. (as she then was) dealt with the issue of whether or not the liberty interest protected by s. 7 extended to include the right to practice a profession. On appeal, this Court did not find it necessary to definitively address this issue. In *Waldman*, there was an issue as to what extent the British Columbia Medical Services Commission could impose conditions of practice on newly qualified physicians. The chambers judge, Levine J. concluded that the measures enacted by the Commission violated the mobility and equality rights of the complainant physicians. After referring to earlier cases where this Court had appeared to endorse the proposition that the right to liberty under Section 7 could afford an individual the right to practice a profession, she analyzed subsequent jurisprudence and concluded that on the basis of more recent governing authority, s. 7 did not have application in the case dealing with the right of an individual to practice a profession....
>
> .....
>
> In the *Soliciting Reference* case, Lamer J. took the opportunity to express his view on the question of whether Section 7 of the *Charter* guarantees the right to practice a profession.....

He concluded at page 107:

> The rights under Section 7 do not extend to the right to exercise their chosen profession.

Ultimately, the B.C. Court of Appeal concluded:

> In the case of *Buhlers v. British Columbia (Superintendent of Motor Vehicles)*, [1999] BCJ No. 408 (BCCA) this court concluded that the right to drive a motor vehicle did not engage a liberty interest protected under Section 7 of the *Charter.* Of course the right to drive a motor vehicle, as is also the case of employment, can have important effect on the economic interests of an

> individual. However as a general rule, previous jurisprudence has held that purely economic interests are not interests that will engage the provisions of s. 7 of the *Charter.* (at para. 203)

The majority judgment also dealt with a similar argument to that made by the Union. The appellants had submitted the comments of La Forest J. in *Godbout* supported the argument that Section 7 should be found to extend to matters concerning an individual's employment. The Court noted this argument was touched on by Bastarache J. in the course of his judgment in *Blencoe.* It noted:

> ....
>
> La Forest J. therefore spoke in *Godbout* of a narrow sphere of inherently personal decision-making deserving of the law's protection. Choosing where to establish one's home fell within that narrow class according to three members of this Court.
>
> Dissenting at the New Brunswick Court of Appeal G.(J), I also favoured a more generous approach to the liberty interest that would protect personal rights that are inherent to the individual and consistent with the essential values of our society (*New Brunswick (Minister of Health and Beauty Services) v. JG* (1997) 187 NBR (2d) 81 at paragraph 49). In this vein, the parental interest in raising and caring for one's children would be protected. I however agreed with La Forest J.'s caution that the liberty interest would encompass only those decisions that are of fundamental importance.
>
> Professor Hogg, supra, at p. 44-9, supports a more cautious approach to the interpretation of s. 7 such that s. 7 does not become a residual right which envelops all of the legal rights in the *Charter.* Professor Hogg also addresses the deliberate omission of "property" from "life, liberty and security of the person" in s. 7, and states, at page 44 – 12:
>
> > It also requires....that those terms [liberty and security of the person] be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.

> Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. In the circumstances of this case, the state has not prevented the respondent from making any "fundamental personal choices". The interests ought to be protected in this case do not in my opinion fall within the "liberty" interest protected by s. 7.

The Court of Appeal ultimately said:

> My reading of the above passage and in particular the reference therein to the comments of Professor Hogg lead me to conclude that that Bastarache J., at least by inference, was suggesting that economic matters such as a right to a specific employment would not be in the purview of s. 7.
>
> I would observe that even if the reasoning of La Forest J. in *Godbout, supra,* was to be considered, it appears to me that what was at issue there, namely the right of a person to reside where he or she chooses and what is at issue here, the requirement to undergo a medical examination, are scarcely on the same plane.,,,

The majority judgment in the Court of Appeal concluded by noting:

> There are any number of issues concerning the employment relationship that may lead to disagreement between the employer and the employee. In the non-union context, these issues are to be resolved under the contract rubric and in a union setting the grievance-arbitration process is available. In this area of private law, these remedies should suffice to resolve the issues that may arise for resolution. What is at issue in addition in this case does not, in my opinion, rise to the level of any interest concerning the life, the liberty or security of the person that would invoke the application of s. 7 of the *Charter.* La Forest J. noted in *R. v. Beare*, [1988] 2 SCR 387 (the fingerprinting case), that while s. 7 must be given a generous interpretation, it was important not to overshoot the purpose of the right can question. To allow s. 7 to be invoked in the context of this case, in my view, what would amount to overshooting the purposes this section was designed to protect.
>
> Since, in my opinion, the issue in this case concerns a

> particular employment relationship and a health issue related thereto, I do not consider s. 7 of the *Charter* can properly be engaged. I am unable in this case to discern any state interference with a liberty or security interest that should be found to be subject to s. 7 *Charter* protection. Because of this conclusion, it follows that I do not consider that the impugned provisions of the *School Act* and can be successfully asserted to be of no force or effect because of alleged inconsistency with the provisions of Section 7 of the *Charter*.... (at para. 209-210)

This case is the most recent statement cited to me on Section 7 of the *Charter* in British Columbia. It has considered the two *Charter* cases heavily relied upon by the Union. Ultimately, the Union argues as the Supreme Court of Canada has found the right to live where one chooses to be a protected Section 7 right, it surely would find the right of employees to be free from coercive immunization, a protected right under that provision. In answer to the Employer's reliance on the *British Columbia Teachers' Federation* case, the Union maintains it is not asserting a constitutionally protected right to practice nursing. Rather, it is asserting a right of employees to be free from coercive immunization. The Union submits this case does not stand for the blank proposition that Section 7 of the *Charter* does not apply in the employment context because the *Charter* does not protect economic rights as alleged by the Employer.

A review of these cases leads to a number of conclusions. First, I note it is likely as the Union maintains, *British Columbia Teachers' Federation, supra,* does not stand for the blank proposition that Section 7 of the *Charter* will never apply in the employment context because the *Charter* does not protect economic rights. It would appear from the passages cited above that it is fairly settled the rights under Section 7 do not extend to the right to exercise the chosen profession or employment. That does not necessarily mean that Section 7 is never applicable in the employment context. While as noted "the right to security of the person does not protect individuals from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action," (*Blencoe* at page 355), the security of the person may be

triggered where:

> ...the impugned state action must have had a serious and profound effect on the respondent's psychological integrity (G.J.), supra at paragraph 60). There must be state interference with an individual interest of fundamental importance (at para. 61).....
> (*Blencoe* at p.355).

The Supreme Court of Canada considers the parameters of Section 7 to be developing. Those parameters are however constrained both by the developing jurisprudence and the interpretive principles such as those cited by the B.C. Court of Appeal in coming to its conclusion in the *British Columbia Teachers' Federation* case. That includes comments that the focus of the interests under Section 7 of liberty and security encompass only those decisions that are of fundamental importance. As noted by Professor Hogg in the quote above, that interpretation requires some caution in ensuring Section 7 is not a residual right which envelopes all of the legal rights in the *Charter.*

In this case, the question is whether the decision at issue is one of fundamental importance such that the liberty and security of the person is engaged under Section 7 of the *Charter.* The parties take dramatically different points of view on this point. The Employer maintains this is a case of choice, where employees can choose whether or not to be immunized. If not immunized, they may well suffer an economic consequence when they are sent home without pay during an outbreak. The Union on the other hand has characterized this as coercive immunization similar to that in articulated in the minority decision in *British Columbia Teachers' Federation, supra,* and thereby in effect a case of no choice. It maintains the issue is whether the Employer can promulgate a policy which coerces employee influenza immunization by threatening exclusion from work without pay in order to achieve a particular target rate of immunization. The Union submits the policy is a violation of Section 7 of the *Charter.* As set out earlier, it relies upon the case of *St. Peter's Health Center* which characterizes the matter is one of assault thereby breaching the protection which of physical

integrity under Section 7 of the *Charter*. The comments in *Fleming v. Reid (Litigation Guardian, supra,* in dealing with Section 7 of the *Charter* are also cited by the Union in support of its case:

> The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlines the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination....
>
> On the first branch of the analysis, it is manifest that the impugned provisions of the Act operate so as to deprive the appellants of their right to "security of the person" as guaranteed by s. 7. The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by Section 7. Indeed in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of person, both of which, are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.
>
> (at page 312)

The case before me is distinguished somewhat from the jurisprudence cited by the Employer that established no protected *Charter* right to practise a profession, because of the element of potential invasion of bodily integrity. I also note the situation here is more aptly characterized as medical treatment rather than a medical examination case. The question arising with medical treatment is whether a real choice exists such that the protections of liberty and security under Section 7 of the *Charter* are not engaged.

As set out in the minority opinion in *British Columbia Teachers' Federation*, Section 7 involves a two-stage process. At the first stage, the court

must determine whether there has been a deprivation of the individual's life, liberty or security of the person. If and only if that test is met, the court must consider whether that deprivation is in accordance with the principles of fundamental justice (at paragraph 138). In considering whether the liberty interest is engaged under Section 7 of the *Charter*, the minority and other arbitral jurisprudence on this point, focused in on the nature of the choice made by the individual. It noted:

> As in the case of Section 8, the respondents assert that the teacher's loss of livelihood was a matter of her own choice and that she might have maintained her means of livelihood had she chosen the other alternative available to her, which was to submit to the psychiatric examination.
>
> *The question of choice, the nature of that choice and the reality of choice is fundamental to the analysis in both the Charter court case and arbitral jurisprudence.*
>
> I would reject this reasoning under Section 7 of the *Charter* for the same reasons I rejected it under Section 8 (at paragraph 82 – 93 of my reasons). So-called choice referred to by the respondents is not a meaningful, free or fair choice. It is one which called on the teacher's, the sacrifice either her personal privacy, or her livelihood, and circumstances which I have found amount of each of her rights under Section 8 of the *Charter* (subject, of course, to a Section 1 analysis).
>
> Like Mr. Justice La Forest in *Godbout*, I do not view the choice imposed on the teacher by Section 92(2)(2) and (3) of the *School Act* as one which is fundamentally about economic interests. Rather, as Mr. Justice La Forest emphasized, the choice is one which is fundamentally about privacy interests -- that area of fundamental personal choice is referred to in *Blencoe, supra*, I see the Section 7 question here is being directly analogous to that posed in *Godbout* in which I will repeat here for emphasis.
>
> Similarly, in this case the teacher is not challenging the fact of her termination per se as being contrary to her Section 7 liberty interest. Rather, she is challenging the fact that Section 92(2) imposed on her the choice of whether to forego her right to personal and psychological privacy or to forgo her employment. As in *Godbout*, it is not the loss of her employment which the teacher

> submits engages her Section 7 interest in liberty, but, rather, the basis upon which her employment was terminated.
>
> In this case, although the underlying liberty interest asserted by the teacher is different from that asserted by *Ms. Godbout*, it is a right which, based on my findings with respect to Section 8 of the *Charter*, is equally valid and protected. (at paragraph 143 – 146)
>
> I am satisfied that the teacher has established that her right to liberty was engaged in these circumstances within the meaning of Section 7 of the *Charter*. I am also satisfied that, as in *Godbout*, the teacher's liberty interest was infringed by the state mandating that she forego her right to personal and psychological integrity or forfeit the means of livelihood. Because I am satisfied of this infringement can best be described as an infringement of the teacher's right to liberty, it is unnecessary for me to consider whether it also infringes a right to security of the person.

As the minority judgment notes, the Supreme Court of Canada has made a decision not to tie the hands of the courts in dealing with novel Section 7 arguments. Rather, the boundaries of Section 7 are to be determined and adjusted on a case-by-case basis. (at paragraph 160)

In this case, even if the minority position above were to prevail, it is not evident that the loss of a number of days or weeks of work during the flu season would meet the threshold set out above to reach the conclusion that there has been a loss of liberty or security protected under Section 7 of the *Charter.* In the case at hand, the jurisprudence makes clear the *Charter* must be applied in a way that recognizes profound and important fundamental life choices. The situation may well be different if there was no real choice. It is not evident the economic consequences of failing to become immunized are so severe they effectively deny an individual choice over her body. It cannot be said the loss of a number of days or weeks of work, although no doubt significant on an individual basis, meets that threshold. The employee is able to continue her livelihood albeit somewhat restricted during the flu season. She is able to access her vacation leave or other accrued leave, other than sick leave. Her leave is not considered disciplinary. While the rationale behind the choice of the employee

may be understandable, this is unlike the conclusion of the minority in *British Columbia Teachers' Federation* who found in dealing with the "choice" that:

> A person who "chooses" not to undergo an examination pursuant to those sections does so at risk of grave economic peril. The compulsion to submit to an examination is overwhelming. Any apparent consent given to undergo the examination is effectively coerced by the severity of the sanction attached to a refusal to undergo it.

That is simply not the case here. The employee may in fact suffer no economic sanction at all if there is no flu outbreak declared at her particular worksite. In my view, the Union has not been able to demonstrate the policy creates "coerced" immunization such that it would attract the protection of Section 7 of the *Charter.*

The case of *St. Peters' Health Systems, supra,* is ultimately not helpful to the Union as it predicates its analysis on the basis of no choice. It does not delve into the question of medical treatment, choice and the severity of economic consequences which may affect that choice. Rather, the arbitrator simply concludes the medical treatment at issue is forced and proceeds to an analysis of the question of coercive immunization. He did not deal with the employer's argument that there was no *per se* assault or trespass on the person; rather not taking the medication or shot renders them unfit to work during an outbreak as it increases chances of transmission. He characterized the issue as:

> ...we are faced with a different proposition, namely that the allegation is not whether the rule is reasonable or unreasonable but whether one can commit what the Supreme Court of Canada has said is an assault and force medical treatment on people that do not give consent...

His statement of the proposition in this manner contains the conclusion that no choice exists in this situation and the ultimate conclusion that a violation of Section 7 of the *Charter* has occurred. As noted in the minority *British Columbia Teachers' Federation* judgment, the question of "choice" is fundamental to both

the *Charter* and arbitral jurisprudence. This is a case of "choice", rather than "no choice". The reality of that choice has been examined on the basis of the above. All choice is subject to influence and may be difficult. It does not prevent an employee from making that fundamental private choice. When these influencing factors effectively take away the choice, fundamental values may well be engaged. In this case however, I conclude the choice has economic consequences but not such that fundamental *Charter* values are engaged.

In view of all the above, I do not find the implementation of the Policy has caused the deprivation of the liberty or security of a person such that Section 7 of the *Charter* is engaged. The economic consequences of that choice do not result in a liberty or security value under Section 7 being engaged. Accordingly, there is no need to turn to the second issue of whether a deprivation occurred in accordance with the principles of fundamental justice as mandated in *Charter* analysis. The matter is more appropriately dealt with on the basis of whether the Collective Agreement is breached and the reasonableness of the Policy. Included in that is the question of whether the existence of a specific provision in the Collective Agreement means the question of reasonableness is not applicable. I will deal with that as part of my analysis on the latter question.

Much of the reasoning that leads to the conclusion that Section 7 liberty or security has not been deprived is applicable to this question. Furthermore, the existence of a negotiated provision, Article 32.02 is significant. The Union maintains however that the Employer cannot justify mandatory immunization for many of the same reasons the Policy does not meet the threshold of fundamental justice under Section 7. These include the Employer's failure to consider alternatives to mandatory immunization; the individual's circumstances and alternatives to exclusion without pay.

I note first as evident in the line of cases cited by the Employer, *Trillium Ridge Retirement Home, supra; Carewest, supra;* and *Chinook Health Region,*

supra, choice is also an essential part of the reasoning in considering the reasonableness of the Policy. As noted in *Trillium, supra*:

> ...the real substance of the dispute between the parties is whether the Employer's policy of requiring a loss of shifts and pay if an employee refused to take the medication or did not have effective immunity, constituted grounds for vitiating the employee's consent to the prophylactic measures taken or constituted an unreasonable or arbitrary exercise of management rights under the collective agreement.
>
> (at page 17)

The comments contained in dealing with choice and the *Charter* argument are equally applicable here. *Chinook Health Region* expanded on these and noted there was no disciplinary notation evident and the purpose of the Policy:

> ...was to encourage the widest vaccination of staff and residents possible, while not imposing these measures in the absence of apparent consent....
>
> (at page 23)

The arbitrator in *Trillium* noted the potential for a power imbalance, the exploitation of which can vitiate consent and concluded there was no basis to conclude that consent of the immunization measures was invalid or vitiated. She noted reasonable measures were taken by the employer to inform the staff concerning the need for immunization of residents and staff to effectively manage influenza outbreaks. The policy objective sought to provide effective protection against infection for all. The employer's position was not exploited for the self-interest of the employer.

Much of this reasoning is germane in the case before me. The evidence makes clear the policy is designed to meet the 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.

The Union has however sought to distinguish this line of cases by arguing the Policy is an unreasonable exercise of management rights under the Collective Agreement. In particular, it maintains a consideration of the alternatives available to the Employer to accomplish the objective was not and should be considered in any balancing of interest consistent with the *Charter* values. Indeed, it points out that was a factor that led to the policy being upheld in *Re Chinook Health Region, supra.*

On this point, I note first the Policy does not exclude employees for the entire flu season; only during a declared "outbreak". All employees continue to be employed and scheduled for work. Further, I note a voluntary educational approach in 2000 did not result in sufficient increase in immunization. On October 1, 2001, the Deputy Minister of Health wrote to health-care employees to advise the Government now supported implementing the Ministry Draft Policy in a manner which excluded non-immunized employees without pay. That letter indicated:

> ...During the 2000/2001 season, with an approach based on health care workers education and voluntary participation, health authorities improved influenza immunization coverage of staff in long-term care facilities from 43% to 57%, but still fell short of the goal of 80%...

While the Union maintains there was no evidence as to how the Employer communicated its immunization policy to increase employee participation in immunization, the reality of this significant gap in vaccination despite communication efforts by HEABC to the health care employers, is evident from the statistics set out above. In addition, Moulin, the registered nurse who testified, noted her awareness of posters and awareness of the Policy and its requirements.

The Union also seeks flexibility or individualized assessment prior to an individual being sent home. It also says transfers to another location should be considered. The evidence established an employee may be infectious but asymptomatic. As a result, the effect of such a transfer is not predictable and may have further impact. The Union's answer is to argue individual testing should occur. While Dr. Henry testified about the nature of the test the Union's proposition that "the Employer has the ability to rapidly determine whether employees are infectious with influenza" was not established on the evidence. Finally, the Union maintains the employee should be allowed to access all leaves, including sick leave. The entitlement to sick leave is determined by the provisions in the Collective Agreement. Removal from work as a preventive measure for illness, does not easily fit within this concept and without more is not persuasive.

An important aspect of this case is that Article 32.02 of the Collective Agreement gives the Employer the right to require vaccination or immunization. The parties have agreed to the proposition that:

> ...Employees may be required to take...vaccination, inoculation and other immunization...

The Employer must exercise that right in good faith and not in a discriminatory or arbitrary manner. Even if the exercise of that right is required to be "reasonable" under either a "fairness" *or Charter* value analysis, the existence of this agreed upon provision in the Collective Agreement along with evidence establishes the reasonableness of the Policy at issue in this case.

The rationale as a preventive measure to prevent the spread of influenza amongst a vulnerable population is clear and indeed not seriously quarrelled with by the Union. Further, the employee is entitled to refuse the vaccine and/or amantadine, a critical part of the Policy. Removal from work without pay, in the

event of an outbreak is the result of that choice made. I have dealt in detail with the question of choice under the *Charter* and find that analysis to be applicable in considering the reasonable of the Policy.

The real difficulty for the Union in this case is that the evidence establishes the Policy provides for voluntary vaccination and if an outbreak is declared, the option of taking anti-viral medication. This combination is established as necessary in order to contain the spread of an influenza outbreak in a fragile population. The employees have a choice in the matter. Financial consequences may occur if there is both an outbreak declared and they do not have any residual vacation or other leave remaining, other than sick leave. That does not eliminate the reality of a choice, albeit one that may be difficult.

Ultimately there may well be other ways to minimize the risk of transmission. That however does not in and of itself detract from the conclusion that overall, on the basis of the reasons set out earlier, the Policy as it stands is reasonable and consistent with the Collective Agreement.

In conclusion, I find the Policy is reasonable and does not violate Section 7 of the *Charter*. In doing so, I note the parties disagreed as to whether the *Charter* applies to the Interior Health Authority and reserved that issue to be argued only if necessary. In view of the conclusion above this is not necessary. Finally, I am not inclined to issue any further declarations as requested by the Employer. They are not essential in order to deal with this and may well be beyond the confines of the matter before me.

The grievance is accordingly dismissed.

Dated at Vancouver, British Columbia, this 15th day of September, 2006.

EMILY M. BURKE ARBITRATOR