

IN THE MATTER OF AN ARBITRATION

BETWEEN

**ELLISDON CONSTRUCTION LTD./
ELLISDON CORPORATION AND VERDI STRUCTURES INC.**

(the "Employers")

and

**LABOURERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL 183**

(the "Union")

RAPID TESTING GRIEVANCE

SOLE ARBITRATOR: Robert W. Kitchen

APPEARANCES

For the Union

Ryan Newell on behalf of Labourers' International Union of North America, Local 183

For the Employers

Christopher F. Fiore and Erich Schafer on behalf of EllisDon Construction Ltd./EllisDon Corporation; and

Carl Peterson, Diane Laranja and Danny Parker on behalf of Verdi Structures Inc.

The Grievance was heard by way of written submissions on May 15 and 16, 2021.

AWARD

1. The parties requested a "bottom line decision". Having regard to the submissions of the parties, the grievance was dismissed, with reasons to follow.
2. The following are the written reasons for that decision. The parties proceeded by way of an Agreed Statement of Facts.

AGREED STATEMENT OF FACTS

Background Information

1. EllisDon Construction Ltd. ("EllisDon") is the general contractor on a mid-rise residential construction project located at 19 Duncan Street in Toronto (the "Project").
2. Verdi Structures Inc. ("Verdi") is a formwork contractor which has been engaged by EllisDon to construct certain concrete formwork at the Project.
3. EllisDon is bound to the Collective Agreement between Metropolitan Toronto Apartment Builders' Association and the Labourers' International Union of North America, Local 183 ("Local 183"), currently effective from May 1, 2019 to April 30, 2022, in the residential sector of the construction industry in OLRB Area #8.
4. Verdi is bound to the accredited Provincial Formwork Collective Agreement between the Ontario Formwork Association and the Formwork Council of Ontario, currently effective from May 1st, 2019 to April 30th, 2022 and continuing thereafter in accordance with its terms and by statute (the "Formwork Agreement").

The Project

5. The Project will be a 59 floor residential condominium building upon being finished.
6. Demolition related to the Project took place in May of 2018 and construction began in December of 2019.
7. Verdi has performed the formwork under the Formwork Agreement at the Project since January 2020 using a composite crew of its employees which includes rodmen, carpenters, and labourers.
8. Since January 2020, Verdi has completed the formwork on approximately 10 floors of the Project, and continues to perform the formwork in the construction of the remaining floors. There are no walls on the floors of the building that Verdi employees are working on

at this stage of its construction. As a result, Verdi employees are working in areas where there is a good flow of fresh air. Workers are directed, by both Verdi and EllisDon management, to maintain at least 6 feet of physical distance except when their work requires them to get closer to one other.

9. Several workers have been sent home or received written warnings for failing to comply with these instructions regarding social distancing. For example, EllisDon issued written warnings to employees on April 26 and April 29, 2021. Verdi issued written warnings to employees working at the Project on January 15 and 18, 2021.
10. Also, due to the nature of the work at the Project, social distancing is not always possible.
11. Since January 2020, Verdi has had between 40-50 Verdi employees on site at the Project every day on which work is being completed. Verdi will continue to have 40-50 Verdi employees on site at the Project every day on which work is being completed.
12. Besides Verdi, other trades and contractors are currently attending at the Project to perform work related to that project. Other trades currently performing work at the Project include electricians, plumbers, and ventilation and mechanical contractors. EllisDon also directly employs a small number of the Union's members to perform work onsite.
13. As of May 12, 2021, there were approximately 108 construction employees at the Project, and that number had remained relatively consistent for several months.
14. The Project is in the middle of the construction process.
15. Verdi expects that its work at the Project will be finished by approximately July 2022.

Policy

16. In late February of 2021, EllisDon implemented a Rapid COVID-19 Antigen Screening Program (the "Policy") as part of a pilot program being led by the Ontario Ministry of Health ("MOH"), with support from partner ministries Public Health Ontario and Ontario Health.
17. The objective of the pilot program was to assess the value of the Abbott Panbio COVID-19 Antigen Screening Test ("AP Test") as a screening tool to support employee safety and business continuity in a variety of workplaces. In its guidance documents regarding the rapid testing pilot project, Ontario does not require or recommend that employers participating in the pilot make testing a compulsory condition for individuals entering the workplace.

Employer Antigen Screening Pilot: FAQ & Information Document, Ontario Ministry of Health (attached as Tab 1)

18. Pursuant to the Policy, all individuals attending at affected job sites (including the Project) are required to submit to the Rapid Antigen Screening Protocol to gain access to the worksite.
19. EllisDon decides which job sites will be subject to rapid testing based on a number of criteria including: community spread and case counts, hot-zone locations, size of project, risk level for workplace transmission, critical infrastructure projects, and client requirements.
20. Testing is currently being performed at forty-seven (47) job sites (see list attached as **Tab 2**). The employees of twenty-four (24) different subcontractors have been tested.
 - (a) Members of other trade unions, including but not limited to,
 - (i) the Carpenters' Union
 - (ii) the International Brotherhood of Electrical Workers
 - (iii) the Plumbers Union
 - (iv) the Operators Union
 - (v) the Ironworkers Union
 - (vi) the Sheet Metal Workers Union
 - (vii) the Brick and Allied Trades Union
 - (viii) the Painters Unionhave all been tested on the various sites without issue and to this date, a grievance has not been filed.
21. Some of these job sites are very large and have 500+ construction employees. All of the employees at these sites are being tested twice weekly. For example, such projects include:
 - (a) West Park Healthcare Centre (Hospital, Toronto)
 - (b) 81 Bay Street (Mixed-Use, Toronto)
 - (c) The Well (Commercial, Toronto)
 - (d) Michael Garron Hospital (Hospital, Toronto)
 - (e) New Toronto Courthouse
22. EllisDon uses the AP Test, which is a form of rapid point-of-care test that has been approved by Health Canada. The testing materials are distributed by the MOH.

COVID-19 Guidance: Considerations for Rapid Antigen Point-of-Care Screening, Ontario Ministry of Health, February 17, 2021 (Tab 3) at page 3.

23. The AP Test is conducted on site on a twice-weekly basis, in accordance with MOH guidelines stating that for asymptomatic individuals in high prevalence areas (Yellow / Orange / Red / Grey), specimen collection and screening should be performed 2-3 times per week.

COVID-19 Guidance: Considerations for Rapid Antigen Point-of-Care Screening, Ontario Ministry of Health, February 17, 2021 (Tab 3) at page 4.

24. Since November 20, 2020, the City of Toronto has been under Lockdown or a Stay-at-Home order, within the meaning of Ontario's *COVID-19 Response Framework*.
25. Each site is responsible for establishing its own process to ensure that workers have been screened. On days when screening is not being conducted, access to the site is gained by providing evidence of being signed up for the next screening day.
26. The AP Test is currently *not* administered through a nasopharyngeal swab. Rather, it is administered via a throat and bilateral lower nostril swab. This has been approved by the MOH as an acceptable alternative method of collecting specimens.

COVID-19 Guidance: Considerations for Rapid Antigen Point-of-Care Screening, Ontario Ministry of Health, February 17, 2021 (Tab 3) at page 4.

27. The testing is administered by third party qualified healthcare professionals, who are instructed to administer the test in accordance with the manufacturer's instructions.

Panbio COVID-19 Antigen Rapid Testing: Onboarding Guide Version 2, March 5, 2021 (Tab 4).

28. EllisDon has engaged three external nursing firms to administer the testing. These firms provide Registered Nurses or other healthcare professionals (typically 1 healthcare professional per 100 workers) who perform the testing, as well as one administrator for data entry.
29. Testing is performed on site and does not require shipping the specimen to a lab for processing.
30. Testing is only conducted on individuals who have already answered the questions on a standard-form screening questionnaire (**Tab 5**) and have had their temperature checked upon entering the site.
31. The AP Test takes approximately fifteen (15) minutes to yield results.
32. EllisDon has set up testing areas in accordance with MOH Guidelines:

- (a) Individuals being tested are physically distanced from others during the testing (aside from the healthcare professional administering the test).
 - (b) Swabbing is conducted in a manner such that it cannot be observed by anyone other than the healthcare professional administering the test.
 - (c) Testing results are read and recorded by healthcare professionals such that they cannot be observed by anyone other than the healthcare professional administering the test.
 - (d) Healthcare professionals sanitize before and after each test, and deep cleaning of the test site is conducted at regular intervals throughout the day.
 - (e) All biohazardous waste from the testing site is disposed of through a registered hazardous waste removal process.
33. No personal health card information is taken or stored during the testing.
34. Individuals undergoing the AP Test must provide their name, employer name, phone number, and email address for the purpose of notification in case of a positive result.
35. The information collected is only disclosed and used by healthcare professionals and EllisDon management personnel to communicate results to individuals that have received testing and local public health units.
36. Individuals can refuse to submit to the AP Test, but anyone refusing will be denied access to the worksite.
37. If a Verdi employee refuses to submit to the AP Test and is therefore denied access to the Project, Verdi will make best efforts to reassign that employee to a different site on which Verdi performs work, but if no such site is available, the refusing employee will be laid off.
38. If the AP Test is negative, the individual will return to work.
39. If the AP Test is positive, this is considered a preliminary (or presumptive) positive, as opposed to a diagnosis. A positive AP Test will result in the following:
- (a) The testing team will communicate the results to the individual, as well as EllisDon's HSE Coordinator.
 - (b) The HSE Coordinator will notify the EllisDon Healthline and begin contact tracing.
 - (c) Any employees that have been in close contact with the COVID-positive employee will be required to self-isolate.
 - (d) The local public health unit will be notified of the rapid positive test.

- (e) The individual that has tested positive must receive a follow-up, confirmatory, lab-based polymerase chain reaction (“PCR”) test.
 - (f) The individual is required to attend a COVID-19 Assessment Centre within 24 hours to get tested.
 - (g) The individual is prohibited from accessing the job site, pending the outcome of the PCR test. They must advise their employer of the result and self-isolate until results of the PCR lab test are available.
40. During the time spent testing and the 15-minute period between testing and the receipt of results, employees continue to receive their regular pay. If an employee needs to take time off to obtain a confirmatory PCR test, it is up to the individual subcontractors to decide whether the employee will be paid.
41. When EllisDon direct hires have received positive rapid test results, they have not been paid for the time spent obtaining a PCR test unless it turns out that the on-site test was a false positive. When Verdi employees have received positive rapid tests at other sites, they have not been paid for the time spent obtaining a PCR test.
42. Employees who receive a positive PCR test and who are therefore required to self-isolate are compensated in accordance with Ontario’s recent paid sick leave legislation (Bill 284), but are otherwise placed on an unpaid leave of absence.
43. Requests for accommodation on the basis of human rights concern are addressed on a case-by-case basis.

EllisDon’s Additional Health Measures

44. In addition to the Policy, EllisDon has implemented a number of other health measures related to COVID-19 at the worksites where testing is being conducted. These measures include:
- (a) Individuals attending the sites must answer a standard-form screening questionnaire (attached as **Tab 5**);
 - (b) The provision of handwashing facilities and hand sanitizer;
 - (c) Appropriate Personal Protective Equipment, including masks;
 - (d) Non-essential visitors and guests are not permitted on job sites;
 - (e) Scheduling work and start times to avoid overcrowding at site entry points and at the work face, such that 6 foot / 2 meter social distancing is maintained as much as possible;
 - (f) Tracking and monitoring of EllisDon employees who have reported illness, cold or flu-like symptoms, are in self-isolation, or have tested positive for COVID-19, and requiring subcontractors to do the same for their employees;
 - (g) Enhanced cleaning and disinfection program, which includes:
 - (i) Wiping down door handles, railings, and workstations

- with disinfectant twice a day;
 - (ii) Cleaning all restrooms twice a day, or more frequently as required;
 - (iii) Maintaining a cleaning log for each job site.
 - (h) Individuals attending at the affected sites must have their temperature taken by a health professional prior to accessing the job site.
45. These measures have been described in EllisDon's "COVID-19 Health and Safety Policy" (attached as **Tab 6**).
46. Any individuals that are identified as symptomatic during screening protocols will be referred to public health for testing through the health care system.
47. Verdi and its employees have complied with the health measures implemented by EllisDon in accessing and performing work at the Project.

Testing Schedule at Project

48. As noted above, EllisDon began its testing program in February of 2021. Initially, its ability to test was limited by a number of factors:
- (a) The government of Ontario was only allowing the tests to be administered by Registered Nurses.
 - (b) Some of the owners would not approve the testing, and EllisDon was initially only performing testing at sites where the owner had approved.
 - (c) Testing requires a number of arrangements to be made at each site. For example, the testing must be conducted in an area with a hard floor that can be easily cleaned, and a computer with access to WiFi service must be set up. It was not possible to set up all of the necessarily facilities at once.
49. A number of factors led EllisDon to announce on April 28, 2021 that it would expand its testing policy to sites where the owners had not expressly approved the testing:
- (a) The "third wave" of COVID had resulted in increased case counts in Ontario.
 - (b) There was more news of more contagious variants.
 - (c) The government had begun to allow non-registered healthcare professionals to administer tests.
50. The expanded testing started on May 3, 2021.
51. Testing was scheduled to begin at the Project on May 10, 2021, but it was pushed back by a week due to the unavailability of healthcare

professionals.

- (a) As noted above, EllisDon has been obtaining healthcare professionals from three agencies.
- (b) EllisDon contacted each of these agencies in early May to request healthcare professionals for the Project.
- (c) Each of the agencies informed EllisDon that it could not provide healthcare professionals during the week of May 10, because many healthcare professionals were being sent to vaccination clinics. However, they could provide healthcare professionals starting on May 17.
- (d) By the time it learned that the three above-noted agencies could not provide healthcare professionals, it was too late for EllisDon to obtain nurses from another agency before May 17. Before an agency can begin providing healthcare professionals, EllisDon must enter into a contract with the agency and make arrangements related to insurance.

Testing Results

- 52. As of May 12, 2021, there had been 100,237 tests conducted as part of EllisDon's testing program, producing a total of 179 positive results. Of these 179 positive results, 118 were later confirmed as positive by PCR and 20 were false positives. There are currently another 41 preliminary positive results that have not been confirmed by PCR. PCR results are pending for these 41 preliminary positive results.
- 53. Among the workers at the Project specifically, since construction began there have been nine cases of COVID-19 that have been confirmed by PCR, including four employees of Verdi. The dates of these cases were as follows:
 - (a) September 2020 – 1 case
 - (b) January 2021 – 4 cases
 - (c) February 2021 – 1 case
 - (d) March 2021 – 2 cases
 - (e) April 2021 – 1 case
- 54. All of these cases were detected off-site. The affected employee either noticed symptoms or learned of a COVID-positive contact, and then received publicly-available COVID-19 testing.
- 55. There have been two apparent cases of COVID-19 transmission among non-bargaining unit employees on the Project:
 - (a) In late February of 2021, a field engineer employed on the Project tested positive for COVID-19. He was then in contact with an HSE Coordinator and Senior Superintendent at the Project.
 - (b) At approximately the same time in early March, both the HSE

- Coordinator and Senior Superintendent developed symptoms.
- (c) The incident was reported to Toronto Public Health, which declared the Project to be an outbreak worksite.
 - (d) EllisDon also reported this incident to the Ministry of Labour (“MOL”) in accordance with its obligations under the *Occupational Health and Safety Act* (see report attached as **Tab 7**).
 - (e) An MOL Inspector attended the site on March 19, 2021 and issued a Field Visit Report (**Tab 8**). No orders were issued.
56. Other EllisDon sites in Toronto have been affected as well (see news article attached as **Tab 9**):
- (a) On April 23, 2021, an EllisDon site located at 825 Coxwell Ave. was partially shut down by Toronto Public Health.
 - (b) On April 29, 2021, an EllisDon site located at 390-440 Dufferin St. was partially shut down by Toronto Public Health.
 - (c) Between December 27, 2020 and January 29, 2021, there were 69 positive test results reported at The Well Project located at the corner of Front St. and Spadina St.
 - (d) There were also multiple positive tests at Crosslinx sites, where EllisDon is a contractor, and there were 15 positives reported at Michael Garron Hospital site in December, another EllisDon job.
57. As of May 14, 2021, there were four active workplace outbreaks at EllisDon sites in Toronto.

Grievance

58. On or around May 11, 2021, Local 183 filed a grievance against EllisDon and Verdi (the “Grievance”) (**Tab 10**), claiming that the two companies had violated the MTABA Agreement and / or the Formwork Agreement (collectively, the “Collective Agreements”) by implementing the testing. Appended to Local 183’s grievance was a letter addressed to EllisDon outlining concerns about the Policy and signed by approximately 55 of Local 183’s members employed by Verdi at the Project (**Tab 11**). The Employers dispute that there is a reasonable basis for the concerns expressed therein.
59. In the Grievance, Local 183 took the position that the Policy was an unreasonable exercise of management rights and an unreasonable company policy or rule.
60. It noted that the alleged violations of the Collective Agreements had taken place at all job sites within the geographic scope of the Collective Agreements, including the Project.

Expanded Access to Rapid Testing for Workplaces

61. As of May 12, 2021, Ontario had delivered more than nine million rapid

testing kits to nearly 1,600 workplaces as part of its Provincial Antigen Screening Program.

62. The Program provides free rapid antigen screening kits to help screen for asymptomatic cases of COVID-19.
63. On May 12, 2021, the Ontario government announced that it was launching a new rapid testing portal to make it easier for essential businesses to access rapid testing for employees.
64. It encouraged participation from any business that was open and required staff to work on-site.

Ontario Continues to Expand Access to Rapid Testing for Workplaces, Government of Ontario News Release, May 12, 2021 (attached as Tab 12).

COVID-19 Transmission

65. In its summary of the available scientific evidence from December 1, 2020, Public Health Ontario has indicated that the transmission of COVID-19 occurs predominantly through close (<2 m), unprotected contact with an infected individual(s). Transmission predominantly occurs via respiratory droplets from symptomatic, presymptomatic or less commonly, asymptomatic individuals. Transmission over longer distances (>2 m) is less common, but possible under certain conditions such as prolonged exposure in a poorly ventilated space or with recirculation of unfiltered and untreated air. Under these conditions, inhalation of small particle respiratory droplets may occur.

COVID-19 Routes of Transmission – What We Know So Far, Public Health Ontario, December 1, 2020 (attached as Tab 13) at pages 2 & 4.

66. A recently published scientific article suggests that COVID-19 is transmitted primarily through the airborne or aerosol route.

Grennhalgh Trisha et al. “Ten scientific reasons in support of airborne transmission of SARS-CoV-2,” The Lancet, April 15, 2021 (Attached as Tab 14)

67. According to the Government of Canada, the transmission of COVID-19 occurs through respiratory droplets and aerosols which vary in size from large droplets that fall to the ground rapidly to aerosol droplets that may linger in the air.

COVID-19: Modes of transmission, Government of Canada, Accessed May 13, 2021 (Attached as Tab 15).

68. According to the US Centre for Disease Control, the transmission of COVID-19 occurs in three principal ways: “(1) inhalation of very fine respiratory droplets and aerosol particules, (2) deposition of respiratory droplets and particles on exposed mucous membranes in the mouth, nose or eye by direct splashes or sprays, and (3) touching mucous membranes with hands that have been soiled either directly by virus-containing respiratory fluids or indirectly by touching surfaces with virus on them.”

Scientific Brief: SARS-CoV-2 Transmission, Updated May 7, 2021 (Attached as Tab 16)

69. According to the Government of Canada, most transmission of the virus occurs indoors.

COVID-19: Modes of transmission, Government of Canada, Accessed May 13, 2021 (Attached as Tab 15).

70. The Government of Ontario has indicated that the risk of COVID-19 transmission indoors is higher than it is outdoors.

“Develop your COVID-19 workplace safety plan,” Government of Ontario, (attached as Tab 17)

71. A systematic review of studies assessing the horizontal distance travelled by respiratory droplets found that droplets could travel up to 8m.

COVID-19 Routes of Transmission – What We Know So Far, Public Health Ontario, December 1, 2020 (attached as Tab 13) at page 4.

72. There is a low risk of transmission through the eyes or via surfaces, although it is possible. Some studies indicate that under ideal conditions, COVID-19 remains viable on surfaces for several days.

COVID-19 Routes of Transmission – What We Know So Far, Public Health Ontario, December 1, 2020 (attached as Tab 13) at pages 10-11 & 18.

73. There is some evidence of transmission from people who are asymptomatic and never develop symptoms, and more evidence of transmission from people who are in their incubation period (i.e. people who transmit infection while asymptomatic, but prior to their development of symptoms). High viral loads have been detected in individuals who were asymptomatic or pre-symptomatic.

COVID-19 Routes of Transmission – What We Know So Far, Public Health Ontario, December 1, 2020 (attached as Tab 13) at pages 3-4.

COVID-19 - What We Know So Far About... Asymptomatic Infection and Asymptomatic Transmission, May 22, 2020 (attached as Tab 18) at pages 5 & 7.

74. Several studies reported that a substantial portion of COVID-19 patients remained asymptomatic at the end of their isolation period.

COVID-19 - What We Know So Far About... Asymptomatic Infection and Asymptomatic Transmission, May 22, 2020 (attached as Tab 18) at pages 1-2.

75. Studies to date have found that the use of *medical* masks may reduce the amount of aerosol/droplet shedding of some bacteria and viruses from symptomatic individuals, but have inconsistently demonstrated a reduction in secondary cases in households or other close contact studies.

Wearing Masks in Public and COVID-19 - What We Know So Far, Public Health Ontario, September 14, 2020 (attached as Tab 19) at page 4.

Employee Concerns

76. Some of the employee concerns with the Policy are articulated in the letter to EllisDon attached at **Tab 11**. Members of the Union have also expressed the following concerns about the Policy:
- Rapid testing is invasive and violates employee privacy
 - Rapid testing is “experimental”
 - Rapid tests produce false positive results
77. The Employers dispute that there is a reasonable basis for these concerns.

SUBMISSIONS OF THE UNION

3. The grievance, filed on May 11, 2021 has been referred to arbitration for an expedited determination, asserts the implementation of a rapid testing policy at 19 Duncan Street (the “Project”) is unreasonable, contrary Articles 1, 2, 3 and Schedule “A” of the Collective Agreement between the Union and the Metropolitan Toronto Apartment Builders Association binding on EllisDon (the “MTABA Agreement”) and

contrary to Articles 2, 3, 4 and Schedule “D” of the Accredited Provincial Formwork Collective Agreement (the “Formwork Agreement”) which is binding on Verdi.

4. It is submitted that the implementation of the compulsory rapid testing protocol at the Project is unreasonable on the basis that the evidence does not demonstrate that it is a reasonably proportionate response to mitigate the risk of COVID-19 transmissions in this workplace among these workers.

5. The Union asserts that the risk of COVID-19 transmission in this workplace has been significantly reduced through other less intrusive measures already in effect on site including extensive pre-attendance screening, mandatory masking, physical distancing and enhanced cleaning. Further, in light of the “open air” setting in which the employees work on this Project, the risk of workplace transmission is at the lower end of the spectrum.

6. The collection of a body sample through the rapid testing is inherently invasive and engages critical employee interests, including the right to privacy and bodily integrity. When these important employee interests are weighed against the problem the Policy is intended to address, and the availability of less intrusive measures to address it, it is submitted that it becomes clear that compulsory rapid testing is not a reasonably proportionate response at this Project at this juncture.

7. The compulsory rapid testing protocol is a unilaterally adopted policy and is subject to the test of reasonableness as set out in *Lumber & Sawmill Workers’ Union v. KPV Co.* (1965), 16 L.A.C. 73 (Ont. Arb.) as follows:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.

4. It must be brought to the attention of the employee affected before the company can act upon it.
 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used for a foundation for discharge.
 6. Such rule must be consistently enforced by the company from the time it was introduced.
8. In applying this test, arbitrators must consider whether the policy strikes a reasonable balance. In doing so, among the factors to be considered are the nature of the interests at stake, whether there are less intrusive means available to achieve the objective, and the impact of the particular policy on employees: *St. Michael's Hospital and ONA*, (2018) 295 L.A.C. (4th) 109 (Kaplan).
9. In support of its position, the Union relies on the imposition of drug and alcohol testing and other contexts in which employee privacy, bodily integrity and dignity interests are engaged to assess the reasonableness of the rapid testing protocol.
10. The Union does not dispute that the underlying objective of the rapid testing protocol is to mitigate the risk of COVID-19 in the workplace. However, it is submitted that given that the rapid testing protocol violates important employee interests, including privacy and bodily integrity interests, the employer bears the onus of establishing the reasonableness of the unilaterally imposed policy: *Mechanical Contractors Assn. Sarnia and U.A. Local 663 (Alcohol and Drug Testing)*, 2013 CarswellOnt 18985, upheld on judicial review.
11. In the Supreme Court of Canada's decision in *Irving Pulp & Paper Ltd.*, 2013 SCC 34, Abella J. emphasized the critical importance of the concepts of proportionality and "reasonable cause" when assessing the reasonableness of an employer's random drug testing policy. The Court noted that random drug testing had been overwhelmingly rejected by arbitrators as an "unjustifiable affront to the

dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace". It is submitted that it is clear from the statements of Abella J. in *Irving Pulp & Paper, supra* that the dangerousness of a workplace does not automatically justify the imposition of a drug testing program. Significant countervailing employee interests must be taken into account in the balancing exercise.

12. In *St. Michael's Hospital, supra*, Arbitrator Kaplan characterized the evidentiary burden on an employer seeking to justify a mandatory vaccine or mask policy as follows: "VOM policy cannot be upheld simply because it is supported by good faith and some evidence. To satisfy the reasonableness test, objective evidence is required of a real problem that will be addressed by a specific solution".

13. Similarly, the risk or danger associated with COVID- 19 transmission in the workplace ought not be accepted as justification of a compulsory rapid testing protocol, absent clear and compelling evidence that there is a specific problem in the context of this specific workplace which cannot be addressed through less intrusive means.

14. In assessing the risk of transmission, the "open air" environment in which Verdi employees work must be considered. Recent scientific literature suggests that aerosol, not droplets, may be the primary mode of COVID-19 transmission. This is critical when assessing the risk of transmission in an "open air" setting such as the one in which the Union members are working. The workplace setting has a strong flow of fresh air thereby reducing the risk of COVID-19 spread. There is no evidence that COVID-19 has been transmitted in the setting that Union members are working at the Project. The small number of confirmed cases among employees at the site were all detected off site. Three cases that occurred in late February and March were among non-bargaining unit employees and the highest number of confirmed cases was in January.

15. Further, EllisDon has implemented rapid testing at other projects. It has conducted a total of 100,237 tests with a total of 179 positive tests and 20 false positives. There are several protections already in place in order to minimize the risk of COVID-19 at the Project including:

- (a) Individuals attending the sites must answer a standard form screening questionnaire;
- (b) All individuals are subject to temperature screening before entering the site;
- (c) Scheduling work and start times to avoid overcrowding at the entry points and at the work face, such that 6 foot/ 2 meter social distancing is maintained as much as possible;
- (d) Mandatory masking;
- (e) The provision of hand washing facilities and hand sanitizer;
- (f) Non-essential visitors and guests are not permitted on job sites;
- (g) Tracking and monitoring employees who have reported illness, cold or flu-like symptoms, are in self isolation, or have tested positive for COVID-19, and requiring subcontractors to do the same for their employees;
- (h) Enhanced cleaning and disinfection program which includes:
 - (i) Wiping down door handles, railings and workstations with disinfectant twice a day;
 - (ii) Cleaning all restrooms twice a day, or more frequently as required;
 - (iii) Maintaining a cleaning log for each site.

16. It is submitted that the implementation of the compulsory rapid testing program is an unjustified affront to significant employee interests, namely their privacy and dignity rights. The taking of bodily samples is an inherently intrusive act. The compulsory rapid testing protocol to be administered at the Project involves the following steps:

- (a) Insert swab in posterior pharynx and tonsillar areas.
- (b) Rub swab over posterior pharynx and tonsillar areas: avoid tongue, teeth and gums.
- (c) Using the same swab, insert about 1 cm. (0.5 in.) inside nares.
- (d) Rotate the swab several times against the nasal wall.
- (e) Leave the swab in place for several seconds to absorb secretions.
- (f) Using the same swab, repeat for the other nostril. Immediately place in pre-labeled tube containing buffer....

17. This rapid testing protocol requires seizure of a body sample twice per week. The Supreme Court in *Irving Pulp & Paper, supra* concluded that universal random testing for drugs and alcohol was an unreasonable exercise of management rights because the impact on employee privacy was found to be more severe than the expected gains. The Union submits that the same principle should be applied in this case.

18. It is submitted that there is no reasonable argument that compulsory rapid testing does not intrude upon substantial employee interests, including the rights to privacy, bodily integrity and associated human dignity interests. In order to justify the unilaterally imposed policy as reasonable, an employer must demonstrate it has considered less intrusive measures available to achieve the objective.

19. In conclusion, the Policy fails to strike an appropriate balance when weighed against the critical privacy rights and bodily integrity interests that it violates. The Employers have therefore not discharged their burden of establishing on the basis of objective evidence that the Policy is a reasonably necessary and proportionate response to a specific problem in the setting in which the Union members work.

DECISION

20. The grievance was heard by way of written submissions submitted on May 15 and 16, 2021. At the request of the parties, a "bottom line" decision was issued on May 16, 2021 dismissing the grievance with reasons to follow.

21. While much of the evidence in the Agreed Statement of Facts deals with the circumstances which have existed at the 19 Duncan Street, the Project, it must be noted that the grievance filed by the Union on May 11, 2021 is not limited to an alleged violation of the respective Collective Agreements at 19 Duncan Street. More specifically it states:

The Union grieves that EllisDon has violated Article 1, 2, 3 and Schedule "A" of the MTABA Agreement and that Verdi has violated Articles 2, 3, and Schedule "D" of the Formwork Agreement, and any other applicable article of the Collective Agreements and/or statute by implementing or imposing a mandatory rapid testing program at, among other locations and projects, 19 Duncan St. Toronto.

The above noted violations pertain to all work performed at job site locations within the geographic scope of the Collective Agreements, including but not limited to the project at or near 19 Duncan Street Toronto.

22. The parties agree that unilateral implementation by the Employers of the rapid testing policy pursuant to its management rights clause is subject to the principles set out in *KVP Co., supra*. In that regard, the issue to be determined is whether the policy is reasonable. Arbitrators have consistently applied a "balancing of Interests" approach. As stated in *Weyerhaeuser Company Ltd.* (2004), 127 L.A.C. (4th) 73 (British Columbia):

I am keenly aware of the competing interests striving for dominance here. The Union seeks protection for the privacy and dignity of individual employees and the right to be free from unreasonable invasion of those strongly held Canadian values. The Company operates in a safety sensitive environment and seeks to protect the safety and well-being of its employees and operations consistent with its public duty. The solomonic task is to reconcile those competing interests in light of established jurisprudence.

23. The Employers submit that the main employer interest in the present case is the safety of not only its workforce, which includes the workforces of various trades on site, but also the safety of the public. The interests of the employers in promoting health and safety and preventing the spread of COVID-19 not only in the workforce but in the public, far outweighs the interests of the employees in this case.

24. In that regard, consideration must be given to the circumstances in the public at large and in the construction industry in particular. The City of Toronto has been on Lockdown or Stay-at-Home orders since November 20th, 2020. Further, the Province of Ontario has been on full Lockdown since April 8th, 2021. Large segments of the economy have been shut down in an effort to slow the spread of COVID-19. Residential construction has been designated an essential service and allowed to continue. As noted in the Agreed Statement of Facts, EllisDon's testing program started as part of a pilot program led by three government ministries. EllisDon receives the testing materials from the Ontario Ministry of Health and administers the testing in accordance with all applicable government rules and guidelines. On May 12, 2021 the government announced that it was expanding access to the program.

25. As an essential service, workers in the residential construction industry continue to put themselves at risk. COVID-19 represents an extraordinary threat to the health and safety of these workers. COVID-19 can spread through respiratory droplets. While there are approximately 100 workers on site at the Duncan St. project, some of the job sites where EllisDon conducts testing have up to 500 workers who may work side by side over extended periods of time. Given the nature of the work and the size of the projects, employees do not and cannot maintain social distancing.

26. Further, the risk of COVID spread is increased by the nature of the construction industry. As noted in *Al Gordon Electric Ltd.*, [1990] O.L.R.B. Rep. 637,

employment in the construction industry is transitory and employees regularly move between job sites and employers. In the construction industry, viruses can spread more easily than in other industries. On large job sites, employees of one subcontractor can easily infect employees of another subcontractor putting other employees and their families at risk.

27. In an effort to minimize the spread of COVID-19, some of the job sites where EllisDon has been conducting testing have over 500 workers. EllisDon has tested employees of 24 different contractors. As noted in the Agreed Statement of Facts, members of eight other building trades, including members of the Labourers, have been tested without grievances being filed and employees of Verdi have been tested at other job sites.

28. The Union, in its submissions, relies on the fact that the Project at 19 Duncan Street has no walls and is an "open air" environment, thereby minimizing the risk of COVID spread. It emphasizes that there has been no COVID-19 spread among workers at that job site.

29. However, the risk of COVID-19 spread is not hypothetical or speculative. EllisDon has had numerous outbreaks at its site in Toronto. Nine individuals at the Project have contracted COVID-19, despite existing protocols and there have been two apparent cases of transmission in the Project itself. The Project was declared an outbreak worksite by Toronto Public Health, which resulted in a formal report under the *Occupational Health and Safety Act* and a site visit from a Ministry of Labour Inspector. Other EllisDon worksites have been affected as well. In April, 2021, two of its sites were partially shutdown by Toronto Public Health. Through the period December 27th, 2020 to January 29th, 2021, there were 69 cases of COVID-19 among workers at the Well project at the corner of Front and Spadina, which is only a few blocks away from the Project. The Crosslink and Michael Garron Hospital sites have also reported numerous cases.

30. In the rapid testing policy, significant efforts are made to protect the privacy and dignity of the employee. The Abbott Panbio COVID-19 Antigen Screening Test is minimally invasive compared to the laboratory-based PCR test. EllisDon has chosen to administer the test via throat and bilateral nostril swab to minimize discomfort rather than the nasopharyngeal swab.

31. Further, significant steps have been taken to protect the privacy of the individual as follows:

- (a) Individuals being tested are physical distanced from others during the testing (aside from the healthcare professional administering the test).
- (b) Swabbing is conducted in a manner such that it cannot be observed by anyone other than the healthcare professional administering the test.
- (c) Testing results are read and recorded by healthcare professionals such that they cannot be observed by anyone other than the healthcare professional administering the test.
- (d) Healthcare professionals sanitize before and after each test, and deep cleaning of the test site is conducted at regular intervals throughout the day.
- (e) All bio hazardous waste from the test site is disposed of through a registered hazardous waste removal process.

32. Arbitrators have addressed the balancing of employer and employee interests in the context of COVID-19 testing. In *Caressant Care Nursing and Retirement Homes*, (2020) CanLII 100531 (On LA) (Randall), the employer operated a Retirement Home (the "Home") in Woodstock. The Union challenged the reasonableness of a unilaterally imposed policy requiring all staff at the Home to be tested for COVID-19 every two weeks on the ground that it was an unreasonable exercise of management rights.

33. The Union relied on the Supreme Court of Canada decision in *Irving Pulp & Paper, supra*. The thrust of the Union's case was that the Employer's policy, which

mandates a nasal swab every two weeks, is both an intrusion on their privacy and a breach of their dignity. The Union asserted that having a swab stuck up one's nose is more intrusive than a breathalyzer test. Further, it argued that the policy was unnecessary because the Home had adopted mitigation strategies that had been successful and there had not been a case or any outbreaks at the Home. It was submitted that the testing was unfair without the requirement of symptoms as a triggering event.

34. The arbitrator rejected the analogy of drug and alcohol testing and stated:

While the Union's reliance on drug testing cases is a reasonable starting point for the analysis -- weighing the privacy breach against the goals of the policy -- clearly controlling COVID infection is not the same as monitoring the workplace for intoxicants and I so find. They are different in kind. Intoxicants are not infectious. COVID testing reveals only one piece of information: the employee's COVID status. Being intoxicated is culpable conduct: testing positive is not.

But, most importantly, while the privacy concern is arguably comparable, in both cases, the factors to be taken into account in order to determine the weight to be given to the need for COVID testing as compared with drug and alcohol testing is not. COVID is novel, thus its name. Public health authorities are still learning about its symptoms, and its long-term effects.

35. The arbitrator concluded:

In my view, when one weighs the intrusiveness of the test: a swab up your nose every fourteen days, against the problem to be addressed -- preventing the spread of COVID in the Home is a reasonable one. While the Home has not had an outbreak, I entirely agree with the Employer that, given the seriousness of an outbreak, waiting to act until that happens, is not a reasonable option.

36. A similar approach was taken in *Unilever Canada Inc.*, (April 24, 2021) (Unreported Bloch). In this case, the Employer operated a plant in Simcoe, Ontario manufacturing ice cream, water ice products and novelty deserts. The Employer employs seasonal workers and recently the complement of employees increased to approximately 310 employees. Since the start of the COVID pandemic, the Employer has had comprehensive masking and social distancing measures in place in the plant as well as other measures to reduce the transmission of the virus within the facility.

37. The Employer announced that "Due to the increase in the number of cases in the Haldimand-Norfolk County, we are moving to mandatory testing". Since the onset of COVID some employee who work at the plant have tested positive for COVID-19 because of the increased community spread (there was no evidence that these employees contracted the virus in the workplace).

38. As is the case with testing administered by EllisDon, the COVID testing is conducted on site by a third party contractor. The test is a rapid antigen test which involves taking a swab from the employee's nose. The testing is conducted in a manner which ensures the privacy of the employee's health information including the destruction of the testing swab in the employee's presence following the administration of the test. The sample collected is used to test for COVID-19 and no other purpose and then disposed of in front of the employee.

39. The parties agreed that the principles of *KVP* applied and the only issue to be determined was the reasonableness of the policy. In finding the policy to be reasonable, the arbitrator had regard to the following factors:

a. There are many employees in the facility many of whom work on one or more of the Employer's production lines. The employees work in a food manufacturing facility which is governed by a variety of food safety regulations designed to ensure the safety of the food manufactured.

b. Several employees have contracted the virus in a relatively short period of time. Although there is no evidence of transmission within the facility, given the rise of COVID-19 variants in Ontario and in the community, it is prudent to err on the side of caution and ensure that the Employer is permitted to take reasonable steps to reduce the risk of COVID transmission in the workplace. I find the testing policy, introduced by the Employer to be one such reasonable step.

c. In the balancing of the interests of employees who are opposed to mandatory testing and the well documented benefits of a testing program in preventing the spread of COVID in the workplace to other employees, and because several employees have tested positive, I view the policy to be a reasonable attempt to protect the health and safety of workers in the plant.

40. The Union in its submissions relies heavily on its assertion that the workers at the Project work in an "open air" environment. It reasons that COVID-19 is not necessary given the low risk of transmission and there is no evidence of workplace among unionized workers. This is also the basis for distinguishing *Caressant Care and Unilever, supra*.

41. While the Union states that the "open air" environment lowers the risk of transmission, nowhere does the Union assert that it eliminates the risk. It must be remembered that the City of Toronto was in full Lockdown and many business had been closed to prevent COVID spread. Further, there are approximately 100 workers on any day at the Project while there have been up to 500 workers at other sites. Notwithstanding efforts to enforce social distancing where possible, the fact remains that these employees work on site for long hours where social distancing is not always possible as well as using lifts and washrooms. There is no evidence that the mitigation efforts in place have "significantly reduced" transmissions.

42. In neither *Caressant Care and Unilever, supra*, was there any evidence of transmissions at the work place. As Arbitrator Bloch stated "While the Home had not had an outbreak, I agree entirely with the Employer that, given the seriousness of an outbreak, waiting to act until that happens, is not an option". The case of *EllisDon* is much stronger because the risk of COVID-19 spread is not hypothetical or speculative. There has already been an outbreak and two cases of apparent workplace transmission at the Project.

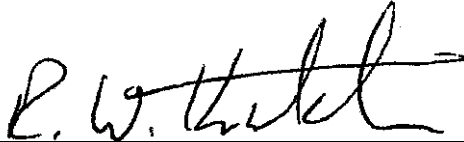
43. The Union in the Agreed Statement of Facts and in its submissions focuses on the Project and the "open air" environment. However, it must be noted that the alleged violations of the respective Collective Agreements are much broader than the Project. The grievance specifically states that "the above violations pertains to all work performed at all job site locations within the geographic scope of the Collective Agreements, including but not limited to the project located at or near 19 Duncan Street in Toronto, Ontario".

44. There is no evidence to suggest that workers in all 47 job sites where testing has been performed work in an "open air" environment. The experience of EllisDon in other job sites including positive tests and sites partially shut down by Toronto Public Health are very relevant to assessing the risk of COVID spread. This assessment of COVID risk and this decision should not be made in a vacuum of the Project.

45. In conclusion, COVID spread remains a threat to the public at large and those working at EllisDon construction sites. When one weighs the intrusiveness of the rapid test against the objective of the Policy, preventing the spread of COVID-19, the policy is a reasonable one.

46. For all the reasons set out above, this grievance is dismissed.

Dated this 10th day of June, 2021.

A handwritten signature in black ink, appearing to read "R. W. Kitchen", written over a horizontal line.

Robert W. Kitchen, Arbitrator