Court File No.: 223/21

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

DAVID DANESHVAR

Applicant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF HEALTH, and the HONOURABLE CHRISTINE ELLIOTT, MINISTER OF HEALTH for the PROVINCE OF ONTARIO

Respondents

FACTUM OF THE RESPONDENTS

April 13, 2021

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto ON M7A 2S9

David Tortell (LSO No. 55401A)
Tel: (416)571-8235
Fax: (416)326-4015
E-mail: David.Tortell@ontario.ca

Padraic Ryan (LSO No. 61687J)
Tel: (647)588-2613
Fax: (416) 326-4015
E-mail: Padraic.Ryan@ontario.ca

Counsel for the Respondents

TO: **BAKER LAW**
4711 Yonge Street, Suite 509
Toronto, ON M2N 6K8

David Baker (LSO No. 17674M)
Kimberly Srivastava (LSO No. 69867U)
Tel: (416)533-0040
Email: dbaker@bakerlaw.ca
ksrivastava@bakerlaw.ca

Lawyers for the Applicant

OVERVIEW

1. This application for judicial review asks the Court to make declarations concerning the alleged approval by the Minister of Health ("Minister") of the COVID-19 vaccination plans established by local public health units. The application also seeks that the Court require the Minister to order public health units to modify their plans and monitor the conduct of public health units "for the enforcement of equity … and to intervene if necessary."[1]

2. The application is premised on a fundamental factual and legal misunderstanding of how COVID-19 vaccines are administered in Ontario. It should be dismissed on that basis alone. While Ontario has established a province-wide COVID-19 Vaccination Plan which addresses prioritization and other high-level policy directions, it is ultimately up to Ontario's 34 public health units to administer vaccines and implement a vaccine rollout suitable to their local populations given their superior knowledge of the local context in which they operate. Neither the Minister nor any other provincial official approved or purported to approve the individual vaccination plans prepared by Ontario's 34 public health units. The Minister has no power to do so under the *Health Protection and Promotion Act*[2] ("HPPA") or any other statute. The HPPA assigns responsibility for immunization services to local public health units, which are independent legal entities that are responsible for their own actions. No local public health unit is named as a respondent in this application and no relief is sought against any local public health unit. The Applicant has simply sued the wrong respondent and the application should therefore be dismissed.

---

[1] Notice of Application at para. 1(f). [Application Record of the Applicant ["**AR**"**]** Tab 1 p. 13.]

[2] *Health Protection and Promotion Act*, RSO 1990, c H.7 ["*HPPA*"].

3. The provincial government is not involved in the day-to-day operations of public health units, including the operational details of how they provide COVID-19 vaccines. Ontario is not liable for any alleged unconstitutional or unlawful conduct of these independent entities. Public health units can be named as respondents in their own right to respond to such allegations and can be ordered by this Court to comply with the law if such allegations are made out.

4. The sole person who has given direct evidence in this application as to their ability to access the COVID-19 vaccine is the 38-year-old Applicant, David Daneshvar. His evidence does not establish that he has been unable to access a vaccine. He indicates that he does not know if he wants a vaccine or if it is safe for him to receive one, and that he has not been advised by any regulated health professional that he is eligible for one. He has not asked his local public health unit how he would receive a vaccine if he wanted one and has not asked anyone to make this inquiry on his behalf. His allegation that he would not be able to access a vaccine (if he were to want one and if he were eligible and if the vaccine was medically indicated for him) is based on the assumption that mass immunization clinics are the only way COVID-19 vaccines are provided, which is not accurate. In any event, there is no evidence that he is unable to travel to any particular mass immunization clinic. His evidence is that he is able to access a variety of medical services outside of his home, including doctor and specialist appointments, pharmacy visits and eye testing.

5. The Applicant has no knowledge of and no legal interest in the provision of COVID-19 vaccines in the 33 public health units outside of the City of Toronto where he resides. The vaccination plans of 31 of those other public health units are not in evidence. The Applicant has no private interest standing to pursue a declaration or remedy against the public health

units in cities or regions where he does not live and has not sought public interesting stand. Nor has he provided the Court with sufficient evidence to adjudicate such matters.

6. The only statutory power in relation to which the Notice of Application for Judicial Review seeks relief is HPPA s. 83, which authorizes the Minister to provide written directions to public health units. This power is not available, however, until the Minister has appointed an assessor under HPPA s. 82 and the assessment process has run its course, neither of which have occurred. As this statutory precondition for the exercise of the s. 83 power has not been met, no declaration can be made against the Minister for failing to exercise this power. Even if all of the above threshold issues were not fatal to the application, no violation of *Charter* ss. 7 and 15 or the HPPA has been proven.

7. This application was brought against the wrong level of government, is based on an inadequate factual foundation, and seeks remedies that would bring the Court well beyond its institutional competence into the day-to-day operations of public health authorities fighting a global pandemic. It should be dismissed.

PART I – FACTS

A. The *Health Protection and Promotion Act* places responsibility for the provision of vaccines on local public health units

8. The HPPA provides that local boards of health (more commonly known as "public health units" or "PHUs") are responsible for providing health programs and services required by the HPPA to people who reside in the area served by the board.[3] One mandatory health program they must provide is immunization services to children and adults.[4]

---

[3] *HPPA* s. 4.
[4] *HPPA* s. 5(2).

9. Every PHU is required to appoint a full-time medical officer of health. PHUs are governed by a board on which those appointed by local municipalities hold a majority.[5] PHUs are independent corporations[6] and have complete fiscal independence. Section 72 of HPPA provides that the relevant municipalities shall pay the expenses incurred by a board of health and medical officer of health in the performance of its functions and duties under the HPPA.[7] The HPPA does not provide for a municipality to refuse to pay for such expenses. In any event, Ontario has advised PHUs that it will reimburse them for exceptional costs related to the COVID-19 pandemic.[8]

10. PHUs are subject to the mandatory public health standards and guidelines published by the Minister under s. 7 of the HPPA, including the *Ontario Public Health Standards* and the Health *Equity Guidelines, 2018*,[9] the latter of which provide:

> …[B]oards of health shall develop and implement strategies to engage priority populations in the planning, implementation, and evaluation of public health programs and services, in order to advance health equity.[10]

11. The Minister is authorized to appoint an "assessor" under s. 82 of the HPPA for the purpose of ascertaining whether a PHU is providing mandatory programs in compliance with binding standards and guidelines. If the Minister is satisfied, based on such an assessment, that a PHU is not in compliance, she may issue a written direction under s. 83. If the written direction is not carried out, then under s. 84 she may take steps to ensure that it is, such as

---

[5] *HPPA* s. 49(2).
[6] *HPPA* s. 52(1).
[7] *HPPA* s. 72.
[8] Affidavit of Jodi Melnychuk, affirmed March 30, 2021["Melnychuck Affidavit"] at para. 29 [**AR** Tab 6 p. 727] referring to Exhibit "**24**" and Exhibit "**25**" [**AR** Tab 6 p. 966, 968].
[9] Exhibits "**22**" and "**32**" of Melnychuk Affidavit [**AR** Tab 6 p. 865, 1024].
[10] Exhibit **"32"** of Melnychuk Affidavit at p. 9. Emphasis added. [**AR** Tab 6 p. 1033]

directly providing the programs in question or appointing a new medical officer of health. PHUs are also subject to judicial review where they exceed of the scope of their statutory authority under the HPPA.[11]

B. Ontario assists public health units in the mass immunization necessitated by COVID-19

12. In March 2020, the COVID-19 outbreak was declared a global pandemic.[12] The possibility of vaccination to prevent the spread and reduce the impact of COVID-19 was not a reality in Canada until December 9, 2020, when Health Canada authorized the first COVID-19 vaccine for use nationwide.[13]

13. On November 23, 2020 Ontario passed Order in Council 1546/2020, pursuant to its prerogative powers, creating the COVID-19 Vaccine Distribution Task Force (the "Task Force"). The Task Force was tasked with providing advice and recommendations to the Government in support of its vaccine distribution plan and related initiatives.[14] On the same day, by Order in Council 1551/2020, Ontario appointed General Rick Hillier as Special Advisor, COVID-19 Vaccine Distribution Plan for a period ending March 31, 2021,[15] a role which included serving as Chair of the Task Force.[16] The Task Force is an advisory body with no statutory or legal powers.

14. Ontario relies on Canada for access to vaccines. Provincial ability to distribute the vaccine is determined by (i) the scope and timing of vaccine delivery by the federal government

---

[11] *City of Guelph v Board of Health*, 2011 ONSC 5981at para. 108.
[12] Melnychuk Affidavit at para. 8 [**AR** Tab 6 p. 720] and Exhibit **"35"** at p. 8 [**AR** Tab 6 p. 1089].
[13] Exhibit **"2"** of Melnychuk Affidavit at p. 1. [**AR** Tab 6 p. 748]
[14] Melnychuk Affidavit at paras. 9 and Exhibit **"1".** [**AR** Tab 6 p. 720, 745]
[15] Order in Council 1551/2020 Approved and Ordered November 23, 2929, Brief of Authorities of the Respondent ["**RBOA**"] at Tab 1 p. 1.
[16] Exhibit "**1**" of Melnychuk Affidavit at s. 4 [**AR** Tab 6 p. 745].

and (ii) Health Canada's authorization of new vaccines.[17] Prior to Health Canada's approval of the first vaccine, the Task Force worked with the National Advisory Committee on Immunization ("NACI") and the Ontario COVID-19 Science Advisory Table ("Science Table") to advise Ontario on how to prioritize populations for vaccine access.[18] Ontario subsequently identified the priority groups for Phase 1 under its COVID-19 Vaccination Plan ("Vaccination Plan") on December 7, 2020.[19] The Vaccination Plan refers to three phases.[20] The basis for incrementally expanding the program one phase at a time is to prioritize vaccines to those who are most at risk of severe illness and those who care for them.[21] Phase 1, which began in December 2020, identifies those vulnerable populations who would receive vaccines first.[22] One of these four populations is "Adult recipients of chronic home health care".[23] Phase 2 began in April 2021 and is expected to run until July 2021, at which time it is anticipated the balance of the adult population will become eligible for vaccines in accordance with Phase 3.[24]

15. While Ontario released a province-wide Vaccination Plan, it is ultimately up to Ontario's 34 PHUs to administer vaccines and implement a vaccine rollout suitable to their local populations, given that PHUs operate under a statutory mandate to provide public health programs and services to such their local populations.[25] PHUs are able to do so effectively given their infrastructure, experience, and established relationship with the local communities

---

[17] Melnychuk Affidavit at paras. 14-15, 25 [**AR** Tab 6 p. 722, 726].
[18] Melnychuk Affidavit at paras. 10-11, 13 and Exhibit **"2"** [**AR** Tab 6 p. 721, 722].
[19] Exhibit "**9"** of Melnychuk Affidavit. See also Exhibit "**10**" [**AR** Tab 6 p. 810, 821].
[20] Melnychuk Affidavit at para. 16 [**AR** Tab 6 p. 723].
[21] Exhibit **"9"** of Melnychuk Affidavit at p.1. [**AR** Tab 6 p. 810].
[22] Melnychuk Affidavit at para 17 [**AR** Tab 6 p. 723].
[23] Melnychuk Affidavit at para 17 [**AR** Tab 6 p. 723]. See Exhibits **"10"**, **"11**", and **"12"** for details on the prioritization of certain groups [**AR** Tab 6 p. 821, 825, 829].
[24] Exhibit **"9"** of Melnychuk Affidavit at p. 2-3 [**AR** Tab 6 p. 811-812].
[25] Melnychuk Affidavit at para. 24 [**AR** Tab 6 p. 725].

they service.[26] Vaccines are currently being provided in Ontario in many ways, including mass immunization clinics, hospital immunization clinics, primary care settings including physician offices, pharmacies, through mobile clinics/teams and in the homes of individuals.[27] Ontario has also released an "Ethical Framework for COVID-19 Vaccine Distribution", which includes equity as one of its five pillars and refers to the *Human Rights Code*.[28] The Framework is not a statutory instrument and has no legal effect on any one.

16. On January 18, 2021, Ontario invited PHUs to submit their plans for implementing the COVID-19 vaccination program ("PHU plans") to the Ministry and provided informal feedback.[29] The Ministry also provided PHUs with a document produced by the Council of Ontario Medical Officers of Health entitled "Public Health Playbook for the COVID-19 Vaccination Program" to assist PHUs prepare their plans.[30] In February 2021 the Ministry facilitated voluntary knowledge sharing sessions for PHUs to showcase their plans and provide other PHUs their best practices.[31] Alison Blair, the Associate Deputy Minister of Health, helped lead this voluntary feedback and PHU information sharing process.[32] Jodi Melnychuk, Director of Vaccine Planning and Engagement, likewise participated in this process by supporting planning and stakeholder communication relating to the Vaccination Plan.[33]

---

[26] Melnychuk Affidavit at paras. 26, 30 [**AR** Tab 6 p. 726, 727].
[27] Melnychuk Affidavit at paras. 62, 65 [**AR** Tab 6 p. 737, 738].
[28] Exhibit "**33**" of Melnychuk Affidavit [**AR** Tab 6 p. 1046].
[29] Melnychuk Affidavit at para. 36 [**AR** Tab 6 p. 728].
[30] Exhibit "**35**" of Melnychuk Affidavit [**AR** Tab 6 p. 1081].
[31] Melnychuk Affidavit at para. 38 [**AR** Tab 6 p. 729].
[32] Melnychuk Affidavit at paras. 36-37, 49, 54 [**AR** Tab 6 p. 728, 733, 735].
[33] Melnychuk Affidavit at para. 2 [**AR** Tab 6 p. 718].

17. At no point did the Ministry purport to approve the PHU plans it received during any of these interactions or communications.[34] Neither Ms. Melnychuk nor Associate Deputy Minister Blair (to whom Ms. Melnychuk reports) have any statutory powers under the HPPA.

18. The Ministry is also responsible for the logistics in supply management and distribution to deliver federally approved vaccines to PHUs and health care providers located within the areas served PHUs.[35] The Ministry enters into contracts with those pharmacies to which it delivers vaccines.[36] The Ministry regularly communicates with PHUs to advise on the aforementioned shortages and delays in federal supply.[37]

19. On March 15, 2021, Ontario launched its provincial appointment booking system for mass immunization clinics.[38] The provincial booking system was established to complement PHUs, which may not have the technological capacity or infrastructure to respond to mass requests for individuals eligible to book the vaccine. This booking system has two components: (1) an online booking system (the "Portal") and a provincial-wide call center ("the Information Line").[39] As of March 29, 2021, 20 out of 34 PHUs have chosen to accept appointments through the Portal and Information Line. The Ministry has never communicated to PHUs that the Portal and Information Line should be the sole method of providing access to vaccinations. No PHU has ever advised Ministry that it understands that the Portal and Information Line constitute the sole methods to access vaccinations.[40]

---

[34] Melnychuk Affidavit at para. 52 [**AR** Tab 6 p. 735].
[35] Exhibit **"35"** of Melnychuk Affidavit at p. 16 [**AR** Tab 6 p. 1097].
[36] Exhibit "**8**" of Letter from P. Ryan to D. Baker, dated April 9, 2021 [**AR** Tab 9 p. 1586].
[37] Exhibit "**35"** of Melnychuk Affidavit at p. 16 [**AR** Tab 6 p. 1097].
[38] Melnychuk Affidavit at para. 52 [**AR** Tab 6 p.735].
[39] Melnychuk Affidavit at para. 56 [**AR** Tab 6 p.736].
[40] Melnychuk Affidavit at para. 67 [**AR** Tab 6 p. 739].

C. The Applicant

20. The Applicant, Mr. David Daneshvar, is a resident of Toronto, Ontario who identifies as person living with disabilities. He is the only person before the Court who alleges to have been excluded from access to a COVID-19 vaccine.

21. The Applicant does not know if he wants a COVID-19 vaccine.[41] He does not know if it is safe for him to receive one in light of his medical conditions.[42] He has not been advised by a regulated health professional that he is eligible to receive one.[43] He has not asked Toronto Public Health how he could get vaccinated, and has not asked anyone to do so on his behalf.[44] He has not attempted to book a vaccine appointment through a website, a phone line or through any other means, and has not asked anyone to do so on his behalf.[45] He does not know anything about the availability of vaccines outside of Toronto.[46]

22. Even assuming that the Applicant was interested in and eligible to receive a vaccine, there is no evidence on the record that he cannot readily access one at a mass immunization site, or through the many other ways they have been made available. While the Applicant states in his affidavit he cannot walk 2.4 kilometers to the vaccination site at the MaRS Clinic or be outside for more than 5 minutes at a time without access to a bathroom[47], under cross-examination he described the following trips he has made since 2018 from his home on Pears Avenue at Avenue Road to access medical treatment:

---

[41] Affidavit of David Daneshvar affirmed March 16, 2020, ["Daneshvar Affidavit"] at para. 27 [**AR** Tab 2 p. 32].
[42] Daneshvar Affidavit at para. 27 [**AR** Tab 2 p. 32].
[43] Transcript of Cross-Examination of David Daneshvar held on March 31, 2021 ["Daneshvar Cross-Exam"] at p. 25, q. 123 -124 [**AR** Tab 7 p. 1211].
[44] Daneshvar Cross-Exam at p. 28-29, q. 134-143 [**AR** Tab 7 p. 1214-5].
[45] Daneshvar Affidavit at paras. 17-20 [**AR** Tab 2 p. 30].
[46] Daneshvar Cross-Exam at p. 31, q. 154 [**AR** Tab 7 p. 1217].
[47] Daneshvar Affidavit at para. 25 [**AR** Tab 2 p. 31].

- frequent visits to Dr. Hamedanchi at walk-in clinic at Bay Street and Dundas Avenue;[48]
- several trips on the bus or driving with a friend to Shoppers Drug Mart at Sherbourne Avenue and Bloor Avenue to fill out prescriptions;[49]
- two visits to Mount Sinai Hospital in 2019 and 2020 for a chest x-ray and ultrasound;[50]
- blood tests over the past year at a clinic located at Bay Street and Dundas Avenue;[51]
- taking rides by a friend to and from visits to an optometrist at Bay Street and Bloor Avenue;[52] and
- receiving a flu shot with family doctor at Women's College Hospital in 2018.[53]

23. The Applicant also states that, to avoid the panic he experiences in crowded places, he can "take a taxi or ask someone to help me" to attend medical appointments.[54]

24. The Applicant's evidence demonstrates his capability to communicate over the telephone and the Internet, including:

- attendance at his cross-examinations online via Zoom Video Conferencing;[55]
- receipt and access to email communications with Baker Law;[56]

---

[48] Daneshvar Cross-Exam at p. 10, 27, q. 34-35, 107 [**AR** Tab 7 p. 1196, 1213]
[49] Daneshvar Cross-Exam at p. 14, q. 62 [**AR** Tab 7 p. 1200].
[50] Daneshvar Cross-Exam at p. 18-19 , q. 82-86 [**AR** Tab 7 p. 1204-6].
[51] Daneshvar Cross-Exam at p. 19 , q. 89-90 [**AR** Tab 7 p. 1205].
[52] Daneshvar Cross-Exam at p. 20 , q. 94-95 q. 94-102 [**AR** Tab 7 p. 1206].
[53] Daneshvar Cross-Exam at p. 22 , q. 110-113 [**AR** Tab 7 p. 1208].
[54] Daneshvar Cross-Exam at p. 22 , q. 107 [**AR** Tab 7 p. 1208].
[55] Daneshvar Cross-Exam at p. 5, q. 10. [**AR** Tab 7 p. 1190]
[56] Daneshvar Cross-Exam at p. 6, q. 17 [**AR** Tab 7 p. 1191]

- an hour-long telephone consultation with a psychiatrist on or around Friday, March 19, 2021.[57]

D. Public statements by Toronto Public Health

25. The board of health responsible for providing public health programs and services in the City of Toronto, where the Applicant resides, is Toronto Public Health. The Applicant did not name Toronto Public Health as a respondent to the application and Toronto Public Health has not itself provided any evidence as to the vaccination services it provides.

26. Ontario has adduced public statements made by Toronto Public Health about how residents may access a vaccine.[58] Such statements indicate, for instance, that as of March 15, 2021, the day this application was initiated and the day before the affidavits relied on by the Applicant were finalized, adults in Toronto who are receiving ongoing home care may receive a vaccination at a hospital immunization clinic or via home visits for homebound clients.[59] Likewise, on March 18, 2021 the Toronto Public Health Twitter account posted: "Home visits are being arranged through care providers for those who are homebound."[60]

27. The Applicant has indicated that he may be eligible to receive home care services from a Local Health Integration Network ("LHIN")[61] and that his counsel has applied on his behalf for him to receive home care services.[62] Home care services are provided under the *Home Care and Community Services Act, 1994* by LHINs, which are independent entities from the

---

[57] Daneshvar Cross-Exam at p. 9-10, q. 33, 35-37. [**AR** Tab 7 p. 1195-6]
[58] Melnychuk Affidavit at paras. 79-82 [**AR** Tab 6 p.742-3], Exhibits "**40**" to "**45**"of Melnychuk Affidavit [**AR** Tab 6 p.1141-1184].
[59] Exhibit "**41**" of Melnychuk Affidavit [**AR** Tab 6 p.1157]
[60] Exhibit "**42**" of Melnychuk Affidavit [**AR** Tab 6 p. 1162].
[61] Daneshvar Affidavit at para. 23 [**AR** Tab 2 p. 31].
[62] Daneshvar Cross-Exam at p. 23 , q. 115-116 [**AR** Tab 7 p. 1209].

provincial government.[63] The relevant LHIN for the Applicant is Toronto Central LHIN, which has not been named as a respondent to this application. The Applicant has provided no evidence about his ability to access hospital immunization clinics.

PART II – ISSUES

28. On the basis of the relief requested in the Notice of Application for Judicial Review,[64] Ontario submits that the only issue properly before the Court is:

> Did the Minister breach *Charter* ss. 7 and 15 or s. 83 of the HPPA by not exercising her power under s. 83 of the HPPA to issue written directions to PHUs?

29. The answer to this question is "no".

PART III – ARGUMENT

A. The Applicant has not adduced an adequate factual foundation for his claim

30. Applicants who allege a *Charter* breach are required to prove that breach with evidence. Where a person challenging the constitutionality of a law or state action fails to provide an adequate factual basis to decide the challenge, the challenge must fail.[65] As the Supreme Court held in *MacKay*, "the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position":

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions… *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.[66]

---

[63] *Home Care and Community Services Act, 1994*, SO 1994, c 26; *Local Health System Integration Act*, 2006, SO 2006, c 4, s 2(2); *Legislation Act, 2006*, SO 2006, c 21, Sch F, s 92.

[64] Notice of Application for Judicial Review at para. 1 [**AR** Tab 1 p. 13].

[65] *Ernst v Alberta Energy Regulator*, 2017 SCC 1 ["*Ernst*"] at para. 22 per Cromwell J.

[66] *MacKay v Manitoba*, [1989] 2 SCR 357 at 361-62 and 366 ["*MacKay*"]. See also: *R v Edwards Books and Art Ltd*., [1986] 2 SCR 713 at 767-68 per Dickson CJ; *Danson v Ontario*

31. An adequate evidentiary foundation is particularly critical where, as here, the Applicant's concern is with the alleged effects of an impugned action.[67] The question is not how many witnesses the Applicant has led, but whether their evidence is cogent and proves the harms alleged: "[w]hile the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct."[68] Unsupported hypotheses are no stronger for being echoed by multiple witnesses: "[a] repetition of conjecture does not constitute evidence."[69]

32. This case is about access to vaccines but there is no admissible, direct evidence before the Court of anyone who has been denied access to one. The Applicant does not know if he wants a vaccine, does not know if it is safe for him to receive one, and has never been advised by a regulated health professional that he is eligible for one. He has not attempted to book a vaccination through the Portal or Information Line or asked anyone to do so on his behalf. He has not contacted Toronto Public Health to ask how it would provide him with a vaccine if he were eligible or asked anyone to do so on his behalf.

33. The Applicant seeks relief in relation to all 34 of Ontario's PHUs but (i) has no knowledge of how vaccines are administered outside of the City of Toronto and (ii) has nowhere indicated that he seeks public interest standing.[70] In any event, he could not satisfy the test for public interest standing because there is no evidence that he has a genuine interest in the activities of public health units outside of the City of Toronto, where he lives. The

---

(Attorney General), [1990] 2 SCR 1086 ["*Danson*"] at 1100; *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at para. 219 (Div Ct); *Hamilton v Attorney General of Ontario*, 2018 ONSC 3307 at para. 24; *Affleck v The Attorney General of Ontario*, 2021 ONSC 1108 at paras. 62-69.

[67] *MacKay* at 366; *Danson* at 1099, 1101.

[68] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para. 34.

[69] *Canadian Broadcasting Corp. v Ontario (Attorney General)*, 2015 ONSC 3131 at para. 209.

[70] *Campisi v Ontario (Attorney General)*, 2018 ONCA 869.

application is premised on a theory that PHU vaccination plans are inadequate, but only 3 out of 34 such plans are in evidence.[71]

34. The three expert witnesses relied on by the Applicant provide only bald, vague allegations against the vaccine efforts of PHUs and do not rely on peer-reviewed academic publications to support their claims.[72] Instead, they attach overview non-specific materials, including:

- unsupported media reports and interviews regarding COVID-19 and vaccination issues;[73]
- equally general non-media reports on COVID-19 matters;[74]
- forward looking recommendations and expansive advocacy statements by provincial science advisors and medical / other professional associations;[75]
- COVID-19 vaccination information relating to the United States;[76]
- a document noting the challenges posed by efforts to vaccinate homebound persons;[77]

---

[71] These three plans are found at Exhibits "**11**", "**12**", "**13**" the Affidavit of Dr. Michael Rachlis affirmed March 16, 2021 ["Rachlis Affidavit"]. [**AR** Tab 5 p. 424, 477, 489]

[72] The fact that these experts were not cross-examined does not prevent the Respondent from challenging the reliability of their evidence. See *R v Forcillo,* 2018 ONCA 402 at para. 108.

[73] Exhibit "**1**" of Daneshvar Affidavit, [**AR** Tab 2 p. 34]; Exhibits "**17**" to "**20**" of Rachlis Affidavit [**AR** Tab 5 p. 527-566]; Exhibits "**7**" to "**9**" of the Affidavit of Dr. Arjumand Siddiqi, affirmed March 16, 2021 ["Siddiqi Affidavit"] [**AR** Tab 3 p. 131- 141].

[74] Exhibit "**6**" of Siddiqi Affidavit [**AR** Tab 3 p. 126].

[75] Exhibits "**21**" to "**22**" of Rachlis Affidavit [**AR** Tab 5 p. 567, 571]; Exhibits "**4**" and "**10**" of Siddiqi Affidavit. [**AR** Tab 3 p. 102, 143].

[76] Exhibits "**11**" and "**12**" of Siddiqi Affidavit [**AR** Tab 3 p. 158, 167] ; Exhibit "**6**" of the Affidavit of Dr. Jutta Treviranus affirmed March 16, 2021 ["Treviranus Affidavit"] [**AR** Tab 4 p. 229].

[77] Exhibit "**7**" of Treviranus Affidavit [**AR** Tab 4 p. 237].

- a November 2020 transcript from the Long-Term Care COVID-19 Commission which has no connection to the Applicant;[78] and
- other documents which have no direct bearing on the Applicant's situation.[79]

35. The media articles put to Ontario's affiant during cross-examination, which were not authenticated, are inadmissible double hearsay[80] which, even if accepted, simply establish that people have criticized the government.

36. Further, central materials relied upon by the applicant are contradicted by other evidence or data omitted from his record. Dr. Siddiqi stresses that Ontario must focus on neighbourhoods, in addition to age, in phasing vaccination eligibility, warning that not doing so will increase risk for certain groups.[81] In support of this position, she cites a February 26, 2021 "science brief" prepared by the provincial advisory Science Table of which she is a member.[82]

37. But in a subsequent science brief dated March 17, 2021, Science Table members advise that on March 5, 2021 (prior to Dr. Siddiqi swearing her affidavit on March 16, 2021) "Ontario's COVID-19 vaccine distribution plan was updated to focus on both, age and neighbourhood risk, by including people who live in 'hot spots'".[83] This March 17, 2021 publication, written by her Science Table colleagues, contradicts Dr. Siddiqi's statement

---

[78] Exhibit "**23**" of Rachlis Affidavit. [**AR** Tab 5 p. 229]
[79] Exhibit "**5**" of Siddiqi affidavit [**AR** Tab 3 p. 119].
[80] *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, [2000] 1 SCR 44 at paras. 1, 14.
[81] Siddiqi Affidavit at para. 25 [**AR** Tab 3 p. 51]. See also Notice of Constitutional Question, p. 2, para. iv [**AR** Tab 10 p. 1619].
[82] Siddiqi Affidavit at para.31 [**AR** Tab 3 p. 52], Exhibit "**4**" [**AR** Tab 3 p. 102].
[83] Melnychuk Affidavit at para. 13 [**AR** Tab 6 p. 722]. See also Exhibit "**6**" [**AR** Tab 6 p. 785].

(echoed in the applicant's factum[84]) that "there is no government plan to implement the equity considerations it has stated on its website."[85]

38. Similarly, the Applicant relies on paragraphs of Dr. Siddiqi's expert report to support allegations about vaccine hesitancy.[86] Dr. Siddiqi's analysis in fact makes no mention of the subject.

B. Ontario is not the proper respondent to claims in the application

(1) This Court's jurisdiction is limited to reviewing the exercise of, or refusal to exercise, statutory powers identified in the pleading

39. This Court's jurisdiction to grant declaratory relief is set out in s. 2(1)2 of the *Judicial Review Procedure Act* ("JRPA"), which provides that the Court may grant relief in proceedings "for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power."[87]

40. As this Court held in *McLeod*, in order for the Court to grant declaratory relief, the power under review must "be conferred 'by or under a statute'. The legislation must authorize the decision-maker to make the decision in question. It is this effecting of the will of the legislature by the decision-maker that gives a sufficient public character to this decision to warrant judicial review. There must be a specific power or right to make the very decision in issue."[88]

41. The only statutory power against which relief is sought in the Notice of Application for Judicial Review is s. 83 of the HPPA, which authorizes the Minister to issue written directions

---

[84] Factum of the Applicant dated April 12, 2021 ["Applicant's factum"] at para. 20.
[85] Siddiqi Affidavit at para. 25 [**AR** Tab 3 p. 51].
[86] Applicant's Factum at paras. 11 and 18 citing to Siddiqi Affidavit at paras. 17, 22-28 [**AR** Tab 3 p. 48,50-51].
[87] *Judicial Review Procedure Act*, RSO 1990, c J.1 s. 2(1)2.
[88] *McLeod v City of Brantford*, 2018 ONSC 943 (Div. Ct.) at paras. 9-12.

to PHUs.[89] The Minister has not exercised this power, which means that the Divisional Court's jurisdiction is only engaged due to her "refusal" to do so. Even the characterization of a "refusal" to exercise a power is inapt, since no one asked the Minister to exercise this power prior to this application.

42. Section 83 is a "statutory power" under s. 1 of the JRPA (because it is a power to "give … direction having force as subordinate legislation"), not a "statutory power of decision", and therefore s. 10 of the JRPA requiring the filing of a record of proceedings does not apply. The Notice of Application for Judicial Review makes no reference to a statutory power of decision being exercised. In any event, s. 10 only applies where there is an actual or purported exercise of such a power, not a refusal. There is no obligation on a respondent to file a record of proceedings where no statutory power of decision has been exercised.[90]

43. As the application is only properly concerned with the validity of the Minster's failure to issue a written decision under s. 83, it should be summarily dismissed on the basis that the statutory precondition for the exercise of this power has not been met. This s. 83 power is only available where the Minister forms an opinion "based on an assessment under section 82" of the HPPA. No assessor has been appointed and no assessment has been made. No declaration lies against a Minister or any other decision-maker who refuses to exercise a statutory power which is not legally available. That is a complete answer to the portion of the relief sought in the application over which this Court has proper jurisdiction.

44. The Applicant alleges that the Minister approved PHU vaccination plans and seeks declarations against this purported action. The Minister has no statutory power to approve the

---

[89] *HPPA* s. 83.
[90] *Jacko v McLellan*, 2008 CanLII 69579 (Div. Ct.) at para. 21; *Harrison v Association of Professional Engineers of Ontario*, 2014 ONSC 6549 (Div. Ct) at para. 36.

vaccination plans of PHUs and the evidence is clear that no such purported approval took place.[91] The Applicant has identified no statutory power that the Minister purported to be acting under in approving any PHU plans. The Divisional Court therefore has no jurisdiction to consider this allegation, which in any event is false as a factual matter.

45. Ontario does not rely on any statutory power for its actions supporting the delivery of the COVID-19 vaccine, such as operating the Portal and the Information Line or providing for delivery of vaccines to PHUs and health care providers. These are actions the government can engage in pursuant to the powers the Crown possesses as a natural person. Therefore, this Court has no jurisdiction to grant a declaration in relation to any of these actions by Ontario.

46. In his factum, the Applicant identifies other statutory powers and seeks other grounds of relief which were not raised in his Notice of Application for Judicial Review.[92] Raising these new grounds of final relief for the first time in a factum delivered four days before this hearing is procedurally unfair to Ontario. Ontario prepared its responding evidence on the basis of the Notice of Application for Judicial Review and delivered this factum one day after receiving the Applicant's factum. The Court should not consider these arguments.

(2) Ontario not liable under the *Charter* or the HPPA for actions of independent governmental entities

47. Under section 32 of the *Charter*, the *Charter* applies not just to the provincial Legislature and Executive, but to a wide range of governmental entities, as well as to non-governmental entities when they are carrying out governmental functions. Each of those entities has its own legal personality and is itself responsible for any *Charter* breaches it causes. Where the Legislature gives such an entity the power to make discretionary decisions, it is the

---

[91] Melnychuk Affidavit at paras. 52-54 [**AR** Tab 6 p. 725-6].
[92] Applicant's factum at paras. 9, 60, 77.

entity's decisions that are subject to *Charter* scrutiny, not the legislative grant of authority or the Minister responsible for the legislation in question.[93]

48. The Courts have repeatedly recognized that independent governmental entities are separate state actors responsible for their own *Charter* breaches. Municipalities, professional regulatory bodies, public hospitals, and Children's Aid Societies have all been held to be responsible for their own *Charter* breaches.[94] This is so despite the fact these entities are created by provincial legislation, are subject to certain mandatory provincial directions and depend on provincial funding.[95]

49. The courts have also repeatedly applied this rule in the health care context despite the high degree of government control over the sector and ministerial accountability for health care legislation. In *Eldridge*, the Supreme Court held that the *Charter* applied directly to hospitals and to an independent provincial body (which was named as a separate respondent to the case) because they implemented government policy in the field of health care.[96] The Court expressly held, however, that there was no constitutional requirement that provincial

---

[93] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 ["*Eldridge*"] at para 29; *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paras 125-39; *Loyola High School v Québec (AG)*, 2015 SCC 12 at paras 32, 34, 81, and 163-65.

[94] *Black v Law Society of Alberta*, [1989] 1 SCR 591 at 597 and 634-35; *Eldridge* at para. 44; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at paras. 48-54, Lamer CJ and Sopinka and Major JJ; *Stewart v Toronto (Police Services Board)*, 2020 ONCA 255; *Greater Vancouver Transit Authority v Canadian Federation of Students*, 2009 SCC 31 at paras. 13-24; *CR v Her Majesty the Queen in Right of Ontario*, 2019 ONSC 2734 at paras. 109-114 ["*CR*"] (aff'd 2020 ONCA 198 ["*CR ONCA*"] at para. 63); *Zaugg v Ontario*, 2019 ONSC 2483 ["*Zaugg*"]at paras. 49-51.

[95] See in the comparable context of the *Human Rights Code: MT by his Litigation Guardian RB v Toronto District School Board*, 2019 HRTO 879 at paras. 5, 15-16; *RC v Ontario (Education)*, 2014 HRTO 999 at paras 28-39; *Moore v British Columbia (Education)*, 2012 SCC 61 at paras 54, 64-70.

[96] *Eldridge* at paras. 51-52.

legislation dictate the specific accommodations in question required by *Charter* s. 15. Instead. the violation "inheres in the discretion wielded by a subordinate authority, not the legislation itself"; therefore, "it is not the legislation that is constitutionally suspect, but rather the actions of delegated decision-makers in applying it".[97]

50. Similarly, in *Zaugg*, Sossin J. granted a motion to strike a claim against Ontario for the actions of independent actors, including a hospital:

> Zaugg's application is based on the premise that Ontario ultimately is responsible under the Charter for the actions of psychiatric facilities, physicians and police officers taken under the authority of the [Mental Health Act]….
>
> This premise, however, is not consistent with the case law under the Charter. Courts have held that state institutions and those acting under public authority are to be held accountable in their own right under section 32 of the Charter, as respondents distinct from the Government [cites omitted].
>
> The actions of those individuals and institutions, as alleged by Zaugg, may give rise to breaches of his Charter rights, but to determine whether breaches arise in such circumstances, his application must name those parties and indicate the remedies sought against those parties. This, his application does not do.[98]

51. The same rule has been applied in the tort law context to allegations that Ontario is responsible for the actions of all health care workers and the actions of PHUs when they respond to an outbreak of infectious disease. In *Eliopoulus Estate*, Sharpe J.A. rejected a negligence claim premised on the theory that Ontario's plan for responding to the West Nile Virus was deficient. He found that under the structure of the HPPA, operational responsibility lies with PHUs:

> As I have already stated, the Plan does not identify operations that are to be performed by the Ministry beyond providing general information and coordination. To the extent the Plan may be read as identifying specific operations to be performed, those tasks are left to local authorities and local boards of health. In this regard, the Plan mirrors the scheme of the HPPA, ss. 4 and 5:

---

[97] *Eldridge* at paras. 24, 34.
[98] *Zaugg* at paras. 49-51

> …responsibility for the implementation of health policy, including superintending and carrying out health promotion, health protection, disease prevention, community health protection, and control of infectious diseases and reportable diseases, rests with local boards of health, not the Ministry. Local boards of health are subject to direction from the Minister (s. 83(1)), and in the event the local board of health fails to follow such direction, the Minister can act in its stead (s. 84(1)). However, this serves only to emphasize that under the HPPA, local boards of health, constituted as independent non-share capital corporations, bear primary operational responsibility for the implementation of health promotion and disease prevention policies.[99]

52. Similarly, in *Abarquez*, the plaintiffs argued that Ontario was a "supervisor" of hospital nurses within the meaning of the *Occupational Health and Safety Act*, on the basis that the provincial Chief Medical Officer of Health had issued directives under the HPPA during the SARS outbreak in Ontario. Sharpe J.A. struck the claim on the basis that "Ontario is simply too far removed from the day-to-day operation of the hospitals" for the claim to succeed.[100]

53. The analysis in all of these cases does not turn on factual determinations regarding the involvement or non-involvement of provincial officials in the impugned actions of another body. Rather, it is rooted in the recognition that independent bodies are responsible for their own decisions in law, regardless of who they consult, communicate with or take direction from.

54. This was underlined in *Selkirk*, where the Superior Court held that Ontario was not a proper respondent to a *Charter* application concerning the actions of an independent health care entity, even if the Ministry of Health was deeply involved in the creation of the impugned rule:

> As a matter of law, no matter what the evidence shows about the involvement of the Minister or Ministry employees in the operations of Trillium Gift of Life Network or hospitals, the relief pleaded by the Applicants does not affect the legal interests of Her Majesty the Queen in Right of Ontario.[101]

---

[99] *Eliopoulos Estate v Ontario (Minister of Health and Long-Term Care)*, 82 OR (3d) 321 (ONCA) ["*Eliopoulos Estate*"] at para 27.
[100] *Abarquez v Ontario*, 2009 ONCA 374 at para. 33
[101] *Selkirk v Her Majesty the Queen in Right of Ontario as Represented by the Minister of Health and Long-Term Care*, 2020 ONSC 6707 at para. 9.

55. The Court had no difficulty in coming to this conclusion despite the ministerial responsibilities outlined in the *Ministry of Health and Long-Term Care Act*.[102] Similarly, the HPPA imposes no duty on the Minister to supervise the actions of PHUs or any other independent entity. The provisions referred to by the Applicant are permissive, not mandatory, and do not provide a basis for *Charter* relief.

(3) The application is about the actions of public health units

56. This case is about access to vaccines. The Legislature has imposed the duty to provide vaccines on PHUs through HPPA s. 5(2), which requires every board of health to provide public health programs and services in the area of "control of infectious diseases….including provision of immunization services to children and adults".[103] This is a decision of the Legislature in enacting primary legislation and is not based on any delegation by the Minister or provincial officials.

57. The Applicant does not dispute that PHUs provide the COVID-19 vaccine in Ontario. Indeed, he pursues a legal theory that Ontario is obligated to do more to assist PHUs in carrying out this task as part of their mandate. He does not seek an order compelling Ontario to provide vaccines to anyone.

58. PHUs have independent legal personality and can be named as respondents in their own right with respect to allegations concerning their conduct.[104] The *Charter* and the *Human Rights Code* apply to them. The Applicant provides no reason as to why he has not named PHUs as respondents to this application, or an application under the *Human Rights Code*, to allow them to defend themselves against his allegations of discriminatory treatment.

---

[102] *Ministry of Health and Long-Term Care Act*, RSO 1990, c M.26.
[103] *HPPA* s. 5.2.
[104] *HPPA* s. 52(1).

59. The entity responsible for providing the Applicant with a vaccine, if he is eligible and decides that he wants one, is Toronto Public Health. It has indicated in its public communications that it is providing vaccines through home visits to people like the Applicant, who are eligible for home care services.[105] The Applicant has led no evidence that Toronto Public Health is not providing vaccines this way. To the contrary, his evidence is that he has never inquired with Toronto Public Health as to whether he can receive the vaccine in his home, even though he is aware that other people in his residential apartment complex appear to be receiving vaccinations at home.[106]

60. It is clear from the cases above that even if it the Applicant could prove that Toronto Public Health was acting unconstitutionally, no remedy would lie against Ontario. Ontario submits that this Court should follow those binding authorities and similarly dismiss this application on the basis that the alleged unconstitutional conduct has been engaged in by entities that are not before the Court and for whom Ontario is not responsible for in law.

C. No *Charter* violations have been established

(1) No free-standing right to health care under *Charter* ss. 7 and 15

61. Even if Ontario were a proper respondent to allegations concerning the actions of PHUs, the application would fail because it is premised on a positive *Charter* obligation on Ontario to provide a particular type of health care. No such constitutional obligation exists. As stated McLachlin C.J. in *Chaoulli*, the "Charter does not confer a freestanding constitutional right to health care."[107]

---

[105] Exhibit "**42**" of Melnychuk Affidavit [**AR** Tab 6 p. 1162].
[106] Daneshvar Cross-Exam p. 29, q. 144-145 [**AR** Tab 7 p. 1215].
[107] *Chaoulli v Quebec (Attorney General),* 2005 SCC 35 at para 104.

62. In a related vein, the Applicant seeks to impose a number of positive obligations on the province beyond its current role in the COVID-19 pandemic response. Such additional obligations include approving PHU plans, mandating the revision and implementing of such plans, providing resources to PHUs, enforcing the equity of the PHU roll out and intervening in local PHU vaccination efforts across Ontario as necessary.[108] This Court is also being asked to require Ontario to collect vaccine data, appoint assessors under s. 82(3)(a) of the HPPA (a discretionary power of the Minister) and "remain ultimately responsible for ensuring the provision of vaccine equity".[109]

63. The Court of Appeal for Ontario has confirmed in the context of (i) payment of out-of-province medical expenses and (ii) the provision of an intensive behavioural intervention program for children with autism that s. 7 does not impose positive health care obligations on the province.[110] Section 7 of the *Charter* only restricts the state's ability to deprive persons of life, liberty and security of the person. It does not create a positive obligation on the state to "ensure that each person enjoys life, liberty or security of the person."[111] This principle was very recently restated by this Court in the context of adult developmental disability services.[112]

---

[108] Notice of Application for Judicial Review, para. 1 [**AR** Tab 1 p. 13].
[109] Applicant's factum at para. 77.
[110] *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538 at paras. 105-109; *Wynberg v Ontario*, 2006 CanLII 22919 (ON CA) ["*Wynberg*"] at paras. 218-220.
[111] *Gosselin v Quebec (Attorney General)*, 2002 SCC 84 at para. 81. See *also Elementary Teachers' Federation of Ontario v Ontario (Minister of Education)*, 2019 ONSC 1308 (Div. Ct.) at paras. 137-140; *Wynberg* at para. 220; *Leroux v. Ontario*, 2021 ONSC 2269 (Div. Ct.) ["*Leroux*"] at paras. 113-116.
[112] *Leroux* at paras. 113-116.

64. Along similar lines, while s. 15(1) prevents the state from creating inequity through its own actions (addressed in the section below), it does not create a positive obligation on the state to enact laws or take steps to eliminate such inequity.[113]

(2) No evidence of any *Charter* breach with respect to PHU vaccine access

65. To prove a violation of s. 7, a claimant must show (i) a deprivation of life, liberty or security of the person and that (ii) this deprivation is not in accordance with the principles of fundamental justice. These are distinct analytical steps: if one is unable to meet the first part of the test, the "analysis stops there."[114]

66. Here the applicant adduces no evidence showing that the applicant (or anyone else) has suffered a deprivation of life, liberty or security of the person as a result of failure to access a vaccine. Accordingly, he is unable to proceed to any analysis of the principles of fundamental justice. Likewise, he has entirely failed to demonstrate that anyone (himself or otherwise) has suffered discrimination with respect to the PHU vaccination roll out.

67. To prove discrimination under s. 15(1), a claimant must show that a law, policy or other government action, on its face or in its effects, creates a distinction based on a protected ground, and that the law perpetuates, reinforces or exacerbates disadvantage.[115] Discrimination under s. 15(1) can be direct (evident on the face of the impugned law or government conduct) or indirect (the law or government conduct seems neutral but has a disproportionate impact on a member of a group protected on the basis of an enumerated or analogous ground).[116] The test is the same under the *Human Rights Code* for a law or policy of general application.[117]

---

[113] *Ferrel v Ontario (Attorney General)*, 1998 CanLII 6274 (ONCA) at paras. 44, 46, 66. RBOA at Tab 2 p. 2.
[114] *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para. 47.
[115] *Fraser v Canada (Attorney General)*, 2020 SCC 28 ["*Fraser*"] at paras. 27, 50.
[116] *Fraser* at para. 30.
[117] *ETFO et al. v Her Majesty the Queen*, 2019 ONSC 1308 (Div. Ct.) at para. 150.

68. Direct discrimination does not apply in the present situation, where every eligible person is entitled to a vaccine. Instead, the allegation is one of indirect discrimination regarding the conduct of PHUs, where, in order to succeed, a claimant must ideally present both (i) evidence about the situation of the claimant group and (ii) evidence (often statistical) regarding the results or impact of the law or government conduct at issue.[118]

69. The record includes neither type of evidence, consisting instead of largely "unsupported hypotheses of enthusiastic counsel."[119]

(3) Threshold issues preclude considering *Charter* allegations against services provided directly by Ontario

70. While PHUs bear responsibility for providing COVID-19 vaccines, there are a number of actions Ontario has taken to assist them in this regard. Such provincial actions include operating the Portal and the Information Line, developing the Vaccination Plan and allocating vaccines between PHUs. The Court should not consider any allegations regarding these actions because, as indicated above, (i) they were not exercises of statutory powers, which is required for this Court to have jurisdiction; and (ii) the Notice of Application for Judicial Review seeks no relief against Ontario in regard of this provincial conduct.

71. Further, any allegation against the Portal and Information Line is also premature. The Applicant indicates in his affidavit that, at the time he swore his affidavit, his only knowledge of the Portal and Information Line was obtained through counsel and that he himself had not attempted to use either tool to book a COVID-19 vaccine.[120] It is improper for counsel to act

---

[118] *Fraser* at paras. 55-60.
[119] *Fodor v North Bay (City),* 2018 ONSC 3722 at para. 19 (quoting *Mackay* p. 361-362).
[120] Daneshvar Affidavit at paras. 17-19 [**AR** Tab 2 p. 30].

as both witness and advocate through the device of having someone else swear the affidavit based on information and belief provided by the lawyer.[121]

72. While it is possible to seek relief for a prospective *Charter* violation, such relief may only be granted where a claimant can prove that there exists a sufficiently serious risk that the alleged violation will in fact occur.[122] The Applicant's stated uncertainty as to whether he even wants a vaccine prevents him from proving the existence of such risk.[123]

(4) No *Charter* violation established for services directly provided by Ontario

73. In the alternative, should the Court conclude that these threshold issues do not preclude it from considering the Applicant's *Charter* allegations, no *Charter* violation has been proven with respect to any services provided by Ontario.

74. The Applicant has not met his onus of demonstrating any ss. 7 or 15 violation regarding either the Portal or Information Line. He has not offered any evidence to establish that he has suffered a deprivation of his life, liberty or security of the person, nor has he adduced sufficient evidence to adduce a breach of s. 15.

75. Neither Dr. Rachlis nor Dr. Siddiqi have expertise in online accessibility issues and, in any event, their affidavits do not address the Portal and Information Line except in very broad terms.[124] While Dr. Treviranus is an expert on online accessibility issues, her affidavit, which (like those filed by Dr. Rachlis and Dr. Siddiqi) consists of speculation and bald allegations,

---

[121] *Gutierrez v The Watchtower Bible and Tract Society of Canada et al.*, 2019 ONSC 3069 at para. 37.
[122] *Council of Canadians v Canada (Attorney General)*, 2006 CanLII 40222 (ONCA) ["*Council of Canadians*"] at para. 61-62 (quoting *Phillips v Nova Scotia (Westray Mine Inquiry)*, [1995] 2 SCR 97 at 158).
[123] *Council of Canadians* at para. 62 (quoting *United States of America v Kwok*, 2001 SCC 18 at para. 83).
[124] Siddiqi Affidavit at para. 27 [**AR** Tab 3 p. 51]; Rachlis Affidavit at para. 43 [**AR** Tab 5 p. 253].

provides no specifics on any alleged problem with the provincial booking tools. She does not, for instance, report on her own testing of the Portal or Information Line, nor does she point to a single example of how such tools fail in her view to meet the relevant accessibility standards.

76. Likewise, the Applicant himself does not speak to any challenges encountered in his use of either the Portal or the Information Line. This is the case, of course, because he had not attempted to use these tools prior to swearing his affidavit.

77. In the further alternative, any ss. 7 or 15 *Charter* violation relating to either the Portal or the Information Line would be saved under s. 1. The Portal and Information Line were created pursuant to the Crown's natural person powers and are therefore prescribed by law.[125]

78. The objective behind the creation of these vaccine booking tools: to expedite local efforts by PHUs to vaccinate persons against COVID-19, is pressing and substantial. Both tools were introduced at the request of PHUs, which did not have the technological capacity to run their own booking systems for mass immunization clinics.[126]

79. There exists a rational connection between this pressing and substantial objective and the province's creation of tools designed to supplement existing PHU options for providing access to vaccinations.

80. With respect to minimal impairment, options beyond the Portal and Information Line exist to address the vaccination needs of different persons, groups and communities across the province.[127] These two booking tools are intended only to supplement a range of other means of accessing vaccines. To the extent that the Applicant lacks the technical or other abilities

---

[125] *Bracken v Fort Erie (Town)*, 2017 ONCA 668 at para. 73.
[126] Melnychuk Affidavit at paras. 8-10, 55-57 [**AR** Tab 6 p. 720-1, 736]. The Applicant concedes at para. 2(d)(i) of his Notice of Application for Judicial Review that "the Province's Vaccination Program has a pressing objective".
[127] Melnychuk Affidavit at paras. 62-68 [**AR** Tab 6 p. 737-9].

needed to operate the Portal and Information Line, these alternatives provide him with choice in a way which minimally impairs his *Charter* rights.

81. Regarding salutary versus deleterious effects, the additional vaccination booking options afforded by the Portal and the Information Line outweigh any issues faced by the Applicant himself, particularly given the existence of reasonably available vaccination alternatives. Less than a week into their March 15, 2021 launch, these tools had already been used to book 239,000 vaccination appointments.[128]

82. Deference is owed to government in responding to a once-in-a-century global pandemic. As the Court of Appeal acknowledged in *Eliopoulos Estate*, "In deciding how to protect its citizens from risks of this kind that do not arise from Ontario's actions and that pose an undifferentiated threat to the entire public, Ontario must weigh and balance the many competing claims for the scarce resources available to promote and protect the health of its citizens."[129]

PART IV – ORDER REQUESTED

83. Ontario requests that the Application be dismissed.

84. Ontario does not seek costs against the impecunious Applicant, who evidently has no means to pay a costs order and in any event is only relying on information and belief provided to him by his lawyer. Instead, Ontario submits that the court should consider its power to make an order under Rule 57.07 disallowing the lawyers for the Applicant from receiving or retaining any payment for this Application, including disallowing any payment for this proceeding from legal aid. This Application was ill-advised from the outset, and the responsibility for that fact

---

[128] Exhibit "**19**" of Melnychuk Affidavit at p. 1 [**AR** Tab 6 p. 857].
[129] *Eliopoulos Estate* at para. 33.

lies with the Applicant's lawyers. The public should not be required to pay for the Applicant's lawyers' decision to present this case to court.

85. Under Rule 57.07, the Court has the power on its own initiative to make an appropriate order disallowing the Applicant's lawyers from receiving payment for this application if the Court agrees with Ontario that the application is without legal merit. The Court can provide the Applicant's lawyers with notice and a fair opportunity to respond to a potential Rule 57.07 order after the application is dismissed.

All of which is respectfully submitted this 13th day of April 2021.

David Tortell

Padraic Ryan

SCHEDULE "A" – LIST OF AUTHORITIES CITED

1. *City of Guelph v Board of Health*, 2011 ONSC 5981
2. *Ernst v Alberta Energy Regulator*, 2017 SCC 1
3. *MacKay v Manitoba*, [1989] 2 SCR 357
4. *R v Edwards Books and Art Ltd*., [1986] 2 SCR 713
5. *Danson v Ontario (Attorney General)*, [1990] 2 SCR 1086
6. *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 (Div Ct)
7. *Hamilton v Attorney General of Ontario*, 2018 ONSC 3307
8. *Affleck v. The Attorney General of Ontario*, 2021 ONSC 1108
9. *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30
10. *Canadian Broadcasting Corp. v Ontario (Attorney General)*, 2015 ONSC 3131
11. *Campisi v Ontario (Attorney General)*, 2018 ONCA 869
12. *R v Forcillo*, 2018 ONCA 402
13. *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, [2000] 1 SCR 44
14. *McLeod v City of Brantford*, 2018 ONSC 943 (Div. Ct.)
15. *Jacko v McLellan*, 2008 CanLII 69579 (Div. Ct.)
16. *Harrison v Association of Professional Engineers of Ontario*, 2014 ONSC 6549 (Div. Ct)
17. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624
18. *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69
19. *Loyola High School v Québec (AG)*, 2015 SCC 12
20. *Black v Law Society of Alberta*, [1989] 1 SCR 591
21. *Godbout v Longueuil (City)*, [1997] 3 SCR 844
22. *Stewart v Toronto (Police Services Board)*, 2020 ONCA 255
23. *Greater Vancouver Transit Authority v Canadian Federation of Students*, 2009 SCC 31
24. *Zaugg v Ontario*, 2019 ONSC 2483
25. *MT by his Litigation Guardian RB v Toronto District School Board*, 2019 HRTO 879
26. *RC v Ontario (Education)*, 2014 HRTO 999
27. *Moore v British Columbia (Education)*, 2012 SCC 61
28. *Eliopoulos Estate v Ontario (Minister of Health and Long-Term Care)*, 82 OR (3d) 321 ONCA
29. *Abarquez v Ontario*, 2009 ONCA 374

30. *Selkirk v Her Majesty the Queen in Right of Ontario as Represented by the Minister of Health and Long-Term Care*, 2020 ONSC 6707

31. *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35

32. *Flora v Ontario Health Insurance Plan*, 2008 ONCA 538

33. *Wynberg v Ontario*, 2006 CanLII 22919 (ON CA)

34. *Gosselin v Quebec (Attorney General)*, 2002 SCC 84

35. *Elementary Teachers' Federation of Ontario v Ontario (Minister of Education)*, 2019 ONSC 1308 (Div. Ct.)

36. *Leroux v. Ontario*, 2021 ONSC 2269

37. *Ferrel v Ontario (Attorney General)*, 1998 CanLII 6274 (ONCA)

38. *Fraser v Canada (Attorney General)*, 2020 SCC 28

39. *ETFO et al. v Her Majesty the Queen*, 2019 ONSC 1308 (Div. Ct.)

40. *Fodor v North Bay (City)*, 2018 ONSC 3722

41. *Gutierrez v The Watchtower Bible and Tract Society of Canada et al.*, 2019 ONSC 3069

42. *Council of Canadians v Canada (Attorney General)*, 2006 CanLII 40222

43. *Phillips v Nova Scotia (Westray Mine Inquiry)*, [1995] 2 SCR 97

44. *United States of America v Kwok*, 2001 SCC 18

45. *Yuan v Transitional Council of the College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario*, 2014 ONSC 351

46. *Bracken v Fort Erie (Town)*, 2017 ONCA 668

SCHEDULE "B" – LEGISLATION

***Health Protection and Promotion Act,* RSO 1990, c H.7**

Interpretation
1 (1) In this Act,

"board of health" means a board of health established or continued under this Act and includes,

> **(a)** the regional municipalities of Durham, Halton, Niagara, Peel, Waterloo and York,
>
> **(b)** a single-tier municipality that, under the Act establishing or continuing it, has the powers, rights and duties of a local board of health or a board of health established under this Act, and
>
> **(c)** an agency, board or organization prescribed by regulation; ("conseil de santé")

Duty of board of health
4 Every board of health,

> **(a)** shall superintend, provide or ensure the provision of the health programs and services required by this Act and the regulations to the persons who reside in the health unit served by the board; and
>
> **(b)** shall perform such other functions as are required by or under this or any other Act.

Mandatory health programs and services
5 Every board of health shall superintend, provide or ensure the provision of health programs and services in the following areas:

> **2.** Control of infectious diseases and diseases of public health significance, including provision of immunization services to children and adults.

Boards of health
48 There shall be a board of health for each health unit.

Composition of board of health
49 (1) A board of health is composed of the members appointed to the board under this Act and the regulations.

Municipal members

(2) There shall be not fewer than three and not more than thirteen municipal members of each board of health.

Board to be corporation
52 (1) Every board of health is a corporation without share capital.

Payment by obligated municipalities
72 (1) The obligated municipalities in a health unit shall pay,

(a) the expenses incurred by or on behalf of the board of health of the health unit in the performance of its functions and duties under this or any other Act; and

(b) the expenses incurred by or on behalf of the medical officer of health of the board of health in the performance of his or her functions and duties under this or any other Act.

Assessors
82 (1) The Minister may appoint assessors for the purposes of this Act.

Written appointment
(2) An appointment under subsection (1) shall be in writing.

Assessment
(3) An assessor may carry out an assessment of a board of health for the purpose of,

1. (a) ascertaining whether the board of health is providing or ensuring the provision of health programs and services in accordance with sections 5, 6 and 7, the regulations and the public health standards;
2. (b) ascertaining whether the board of health is complying in all other respects with this Act and the regulations; or
3. (c) assessing the quality of the management or administration of the affairs of the board of health.

Right of entry
(4) In carrying out an assessment of a board of health, an assessor may, without a warrant, enter and inspect,

4. (a) any premises occupied by the board of health;
5. (b) any premises where health programs or services that are required to be provided or ensured by the board of health under this Act are provided; and
6. (c) any premises where the board of health performs any function required under this or any other Act.

Time of entry
(5) The power in subsection (4) to enter and inspect premises without a warrant may be exercised only during regular business hours. .

Private residence
(6) Subsection (4) does not authorize an assessor to enter a private residence without the consent of the occupier.

Use of force prohibited
(7) An assessor is not entitled to use force to enter and inspect premises.

Evidence of appointment
(8) An assessor who enters premises under this section shall produce, on request, evidence of his or her appointment.

Powers of assessors upon entry
(9) Upon entering premises under this section, an assessor,

7. (a) may examine any record or document that is relevant to the assessment, including financial and book-keeping records and minutes and by-laws of the board of health;
8. (b) may demand the production for examination of any record or document described in clause (a);
9. (c) may make copies of any record or document described in clause (a) and may, on providing a receipt, remove any such record or document from the premises in order to copy it; and
10. (d) may question any person on matters relevant to the assessment.

Return of records and documents
(10) An assessor who removes a record or document from the premises shall return it to the premises within a reasonable time.

Admissibility of copies
(11) A copy made under clause (9) (c) that purports to be certified by an assessor as being a true copy of the original is admissible in evidence in any proceeding as proof, in the absence of evidence to the contrary, of the original.

Power to request that information be sent
(12) An assessor may at any time request a board of health to send him or her, at the time specified by the assessor, any information, including copies of any record or document, that is relevant to an assessment under this section.

Compliance
(13) If an assessor demands the production for examination of a record or document under clause (9) (b), the person having custody of the record or document shall comply with the demand.

Same
(14) If an assessor questions a person under clause (9) (d), the person shall answer the assessor's questions.

Same
(15) If an assessor requests a board of health to send information under subsection (12), the board of health shall comply with the request.

Assistance
(16) At the request of an assessor, a board of health shall provide, in respect of the records and documents that the assessor is entitled to examine under clause (9) (a) and in respect of the information that the assessor requests the board of health to send under subsection (12), such assistance and explanations as are reasonably necessary to enable the assessor to carry out his or her assessment of the board of health.

No obstruction
(17) No person shall hinder or obstruct an assessor conducting an assessment of a board of health.

Direction to board of health
83 (1) The Minister may give a board of health a written direction described in subsection (2) if he or she is of the opinion, based on an assessment under section 82, that the board of health has,

(a) failed to provide or ensure the provision of a health program or service in accordance with section 5, 6 or 7, the regulations or the public health standards;
(b) failed to comply in any other respect with this Act or the regulations; or
(c) failed to ensure the adequacy of the quality of the administration or management of its affairs.

Same
(2) In a direction under this section, the Minister may require a board of health,

(a) to do anything that the Minister considers necessary or advisable to correct the failure identified in the direction; or
(b) to cease to do anything that the Minister believes may have caused or contributed to the failure identified in the direction.

Compliance with direction
(3) A board of health that is given a direction under this section shall comply with the direction,

(a) within the period of time specified in the direction; or
(b) if no period of time is specified in the direction, within 30 days from the day the direction is given.

***Home Care and Community Services Act, 1994*, SO 1994, c 26.**

Definitions

2 (1) In this Act,

"local health integration network" means a local health integration network as defined in section 2 of the *Local Health System Integration Act, 2006*; ("réseau local d'intégration des services de santé")

***Legislation Act, 2006,* SO 2006, c 21, Sch F.**

Corporations, implied provisions

92 (1) A provision of an Act that creates a corporation,

(a) gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, to have a seal and to change it, and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated;

(b) gives a majority of the members of the corporation power to bind the others by their acts; and

(c) exempts the members of the corporation from personal liability for its debts, acts and obligations, if they do not contravene the Act that incorporates them. 2006, c. 21, Sched. F, s. 92 (1).

***Local Health System Integration Act, 2006,* SO 2006, c 4.**
Definitions

2 (1) In this Act,

"local health integration network" means a corporation that is continued under subsection 3 (1) or incorporated by regulation under subsection 3 (3); ("réseau local d'intégration des services de santé")

***Ministry of Health and Long-Term Care Act*, RSO 1990, c M.26.**
Duties and functions of Minister

6 (1) It is the function of the Minister and he or she has power to carry out the following duties:

1. To advise the Government in respect of the health of the people of Ontario.
2. To oversee and promote the health and the physical and mental well-being of the people of Ontario.

3. To be responsible for the development, co-ordination and maintenance of comprehensive health services and a balanced and integrated system of hospitals, long-term care homes, laboratories, ambulances and other health facilities in Ontario.

4. To enter into agreements for the provision of health services and equipment required therefor and for the payment of remuneration for such health services on a basis other than fee for service.

5. To institute a system for payment of amounts payable under the Health Insurance Act in the form of payment by the Province of all or any part of the annual expenditures of hospitals and health facilities.

6. To establish and operate, alone or in co-operation with one or more persons or organizations, institutes and centres for the training of hospital and health service personnel.

7. To govern the care, treatment and services and facilities therefor provided by hospitals and health facilities and assess the revenues required to provide such care, treatment and services.

8. To control charges made to all patients by hospitals and health facilities.

9. To authorize and provide financial support, alone or in co-operation with one or more persons or organizations, on a periodic basis or otherwise, for the establishment and operation of corporations to supply centralized services and commodities to hospitals, long-term care homes and health facilities and to others associated with health workers and the health field generally and enter into agreements necessary therefor, and enter into agreements with hospitals, long-term care homes and other health facilities and other persons on such terms and conditions and for such periods as the Minister considers advisable to assist in financing all or any part of the cost of such centralized services and commodities or for any other purpose incidental to the foregoing.

10. To convene conferences and conduct seminars and educational programs respecting health matters.

11. To undertake research and analysis on pregnancy loss and infant death that assists those, including mothers and families, who experience such loss and that informs the establishment or expansion of programs related to such loss.

12. To oversee and promote an evidence-based approach to the provision of physiotherapy services for post-stroke patients of all ages.

***Judicial Review Procedure Act*, RSO 1990, c J.1**

Applications for judicial review

2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

DAVID DANESHVAR	**and -**	**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF HEALTH, and the HONOURABLE CHRISTINE ELLIOTT, MINISTER OF HEALTH for the PROVINCE OF ONTARIO**	**Court File No.: 223/21**
Applicant		Respondents	

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Proceedings Commenced at Toronto

FACTUM OF THE RESPONDENTS

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

David Tortell (LSO #55401A)
Tel: (416)571-8235
Email: David.Tortell@ontario.ca

Padraic Ryan (LSO #61687J)
Tel: (647)588-2613
Email: Padraic.Ryan@ontario.ca

Counsel for the Respondents