

Court File No.

FORM 68A
Courts of Justice Act
NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

BETWEEN:

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

APPLICATION UNDER s. 6(2) of the *Judicial Review Procedure Act*, RSO 1990, c J.1

NOTICE OF APPLICATION TO DIVISIONAL COURT FOR JUDICIAL REVIEW

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar by the method of hearing requested by the applicant, unless the court orders otherwise. The applicant requests that this application be heard

In Person

By Telephone

By Video Conference

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario

lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the applicant's application record, or at least four days before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN TO IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date __ March, 2021

Issued by _____
Local Registrar

Address of court office:
130 Queen St. West, Toronto ON M5H 2N5

TO **Attorney General of Ontario**
Constitutional Law Branch
720 Bay St, 4th Floor
Toronto, ON M7A 2S9

David Tortell, Tel: 416-571-8235, David.Tortell@ontario.ca
Padraic Ryan, Tel: 647-588-2613, Padraic.Ryan@ontario.ca
Zachary Green, Tel: 416-992-2327, Zachary.Green@ontario.ca
Fax: 416-326-4015

Counsel for the Respondents

AND TO **Attorney General of Ontario**
Crown Law Office – Civil
720 Bay St, 8th Floor
Toronto, ON M7A 2S9
Fax: 416-326-4181

APPLICATION

1. The Applicant makes this Application under s. 6(2) of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1 (“*JRPA*”) for:
 - a. allowing this urgent Application for Judicial Review;
 - b. a declaration stating the Respondent, Her Majesty the Queen in Right of Ontario as represented by the Minister of Health, violated its statutory duty at section 83(1) of the *Health Protection and Protection*, RSO 1990, c. H.7, as it has approved plans created by Public Health Units which fail to include equity of access in the COVID-19 vaccination rollout;
 - c. a declaration stating the Respondent, violated the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11 [*Charter*], at sections 7 and 15 when it approved COVID-19 vaccination plans created by Public Health Units which lacked equity and that these violations cannot be saved by section 1;
 - d. an order directing the Minister of Health to mandate Public Health Units revise vaccination plans and implement vaccination plans which ensure equal access immediately and without further delay;
 - e. an order directing the Minister of Health to make available the resources Public Health Units identify as being necessary to ensure timely and equitable vaccination roll out;
 - f. an order directing the Minister of Health to monitor Public Health Units for enforcement of equity in the COVID-vaccine rollout and to intervene if necessary;
 - g. an order for his costs; and
 - h. such further and other order as this Court shall provide.

2. The Grounds for the application are:

- a. The Respondent has violated its statutory duty at section 83(1) of the *Health Protection and Protection*, RSO 1990, c. H.7, to ensure COVID-19 vaccination plans as created by Public Health Units provide equal access for Ontarians;
 - i. Ontario is responsible for providing COVID-19 vaccines to its residents. Its current approach does not provide equal access to Ontarians.
 - ii. The Province is responsible for identifying which residents receive the vaccination and at what level of priority. The Minister of Health has identified an estimated 9 million residents as part of the Phase II vaccination roll out program. These are residents who are determined by the Province to be high risk and most in need of the vaccine.
 - iii. The Minister of Health has delegated its responsibility to rollout the vaccines to Public Health Units (“PHUs”).
 - iv. PHUs are required to implement Ontario Public Health Standards which include reference to health equity and equality of access to health care services such as immunizations (*Health Protection and Protection*, RSO 1990, c. H.7, s.7(1) [*HPPA*]).
 - v. Ontario has also created the Vaccine Distribution Implementation Plan and the Ethical Framework for COVID-19 Vaccine Distribution which is to be read in conjunction with the Ontario Human Rights Commission’s Policy Statement on a Human Rights Based Approach to Managing the COVID-19 Pandemic to guide the PHUs in their vaccination rollout plans. It was recommended that PHUs consider these documents when creating vaccination plans.
 - vi. The PHUs were required to submit their plans to the Province for approval. The Minister has a statutory duty to ensure the plans provide equal access

to Ontarians. It has failed to abide by this duty by approving plans which will not deliver equal access to the vaccines.

- vii. To assist in the vaccination rollout, the Province has created an online booking portal which PHUs can use. When a resident has been identified as being a member of those prioritized to receive the vaccine, they will have access to book an appointment through the online portal. The appointment will be made at the mass vaccination site closest to the individual's residence (based on postal codes). Depending on the vaccine, a follow-up appointment can also be booked if required. A person can also make an appointment over the phone.
- viii. This online booking system is inaccessible to those who are blind, are not computer literate or do not have access to a computer such as the elderly. Likewise, phone booking system will be inaccessible to those who do not have access to phones or cannot afford to be on hold for extended periods of time. Moreover, the system is inaccessible to those whose first language is not English or French. The Province has created a booking system which presents an access barrier to vulnerable populations. It is these same vulnerable populations which have been prioritized as requiring access to the vaccine.
- ix. Some PHU plans reference mobile and/or neighbourhood clinics as alternatives to the mass vaccination sites. However, these clinics are not functioning at a level which provide equal access, if they exist at all. The Province is not taking any steps to address this access issue.
- x. The populations most at risk of suffering as a result of these barriers are house-bound elderly persons, persons with disabilities, persons who do not have access to computers or ready access to a phone, Indigenous, Black, persons of colour, and persons whose first language is not English or French. These individuals, who cannot help themselves to the booking system relied upon by the Province, will be left behind.

- xi. Despite being on the list prioritized to receive the vaccination, these individuals are not able to access the booking system which would enable them to receive the vaccine. Moreover, many of these individuals cannot attend mass vaccinations sites. These individuals face two barriers, one in the access to book an appointment to receive the vaccine and then again in not being able to attend the location where vaccines are primarily being administered at mass vaccination sites.
- xii. It will take time, effort and therefore resources to identify these individuals and provide them with the vaccine. The Province has delegated the responsibility for finding and vaccinating these individuals to the PHUs, but has provided no additional resources to enable the PHUs to be able to spend the time required to locate these vulnerable populations.
- xiii. The Province bears the overall responsibility for the vaccination program. It approved the local PHU plans which detail how the vaccines will be provided to Ontarians. The Province has both the means and statutory duty to require and enforce equity in the vaccination program. Vaccines are not being provided in a way which respects equal access.
- xiv. There is pressure to rollout the vaccines in a timely manner so as to work towards herd immunity as fast as possible. There are logistical challenges such as proper vaccine storage and vaccine expiry dates which further complicate the rollout process. These factors make it more likely that groups which have been prioritized to receive the vaccine but are harder to reach, will simply be ignored until time permits the effort required to reach these populations.
- xv. An example of the dangers arising from the Province's failure to ensure an equitable vaccination program are evidenced by the recent events in York Region. On or about March 5, 2021, access to surplus vaccines were granted to those aged 80 and above. Access to these vaccines were granted through the PHU's online booking system. There was no attempt nor effort made to

reserve some of those vaccines for the purposes of reaching individuals in that age bracket who could not avail themselves to the online booking portal. This is precisely the outcome that has occurred in other jurisdiction where equity is not mandated or enforced. Those most in need of protection, are being left behind.

- xvi. The Province has committed to collecting sociodemographic information from those who receive the COVID-19 vaccine. This will be collected on a voluntary basis to identify who is, and who is not accessing the vaccine. This *ex post facto* review of critical data will identify too late, the gaps in the vaccination rollout. By that point, the vulnerable will have been missed, and the opportunity to ensure those entitled to priority access of the vaccine will be lost.

b. The Respondent's vaccination program violates the *Charter* at section 7;

- i. The Province's failure to ensure equity is a key component of the vaccination program and supply the PHUs with the resources required to implement equal access violates section 7 of the *Charter*.
- ii. The right to life and the security of the persons are endangered as those entitled to priority vaccine access will be in effect denied such access.
- iii. Individuals such as the Applicant have been identified for priority access to the vaccines because they are particularly susceptible to either getting COVID, experiencing complications arising from COVID, or both. The Province has identified these individuals as being at risk for death and prioritized them on this basis. However, the Provincial plans approved to date do nothing to ensure this prioritization can be implemented.
- iv. The Supreme Court of Canada has declared that lack of timely access to health care is a source of a violation both to the right to life and the right to the security of the person (*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35). Both are engaged in this case.

- v. The access barriers prevent timely vaccination of individuals determined by the Province to be at high risk for illness and death caused by COVID-19. This risk also violates the society of the persons (*R v Morgentaler*, [1988] 1 SCR 30, at pp.105-6).
 - vi. This violation is arbitrary and therefore not in accordance with the principles of fundamental justice. Specifically, the vaccination rollout program identifies who is entitled receive access during the various phases, but does not provide the means to ensure such access. Thus, the object of the program, namely to ensure timely delivery to those most at risk, does not correspond with the effect of the same, namely, to exclude those identified to receive the vaccine (*Canada (Attorney General) v Bedford*, 2013 SCC 71, at para 98).
- c. The Respondent's vaccination program violates the *Charter* at section 15;
- i. The Province's vaccination program violates section 15 of the *Charter*. The groups identified above, represent enumerated categories under section 15 of the *Charter* namely: age, race, disability, and persons of Indigenous descent.
 - ii. These individuals face differential treatment. Despite being identified for timely access to a vaccine, they face barriers in the vaccination process (*Fraser v Canada (Attorney General)*, 2020 SCC 28, at para 50 [*Fraser*]). This perpetuates the historical disadvantages these groups have faced. This continues to devalue their role in society (*Fraser*, at para 76).
 - iii. By focusing vaccination efforts on those who can "help themselves" to the mass vaccination set up which is the primary method of vaccination, these vulnerable groups will be left behind.
- d. The Respondent's *Charter* violations cannot be saved by section 1 of the *Charter*;

- i. While the Province's Vaccination Program has a pressing objective, there is no rational connection between the limit and the right being violated (*R v Oakes*, [1986] 1 SCR 103). The program is meant to prioritize and therefore protect those it currently excludes. This cannot be rational. Moreover, it does not minimally impair the right section 7 or 15 rights. If these vulnerable groups are left behind now, they be reached later and receive the vaccine, but not in a manner which respects their prioritization as identified by their need and as articulated by the Province.
- e. The Respondent must remedy the *Charter* violations;
- i. The Province has failed in its duty to ensure its Vaccination Program abides by the *Charter*. It decided to delegate its responsibility to the PHUs but failed to approve plans which abide by the *Charter*. Early rollouts of Phase II vaccines for example in York Region demonstrate the nature of the harm. Without monitoring and oversight, vaccines are being offered in the way which prioritizes speed at the expense of equity. The Applicant seeks an order that requires equity to be a fundamental requirement of each PHU vaccination plan.
 - ii. Ensuring access for at-risk populations does not need to slow down the vaccination process. If properly resourced, PHUs can leverage provincial resources to identify who lacks access and provide access through an alternative to mass vaccination efforts.
 - iii. The Applicant seeks an order that the Minister of Health provide PHUs the resources required to ensure the vaccination plans can be carried out in an equitable manner.
 - iv. The Applicant further seeks an order that the Minister of Health must monitor the rollout of the local vaccination plans and intervene where such plans are not being carried out in accordance with the equity principles outlined.

- f. Sections 2, 6 (2) and 9 of the *Judicial Review Procedure Act*, RSO 1990, c J.1;
 - i. This is an urgent matter.
 - ii. COVID-19 has affected every facet of our lives. The light at the end of the pandemic tunnel appears brighter every day. New vaccines are being approved and shipped into the country in large numbers. Provinces knew this day would come and had time to make a vaccine rollout plan which would ensure timely and equitable access to the vaccines. This case arises because Ontario failed in its duty to balance these two interests.
 - g. *Ministry of Health and Long-Term Care Act*, RSO 1990, c. M.26, ss.3, 6;
 - h. *Health Protection and Promotion Act*, RSO 1990, c. H.7, ss. 1, 4, 5, 7, 48, 83, 84
 - i. The Ontario Public Health Standards: Requirements for Programs, Services, and Accountability are published as the public health standards for the provision of mandatory health programs and services by the Minister of Health and Long-Term Care, pursuant to Section 7 of the *Health Protection and Promotion Act*, Revised July 1, 2018. ([link](#));
 - j. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11, at ss. 1, 7, 15
 - k. Rules 68 of the *Rules of Civil Procedure*, O. Reg. 575/07, s. 6(1); and
 - l. Such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- a. The affidavit of David Daneshvar and corresponding attachments;
 - b. The affidavit of Dr. Michael Rachlis and corresponding attachments;
 - c. The affidavit of Dr. Arjumand Siddiqi and corresponding attachments;
 - d. The affidavit of Dr. Jutta Treviranus and corresponding attachments; and

- e. Such other material as the Applicant may advise and this Honourable Court may permit.

March 15, 2021



bakerlaw

4711 Yonge Street, Suite 509

Toronto, ON M2N 6K8

David Baker LSO# 17674M

Kimberly Srivastava LSO# 69867U

Tel: (416) 533-0040

Email: dbaker@bakerlaw.ca

ksrivastava@bakerlaw.ca

Lawyers for the Applicant

DANESHVAR
Applicant

and

HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO AS
REPRESENTED BY THE MINISTER
OF HEALTH, et al.
Respondents

Court File No:

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

NOTICE OF APPLICATION TO
DIVISIONAL COURT FOR JUDICIAL
REVIEW

bakerlaw

4711 Yonge Street, Suite 509
Toronto, ON M2N 6K8

David Baker LSO# 17674M
Kimberly Srivastava LSO# 69867U
Tel: (416) 533-0040
Email: dbaker@bakerlaw.ca
ksrivastava@bakerlaw.ca

Lawyers for the Applicant