

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

NOTICE OF CONSTITUTIONAL QUESTION

The Applicant, Mr. David Daneshvar, intends to raise the following constitutional questions:

Does the Ontario COVID-19 vaccination program violate 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](#)?

These questions are to be argued on April 16th, 2021 at 10:00am EST in Toronto, by way of a virtual hearing with details to connect to the hearing to be provided by the Court at a later date.

The following are the material facts giving rise to the constitutional questions:

- i. Ontario is responsible for providing COVID-19 vaccines to its residents. Despite being under statutory duties to do so, its current approach does not provide equal access to Ontarians, and in particular to Ontarians who are

members of enumerated and analogous grounds under the *Human Rights Code*, [RSO 1990, c H.19](#) [the *Code*], and s. 15 of the *Charter*.

- ii. The province determines how to distribute the vaccines allocated to Ontario. The province is also 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. This Application does not challenge the prioritization of residents for vaccination but rather accessibility of the vaccines to those prioritized for access. If the province purports to prioritize individuals on the basis membership to groups prioritized for access, but fails to accommodate their access, then it is not *bona fide* prioritization, but instead is denial of accommodation and a denial of access.
- iii. The Minister of Health has established mass vaccination programs that do not accommodate the needs of, and therefore excludes, members of priority groups who are also members of enumerated or analogous grounds under the *Charter*.
- iv. The Minister was advised by various tables of experts who lent their expertise to develop a vaccination program that would ensure equal access, and protect the life and the security of persons who are members of groups which are at the highest risk from COVID 19. These experts and the Ministry, established guidelines for accommodating individuals in groups prioritized for access. These accommodations required planning and time. Nevertheless, the Ministry failed to initiate a vaccination program which would accommodate these individuals on a timely basis. It also failed to engage provincial resources required for the necessary accommodations. This delay violated both s. 7 and 15 of the *Charter*.

- v. Instead of planning and implementing accommodations for individuals of groups prioritized for vaccine access, the Ministry purported to delegate its responsibility to rollout the vaccines to Public Health Units (“PHUs”). In doing so, it failed to direct PHUs to fulfill the province’s accommodation duty on its behalf, and it failed to require PHUs to implement its vaccine equity guidelines.
- vi. Ontario has created the [Vaccine Distribution Implementation Plan](#)¹ and the [Ethical Framework for COVID-19 Vaccine Distribution](#)² 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](#)³ to guide the PHUs in their vaccination rollout plans. It was recommended that PHUs consider these documents when creating vaccination plans.
- vii. 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 and overseeing the rollout of plans which will not and are not delivering equal access to the vaccines.
- viii. 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 Promotion Act, RSO 1990, c. H.7, s.7(1)* [HPPA]). These terms must be interpreted with aid from the *Code* and s. 15 of the *Charter*. At a minimum PHUs were therefore required to implement the province’s vaccine equity guidelines for the vaccination of priority groups. The provincial delegation failed to make clear that PHUs were to assume the provincial obligation to accommodate those excluded by its mass vaccination efforts. The province

¹ <https://www.ontario.ca/page/ontarios-vaccine-distribution-implementation-plan>

² <https://www.ontario.ca/page/ethical-framework-covid-19-vaccine-distribution>

³ <http://www.ohrc.on.ca/en/policy-statement-human-rights-based-approach-managing-covid-19-pandemic>

has likewise failed to monitor and enforce compliance where PHUs fail to provide equal access.

- ix. 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.
- x. 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.
- xi. 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. As such, it is failing in its duty to accommodate.
- xii. The populations most at risk of suffering as a result of the province's failures to accommodate and ensure equity in the vaccination program 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.

- xiii. 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.
- xiv. It will take time, effort and therefore resources to identify these individuals and provide them with the vaccine. The province failed to initiate a timely accommodation planning process and failed to make provide PHUs with provincial resources necessary to ensure equal access to vaccinations. Because of the delay and the urgency involved, even more provincial resources are required. The province has delegated the responsibility for finding and vaccinating these individuals to the PHUs, but has provided inadequate resources to enable the PHUs to be able to spend the time required to locate these vulnerable populations.
- xv. 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. Likewise, the province has a duty to accommodate residents in providing access to the vaccine. Vaccines are not being provided in a way which respects equal access.
- xvi. 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. Many of those who were prioritized to receive vaccination first based on their need, will therefore be amongst the last to receive it, thereby depriving them of their lives and/or the security of their persons without regard to the principles of fundamental justice.

- xvii. 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 PHUs 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 jurisdictions where equity is not mandated or enforced. Those most in need of protection, are simply left behind.
- xviii. 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.

The following is the legal basis for the constitutional question

- i. The province's failure to ensure equity is a key component of the vaccination program, to fulfill its accommodation obligations in vaccine delivery, 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 security 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 program identifies who is entitled receive access during the various phases, but does not provide the accommodations required 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 72](#), at para 98).
- vii. The province's vaccination program violates section 15 of the *Charter*. The unaccommodated, at-risk groups identified above, represent enumerated categories under section 15 of the *Charter* namely: age, race, disability, and

persons of Indigenous descent (*Eldridge v British Columbia (Attorney General)*, [\[1997\] 3 SCR 624](#)).

- viii. These individuals face differential treatment. Despite being identified for timely access to a vaccine, they face barriers in the vaccination program (*Fraser v Canada (Attorney General)*, [2020 SCC 28, at para 50](#) [*Fraser*]). The failure to accommodate these individuals perpetuates the historical disadvantages these groups have faced. This continues to devalue their role in society (*Fraser*, at [para 76](#)).
- ix. 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.
- x. The Respondent’s *Charter* violations cannot be saved by section 1 of the *Charter*. While the province’s vaccination program has a pressing objective, there is no rational connection between the limit and the rights 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 their section 7 or 15 rights. If these vulnerable groups are left behind now, they may 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.
- xi. The province must remedy the *Charter* violations (ss. [24](#), [52](#)). 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 ensure equity of access or accommodation in vaccine delivery. 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.

- xii. The Applicant seeks an order that requires equity and accommodation in vaccine delivery to be a fundamental requirement of each PHU vaccination plan.
- xiii. 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.
- xiv. 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.
- xv. 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.

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Court File No: 223/21

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