

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
HER MAJESTY THE QUEEN) John Semenoff and Stephen Lichti, for the
) Crown
)
- and -)
)
)
MARTIN C. FRAMPTON) James Harbic and Robert Harbic, for the
) Accused
Accused)
)
)

PRE-TRIAL RULING

PHILLIPS J.

[1] Martin Frampton is charged with first degree murder. A multi-week judge and jury trial is scheduled to commence on September 7, 2021.

[2] I have decided that the jury shall consist of only those who have been fully vaccinated against Covid-19. I intend as part of the jury selection process to ask each prospective candidate if they have been fully vaccinated. If the answer is a negative one, that candidate shall be excused in accordance with s.632(c) of the *Criminal Code*. These are my reasons for that decision.

[3] Pursuant to s.626 of the *Code*, a person’s eligibility to serve as a juror is governed by the *Juries Act*, R.S.O. 1990, c. J.3. Section 4 of that legislation provides that a person is ineligible for service if he or she is physically unable to discharge the duties of a juror and cannot be reasonably accommodated in such a way as to allow them to perform those duties.

[4] Serving on a jury requires a physical ability to attend court each day of the trial, along with an ability to observe the proceedings with focused attention. The job also requires interaction and sometimes spirited communication in a confined indoor space.

[5] Covid-19 is a serious and contagious disease that is spread through respiration. A carrier exhales the virus which may unfortunately be inhaled by someone nearby. It is potentially fatal and well worth being concerned about. There is a particularly vicious mutation currently circulating – the so-called Delta variant – and cases of Covid-19 in the community are increasing in a worrisome “fourth wave”.

[6] Data accumulated from around the world appears to show that the available vaccines are very effective. While preventive measures like plexiglass, distancing, masks, et cetera, likely have some salutary effect in reducing Covid-19 spread, it has become clear that the best available method to reduce the risk of transmission and the development of serious illness (or worse) is vaccination.

[7] To my mind, in the context of the burgeoning “fourth wave”, allowing an unvaccinated person to serve as a juror would irresponsibly introduce risk to the trial. An unvaccinated juror is a potential conduit for the Covid-19 virus to make its way into the jury room. Obviously, such a result would derail the proceeding. Indeed, worrying about such an outcome would likely become a constant distraction.

[8] Because including an unvaccinated person on the jury introduces a real risk that the trial could be compromised, I conclude that such a person is physically unable to perform the role of juror. In the context of the pandemic’s fourth wave, an unvaccinated person is not physically able to contribute to the jury process in the manner called for in the circumstances. Simply put, a juror candidate who is unvaccinated against a serious and contagious illness that is currently spreading

out of control and about which there is much concern introduces untenable risk of physical harm as well as distracting anxiety to the others compelled by law to serve alongside.

[9] I cannot see how an unvaccinated juror could be reasonably accommodated. I have considered three ideas before coming to that conclusion. First, that testing of the unvaccinated juror could ensure that s/he does not carry the virus. Second, that protection methods other than vaccination can be relied upon to ensure everyone's safety. Third, that we allow the unvaccinated to mix in with the vaccinated in many other contexts without difficulty and that jury service should be no different.

[10] On the first point, I reiterate that a juror must be able to attend court every sitting day without interruption. Testing the unvaccinated juror every day, or at some interval, or at least when possible symptoms emerge, all while keeping the trial moving forward on schedule strikes me as practically impossible. For that matter, I would expect the vaccinated jurors would also want to be tested if their unvaccinated colleague is manifesting symptoms as vaccines are never one hundred per cent effective. This will all likely cause persistent and meaningful delay. We will spend more time waiting for test results than hearing evidence.

[11] Moving to the prophylactic measures approach, I note that Ottawa has a special courtroom set up for jury trials during the pandemic. The jury room and jury box are divided by plexiglass, everyone wears masks, there is hand sanitizer everywhere and care is taken to keep physical distance.

[12] I have two issues with relying on this sort of thing to address the problem. First, plexiglass and the like does not always work as it is supposed to. This is not my first jury trial during the pandemic. I did a long trial in 2020 in the same special courtroom. What I found is that human nature being what it is, people often slip up on the distancing and related rules, especially as they get familiar with each other and their surroundings. I repeatedly saw jurors do things like leaning in to make comments to each other or to assist one another in finding something in a photobook. I actually had to tell a particular gentleman to stop holding the door for the person exiting after him because it caused them to come too close. I could give other examples but I think the point is made.

[13] A second, and more compelling, reason to reject the non-vaccination measures is that they are simply not the best way. The available science makes clear that vaccination is the superior approach to minimizing risk of Covid-19 illness both per individual and on a collective basis. The stakes are high. Covid-19 is potentially fatal. In endeavouring to minimize risk of transmission, why would we opt to use a method that is not the best method? Surely, the reputation of the administration of justice would be compromised if a court declined to adopt the optimal approach toward preserving the health of those compelled by law to participate in the judicial process.

[14] Finally, I am aware that in many contexts, accommodations are made for unvaccinated persons. For instance, a student may nonetheless attend school even though they are unvaccinated as a result of medical or conscience-based reasons. This approach is the result of a cost-benefit analysis. It is thought that keeping every kid in school, even with medical limitations, is beneficial. Likewise, we see value in allowing people to enjoy their own views in respect to science and medicine. Those values are benefits deemed to outweigh the downside - the risk that certain diseases will manifest themselves. In my view, however, using this sort of reasoning in the Covid-19 context is apples to oranges thinking. With a relatively small cohort of students unvaccinated, the risk of an outbreak of diphtheria, rubella, polio and the like is exceedingly low. Those illnesses have effectively been run out of town such that accommodating the unvaccinated is largely inconsequential. The same cannot be presently said for Covid-19 which is now endemic and spreading in a significant and uncontrolled manner. It continues to qualify as a global pandemic and is causing substantial harm. As a result, in my judgment, the cost-benefit analysis breaks the other way when it comes to Covid-19 vaccination and jury duty. Any upside in accommodating an unvaccinated juror is outweighed by the downside of exposing the remaining jurors to risk of physical harm as we try to make this fourth wave the last one.

[15] Before closing, I should make clear that I have considered the issue of privacy. It is admittedly unusual for a judge to directly ask a prospective juror about particular information related to their health. While we are told about all kinds of health limitations from those who wish to be excused, we typically do not proactively inquire on the subject in any specific sense.

[16] It is important to consider that the law understands privacy to exist on something of a sliding scale. Some things are more private than others. One's core biographical information, for instance, carries higher privacy concerns than the contents of a trash bag one has left at the curb. In my view, the privacy interest inherent in whether a person has or has not been vaccinated against Covid-19 would sit toward the low end of the privacy spectrum. Unlike, say, a sexually transmitted disease or the accessing of mental health services, a Covid-19 vaccination is not a potentially stigmatizing medical procedure. It is not surprising that many vaccination centers were set up in gymnasias or other non-private open spaces. It even became fashionable for "influencers" and others to post photos on social media of themselves getting the jab.

[17] I think the real privacy interest lies in the desire an unvaccinated person might have to avoid having to reveal or explain a considered decision to forego the shot. Covid-19 vaccination has been quite well received by the broader public and those who have decided not to get onboard are sometimes portrayed as contrarian or even irrational. This is not a problem, however, for the simple reason that I will be asking only *whether* a candidate has been vaccinated, not *why not*. Everybody knows that some people cannot be vaccinated due to a medical reason. No one would fault or look askance at anyone in such a circumstance. When a potential juror answers my question about whether s/he has been vaccinated in the negative, no one will know whether it is as a result of a medical excuse or another reason. As such, the prospective juror's conscience-based decision-making process is not revealed or inquired into. A person who has decided to avoid vaccination is indistinguishable from those with medical excuses and cannot therefore have any concern about a negative reaction from me or anyone else.

[18] For those reasons, I intend to ask each potential juror whether they have been fully vaccinated. If they have not, I will be excusing them from duty.

Justice Kevin B. Phillips

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ONTARIO
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B E T W E E N:

HER MAJESTY THE QUEEN

– and –

MARTIN C. FRAMPTON

PRE-TRIAL RULING

Justice Kevin B. Phillips

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