

FACTUM OF THE APPELLANT

Court File No.: 3161-999-00-3261751F-00

**ONTARIO COURT OF JUSTICE
(Peel Region)**

BETWEEN:

Meththa Melani Fernando

Appellant

-and-

HIS MAJESTY THE KING

Respondent

FACTUM OF THE APPELLANT

PART I – STATEMENT OF THE CASE

1. The Appellant Meththa Melani Fernando appeals from the conviction of Her Worship Justice of the Peace G. Lin of the Ontario Court of Justice of the offence of FAIL TO COMPLY WITH ORDER contrary to the QUARANTINE ACT, section 58, refusal to submit to molecular test, \$5000 fine with 12 months to pay.

PART II – SUMMARY OF THE FACTS

2. The Appellant returned to Canada at Pearson International Airport by a flight from the United States on April 11, 2022.¹

3. Upon arrival, the Appellant was questioned by PHAC Screening Officer Roxas, while Peel Police Officers Thompson, Siddiqui, Sandhu and Chohan stood by.²

4. The Appellant refused to submit to a nose swab test³, which is presumably a COVID-19 molecular test. She cited her statutory right of refusal to do so under section 14 of the *Quarantine Act*⁴ and offered to submit to a saliva test instead.⁵ Her offer was denied and she was issued an offence notice for her non-compliance.

5. The Appellant testified under oath that she was illegally detained.⁶ She added in response during her cross-examination of Officer Roxas that she had been detained for over an hour and a half.⁷

6. The Appellant further testified that she had been intimidated by the officers.⁸

7. The Appellant was admitted to be fully vaccinated, but that the testing requirement was an override to her vaccination status.⁹

1 Reasons of Decision Transcript – Page 2, Lines 15 and 16; Page 5, Line 27; Trial Transcript – Page 28, Lines 24-25

2 Reasons of Decision Transcript – Page 2, Lines 14-17; Page 3, Lines 18-21

3 Trial Transcript – Page 5, Lines 16-18

4 Trial Transcript – Page 9, Lines 15-20; Page 14, Lines 1-15; Page 27, Lines 15-18

5 Reasons of Decision Transcript – Page 3, Lines 4-6; Trial Transcript – Page 17, Lines 17-30; Page 19, Lines 2-15

6 Trial Transcript – Page 26, Lines 27-29

7 Trial Transcript – Page 20, Lines 27-29

8 Trial Transcript – Page 26, Lines 27-29

9 Trial Transcript – Page 5, Lines 4-14; Page 17, Lines 6-8

PART III – ISSUES AND THE LAW

A. STANDARD OF REVIEW

8. The standard of review is correctness as this appeal raises general questions of law of central importance to the legal system as a whole.¹⁰ All the questions raised are those of pure law for which there is no deference to the trial judge.¹¹

B. IS THE *CANADIAN BILL OF RIGHTS* APPLICABLE TO THE *QUARANTINE ACT*?

9. The *Canadian Bill of Rights*¹² is a quasi-constitutional statute that applies to federal law.¹³

10. The *Quarantine Act*¹⁴ is a federal statute. Similarly, the order made under section 58 of said Act (the “impugned Order”)¹⁵ is federal subordinate legislation.

11. The *Canadian Bill of Rights* renders inoperative federal legislation that conflicts with its protections.¹⁶

12. The *Canadian Bill of Rights* remains in full force and effect, and is preserved by section 26 of the *Charter*, rather than superseded or cancelled-out by the *Charter*.¹⁷

13. The Appellant was not permitted to advance any arguments, whatsoever regarding the *Canadian Bill of Rights*.¹⁸ Moreover, the trial judge denied for the Appellant's invocation of the *Canadian Bill of Rights* for want of a Notice of Application and because it wasn't before the court.¹⁹

14. Additionally, the trial judge maintained that the *Canadian Bill of Rights* was superseded by the

10 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at paras. 17, 53, 58, 59, 62, 64 and 69

11 *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235 at paras. 8 and 27; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 (CanLII), [2016] 2 SCR 23 at paras. 36 and 115

12 *Canadian Bill of Rights*, SC 1960, c 44

13 *Authorson v. Canada (Attorney General)*, 2003 SCC 39 at para. 31; *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 SCR 177 at para. 85; *Canadian National Railway Company v. Western Canadian Coal Corporation*, 2007 FC 371 at paras. 18-21; *Waterloo (Regional Municipality) v. Bydeley*, 2010 ONCJ 740 at para. 24

14 *Quarantine Act*, SC 2005, c 20

15 [Order in Council PC Number 2022-0321](#) – March 31, 2022

16 *Authorson*, *supra*, at para. 10; *Singh*, *supra*, at para. 121

17 *Singh*, *supra*, at paras. 4 and 84; *Authorson*, *supra*, at para. 34; see also *Kazemi (Estate of) c. Islamic Republic of Iran*, 2011 QCCS 196 at paras. 179, 181 and 194; and *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 (CanLII), [2014] 3 SCR 176 at paras. 20, 22 and 23

18 Trial Transcript – Page 7, Lines 30-32; Page 8, Lines 1-13

19 Trial Transcript – Page 9, Lines 6-13; Page 23, Lines 5-32; Page 29, Lines 25-31

Charter, and that a *Charter* motion would have needed to be served and filed to invoke it.²⁰

15. The errors of law committed by the trial judge are plain, obvious and substantial. The Appellant should have been permitted to invoke the *Canadian Bill of Rights*, the denial of which irreparably prejudiced the proceeding. Similarly, there are no statutory requirements that govern the invocation of the *Canadian Bill of Rights*, or require its service upon the Attorneys General- likely due to the lack of jurisdiction, power and authority of provincial courts to strike law, or make binding declarations of right outside of section 24(1) of the *Charter* or section 52(1) of the *Constitution Act, 1982*.

C. THE STATUTORY INTERPRETATION OF THE *QUARANTINE ACT*

16. The scheme and objective of the *Quarantine Act* is to address risks of significant harm to public health, which is mentioned no less than eight times in the *Act*.²¹

17. In this challenge, sections 14, and 47(1)(e) and (3) were all breached by either the impugned Order, by way of government action, or both. There is very little jurisprudence on the law of quarantine in Canada and none on the *Quarantine Act*, itself. That leaves everything to be determined by the express statutory language employed by Parliament in the *Quarantine Act*.

18. **Section 14 is as follows:**

Screening technology

14 (1) Any qualified person authorized by the Minister may, to determine whether a traveller has a communicable disease or symptoms of one, use any screening technology authorized by the Minister that does not involve the entry into the traveller's body of any instrument or other foreign body.

Refusal to be screened

(2) If a traveller refuses to be screened with the screening technology and the person using it is not a screening officer or quarantine officer, the person shall immediately inform a screening officer or quarantine officer of the refusal.

[Emphasis added.]

19. The Appellant refused the invasive test that necessarily involved the entry into her body, as was her right. She was unlawfully punished for her refusal. The impugned Order at sections 2.1, 2.3, 4.5(a), and 4.8 breaches, frustrates the purpose of, and otherwise conflicts with this section of the *Quarantine Act*.

²⁰ Reasons of Decison Transcript – Page 4, Lines 14-21

²¹ *Quarantine Act*, SC 2005, c 20 at ss. 2, 25(1), 29(3) and (6); 30, 31(3); and 32(a) and (d)

20. Section 47(1)(e) and (3) are as follows:

General Powers

Powers of inspection

47 (1) A quarantine officer or an environmental health officer may, to determine whether a conveyance or place, or any contents within it, could be the source of a communicable disease, or whether a traveller has or might have a communicable disease or is infested with vectors, and to enforce this Act,

...

(e) except with respect to a traveller, conduct or cause to be conducted any test or analysis or take or cause to be taken any sample; and

...

Powers of the screening officer

(3) A screening officer may exercise any of the powers set out in this section, other than those set out in paragraph (1)(e).

[Emphasis added.]

21. These provisions lend further weight to the restrictions and prohibitions regarding the testing of travellers at section 14. There is a conflict of law and it is plain and obvious.

22. The federal *Interpretation Act*²² echoes the Supreme Court's jurisprudence in *Rizzo Shoes* and *Bell ExpressVu v. Rex*. A unanimous Supreme Court stated in the latter per Iacobucci J at para. 62:²³

Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that “it is appropriate for courts to prefer interpretations that tend to promote those [Charter] principles and values over interpretations that do not” (Sullivan, supra, at p. 325), it must be stressed that, to the extent this Court has recognized a “Charter values” interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

[Emphasis added.]

²² *Interpretation Act*, RSC 1985, c I-21 at ss. 8.1, 10-13, 15, 16, 43 and 45

²³ *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 SCR 559 at paras. 26 and 62

This is a textbook case involving *Charter* values as expressed unambiguously by Parliament in the *Quarantine Act*, as well as the *Canadian Bill of Rights*. *Charter* values must necessarily prevail within the context of strict, statutory interpretation.

23. The Appellant submits that statutory interpretation favours the *Quarantine Act* in a conflict with the impugned Order as in keeping with the express, statutory language of Parliament clearly indicating one's rights with respect to testing.

24. To eliminate any ambiguity, the impugned Order contains the following:

Powers and obligations

6.1 For greater certainty,

(a) this Order does not affect any of the powers and obligations set out in the *Quarantine Act*;

[Emphasis added.]

25. Lastly, the COVID-19 molecular test defined at section 1.1 of the impugned Order does not specify that it must be performed via a nasal swab- and if it did, the provision would conflict with section 14 of its enabling statute. Either way, the legal validity of the Appellant's conviction cannot stand. The trial judge failed to undertake even the most basic statutory interpretation, which is an error of law.

D. AN IRRECONCILABLE CONFLICT OF LAW EXISTS BETWEEN THE *QUARANTINE ACT* AND THE IMPUGNED ORDER

26. Legislation and/or government action that conflicts irreconcilably with the law- or otherwise frustrates its purpose and/or creates an impossibility of dual compliance- cannot survive. Supreme Court decisions *Rothmans, Benson & Hedges* from 2005²⁴ and *Lévis* from 2007²⁵ illustrate the nature of a conflict of law, the result of which is the conflicting law becomes inoperable to the extent of the conflict. The Ontario Court of Appeal rendered a similar decision in *Croplife* in 2005, as did the

²⁴ *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 SCR 188, 2005 SCC 13 at paras. 11-14

²⁵ *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 SCR 591, 2007 SCC 14 at paras. 47, 56, 88, 90 and 92

Saskatchewan Court of Appeal in 2006 in *Platana v. Saskatoon*.²⁶

27. A unanimous Supreme Court expressed in *Lévis* at para. 47:

The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:

According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other.

(P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)

...

Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results.

Further, at para. 56:

...this is not a case of one legislative regime imposing a higher standard than another. Rather, it is a case of one statute implicitly taking away what another statute has explicitly allowed. It is for this reason that whatever one thinks about which provision should prevail, the conflict is, in my opinion, unavoidable.

Still further, at para. 88:

Some commentators implicitly incorporate the constitutional principles of the paramouncy doctrine into the analysis of conflicts between statutes or regulations: Sullivan, at pp. 178-79. The “doctrinal similarity” to the principles of paramouncy was noted by La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, at pp. 38-39. The parallels are obvious. Thus, in *Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 S.C.R. 161, at p. 191, a “conflict” is defined as a situation in which “one enactment says ‘yes’ and the other says ‘no’; ‘the same citizens are being told to do inconsistent things’; compliance with one is defiance of the other”.

Penultimately, at para. 90:

A finding by a court that a conflict exists is necessarily founded on an assumption that the legislature has been inconsistent in enacting its laws. It is therefore only where conflict is unavoidable that a court must apply the principles of interpretation that give precedence to one law over the other, in which case the conflicting provision will be tacitly repealed or found to be partially inapplicable.

And lastly, at para. 92:

Although the rule appears to involve a purely literal test, it is now accepted that a court assessing the compatibility of two laws must, in addition to determining whether there is an express conflict between them, consider their respective purposes to ensure that the legislature’s objective will not be frustrated if

²⁶ *Croplife Canada v. Toronto (City)*, 2005 CanLII 15709 (ON CA) at paras. 59, 60, 62, 63 and 74; *Platana v. Saskatoon (City)*, 2006 SKCA 10 (CanLII) at paras. 43, 45, 46, 62, 89, 96, 102 and 106

the laws in question are applied concurrently: Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, 2005 SCC 13, at para. 12. Thus, the court must ensure that the proposed interpretation does not frustrate the purposes of the provisions in question.

[Emphasis added.]

28. To be clear, the impugned Order explicitly precludes the application of various provisions of its enabling statute. They are directly contradictory. Statutory rights are explicitly removed or otherwise laid to waste by subordinate legislation. Citizens are impossibly obligated to comply with two, existing regimes that are in diametric opposition to one another. This conflict is unavoidable and legislative objectives are repeatedly frustrated. Government action compounds said conflict.

29. Further to the above, the Supreme Court specifically expounded upon conflict between statutes and subordinate legislation in *Oldman River* in 1992:

The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (*Belanger v. The King* (1916), 1916 CanLII 87 (SCC), 54 S.C.R. 265), so too it cannot conflict with other Acts of Parliament (*R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.)), unless a statute so authorizes (*Re George Edwin Gray* (1918), 1918 CanLII 533 (SCC), 57 S.C.R. 150). Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two. "Inconsistency" in this context refers to a situation where two legislative enactments cannot stand together; see *Daniels v. White*, 1968 CanLII 67 (SCC), [1968] S.C.R. 517. The rule in that case was stated in respect of two inconsistent statutes where one was deemed to repeal the other by virtue of the inconsistency. However, the underlying rationale is the same as where subordinate legislation is said to be inconsistent with another Act of Parliament -- there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments. There is also some doctrinal similarity to the principle of paramountcy in constitutional division of powers cases where inconsistency has also been defined in terms of contradiction -- i.e., "compliance with one law involves breach of the other"; see *Smith v. The Queen*, 1960 CanLII 12 (SCC), [1960] S.C.R. 776, at p. 800.²⁷

[Emphasis added.]

30. An indelible and irreconcilable conflict of law exists between the impugned Order and the *Quarantine Act*. Statutes are additionally paramount to subordinate legislation. Thus, the impugned Order, especially given the language employed at section 6.1, cannot stand in the context of the conflict as demonstrated. No conflict of law analysis was undertaken by the trial judge, which is an error of law.

²⁷ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3 at pp. 38 and 39

31. Lastly, none of this was argued by counsel or considered in *Spencer*, or any other court decision regarding the *Quarantine Act*. There is no related precedent binding this Court.

PART IV – ORDER REQUESTED

32. An Order overturning the conviction of the Appellant and entering in an acquittal.

PART V – TIME ESTIMATES

33. If the Appellant's Notice of Intention to Present Appeal in Writing is denied, 60 minutes of oral argument for the Appellant, including reply, and 60 minutes for the Crown as Respondent to this appeal.

The Appellant, Meththa Melani Fernando

SCHEDULE A – AUTHORITIES CITED

1. *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 at paras. 17, 53, 58, 59, 62, 64 and 69
2. *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235 at paras. 8 and 27
3. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 (CanLII), [2016] 2 SCR 23 at paras. 36 and 115
4. *Canadian Bill of Rights*, SC 1960, c 44
5. *Authorson v. Canada (Attorney General)*, 2003 SCC 39 at paras. 10, 31 and 34
6. *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 SCR 177 at paras. 4, 84, 85 and 121
7. *Canadian National Railway Company v. Western Canadian Coal Corporation*, 2007 FC 371 at paras. 18-21
8. *Waterloo (Regional Municipality) v. Bydeley*, 2010 ONCJ 740 at para. 24
9. *Quarantine Act*, SC 2005, c 20 at ss. 2, 14, 25(1), 29(3) and (6); 30, 31(3); 32(a) and (d); 47(1)(e) and (3)
10. *Order in Council PC Number 2022-0321* – March 31, 2022
11. *Kazemi (Estate of) c. Islamic Republic of Iran*, 2011 QCCS 196 at paras. 179, 181 and 194
12. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 (CanLII), [2014] 3 SCR 176 at paras. 20, 22 and 23
13. *Interpretation Act*, RSC 1985, c I-21 at ss. 8.1, 10-13, 15, 16, 43 and 45
14. *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para. 21
15. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII), [2002] 2 SCR 559 at paras. 26 and 62
16. *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 SCR 188, 2005 SCC 13 at paras. 11-14
17. *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 SCR 591, 2007 SCC 14 at paras. 47, 56, 88, 90 and 92
18. *Croplife Canada v. Toronto (City)*, 2005 CanLII 15709 (ON CA) at paras. 59, 60, 62, 63 and 74
19. *Platana v. Saskatoon (City)*, 2006 SKCA 10 (CanLII) at paras. 43, 45, 46, 62, 89, 96, 102 and 106
20. *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3 at pp. 38 and 39

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