

REPLY 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

REPLY FACTUM OF THE APPELLANT

A. THERE IS NO NOTICE PROVISION REGARDING THE *CANADIAN BILL OF RIGHTS*

1. The trial judge conflated the *Canadian Bill of Rights* with the *Charter*, and subjected the former to the strict notice requirements of the latter. This includes, presumably, both a written application in the prescribed form, and service on the Attorneys General. This, respectfully, is an error of law.
2. Not only does this fly in the face of the previously cited case law, particularly *Singh* and *Authorson*, given the clear applicability of the *Canadian Bill of Rights*, but there is no stated requirement, whatsoever, for its proper exercise.
3. It is not found in the *Provincial Offences Act*. It is not found in sections 95(3), 109¹, or any other provision of the *Courts of Justice Act*. It is not found in the *Rules of the Ontario Court in Provincial Offences Proceedings*.² It is not found in the *Criminal Rules of the Ontario Court of Justice*.³ It is not found in the Guide For Defendants in Provincial Offences Cases.⁴
4. Such a provision **is**, in fact, found in *The Constitutional Questions Act, 2012*⁵ in Saskatchewan at section 13.1 concerning the *The Saskatchewan Human Rights Code, 2018*. This encapsulates a Bill of Rights at ss. 4-8, with a supremacy clause and remedy at s. 52.⁶ If the legislature here had meant to incorporate similar wording into statute to include the *Canadian Bill of Rights*, it would have.
5. Application provisions in the above legislation *ex* Saskatchewan substantially concern defective offence notices, reopenings, or extensions of time. Outside of these provisions and those concerning the *Charter*, there is no legislative requirement that legal arguments, or assertions of statutory or quasi-constitutional rights, be brought by way of application concerning provincial offences matters.
6. The prosecution's proceeding in this appeal without any written submissions underscores this legal reality and severely undermines any assertion to the contrary.

1 [*Courts of Justice Act*](#), RSO 1990, c C.43 at s. 109

2 [*Rules of the Ontario Court \(Provincial Division\) in Provincial Offences Proceedings, Reg. 200*](#)

3 [*Criminal Rules of the Ontario Court of Justice*](#), SI/2012-30

4 [Guide for Defendants in Provincial Offences Cases](#)

5 [*The Constitutional Questions Act, 2012*](#), SS 2012, c C-29.01 at s. 13.1

6 [*The Saskatchewan Human Rights Code, 2018*](#), SS 2018, c S-24.2 at ss. 4-8 and 52

7. The Supreme Court of Canada weighed in on notice requirements in both *Guindon*⁷ and *Ernst*.⁸

These two cases were specifically cited in oral arguments on the May 10 appeal hearing, but not expounded upon. They are being cited again in writing and *Guindon* is being additionally included in the Appellant's Amended Book of Authorities. The Appellant was unjustly held to comply with written requirements regarding invocation of the *Canadian Bill of Rights* that simply do not exist.

B. THE TRIAL JUDGE DID NOT PROVIDE DIRECTION TO THE *PRO SE* DEFENDANT

8. The Court has a duty to accommodate self-represented defendants, to provide explanation where necessary, to inquire if defendants understand the process, and to otherwise engage in case management activities to protect the rights and interests of the defendants as early as possible.

9. From the Canadian Judicial Council's Criminal Law Notebook for Self-Represented Accused⁹:

Depending on the circumstances and nature of the case, the presiding judge may:

- explain the process;
- inquire whether the accused understands the process and the procedure;
- make referrals to agencies able to assist the accused in the preparation of the case;
- provide information about the law and evidentiary requirements; and
- modify the traditional order of taking evidence.

10. From the Canadian Judicial Council's Statement of Principles on Self-represented Litigants and Accused

Persons¹⁰:

When one or both parties are proceeding without representation, non-prejudicial and engaged case and courtroom management may be needed to protect the litigants' equal right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:

- (a) explain the process;
- (b) inquire whether both parties understand the process and the procedure;
- (c) make referrals to agencies able to assist the litigant in the preparation of the case;
- (d) provide information about the law and evidentiary requirements;
- (e) modify the traditional order of taking evidence; and
- (f) question witnesses.

[Emphasis added.]

⁷ *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 at paras. 95-97, 125, 127 and 130

⁸ *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 (CanLII), [2017] 1 SCR 3 at para. 100

⁹ *Criminal Law Handbook* at page 6

¹⁰ *Statement of Principles on Self-represented Litigants and Accused Persons* at page 4

11. There are various appellate decisions which recognize these principles. From the Ontario Court of Appeal in *Morwald-Benevides v. Benevides*¹¹:

[34] It is no longer sufficient for a judge to simply swear a party in and then leave it to the party to explain the case, letting the party flounder and then subside into unhelpful silence. As this court has noted, "it is well-accepted that trial judges have special duties to self-represented litigants, in terms of acquainting them with courtroom procedure and the rules of evidence": *Dujardin v. Dujardin Estate*, [2018] O.J. No. 3545, [2018 ONCA 597](#), 423 D.L.R. (4th) 731, at para. 37, repeated in *Gionet v. Pingue*, [2018] O.J. No. 6661, [2018 ONCA 1040](#), 22 R.F.L. (8th) 55, at para. 30. The court added, at para. 31 of *Gionet*: "In ensuring that a self-represented litigant has a fair trial, the trial judge must treat the litigant fairly and attempt to accommodate their unfamiliarity with the trial process, in order to permit them to present their case", citing *Dauids v. Davids*, [1999 CanLII 9289 \(ON CA\)](#), [1999] O.J. No. 3930, 125 O.A.C. 375 (C.A.), at para. 36. See, also, *Manitoba (Director of Child and Family Services) v. A. (J.)*, [2006] M.J. No. 171, [2006 MBCA 44](#), at paras. 19-20.

[Emphasis added.]

12. In 2017, the Supreme Court rendered a five paragraph decision in *Pintea v. Johns* incorporating these principles:¹²

[2] The case management judge failed to consider whether Mr. Pintea had actual knowledge of two of the three Orders upon which she based her decision. The respondents concede that the requirements of Rule 10.52(3)(a)(iii) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, were not met with respect to these two Orders.

...

[4] We would add that we endorse the *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) (online) established by the Canadian Judicial Council.

[Emphasis added.]

13. There was absolutely no objection lodged by the prosecution regarding the manner in which the Appellant argued the law, be it the *Canadian Bill of Rights* or the *Quarantine Act*. Yet, the trial judge went out of her way to dismiss the Appellant's arguments regarding the *Canadian Bill of Rights* without direction or adournment. In fact, she went further: she did not allow the Appellant to even make the arguments in the first place. The Appellant's right to make full answer and defence, and to argue her case in a procedurally fair manner, was also necessarily vitiated. This is an error of law. A flagrant one.

¹¹ *Morwald-Benevides v. Benevides*, 2019 ONCA 1023 (CanLII) at para. 34; See also *Sanzone v. Schechter*, 2016 ONCA 566 (CanLII) at para. 21, and *Gionet v. Pingue*, 2018 ONCA 1040 (CanLII) at paras. 30 and 31

¹² *Pintea v. Johns*, 2017 SCC 23 (CanLII), [2017] 1 SCR 470 at paras. 2 and 4

C. RIGHTS MAY ONLY BE REMOVED BY EXPRESS STATUTORY LANGUAGE

14. Three cases were included in the Appellant's Book of Authorities regarding the removal of rights, but not argued in the Factum of the Appellant. They were brought up orally, but only briefly. From the Supreme Court in *Morguard* at p. 509:¹³

In more modern terminology the courts require that, in order to adversely affect a citizen's right, whether as a taxpayer or otherwise, the Legislature must do so expressly. Truncation of such rights may be legislatively unintended or even accidental, but the courts must look for express language in the statute before concluding that these rights have been reduced. This principle of construction becomes even more important and more generally operative in modern times because the Legislature is guided and assisted by a well-staffed and ordinarily very articulate Executive. The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved. The Legislature has complete control of the process of legislation, and when it has not for any reason clearly expressed itself, it has all the resources available to correct that inadequacy of expression. This is more true today than ever before in our history of parliamentary rule.

[Emphasis added.]

15. Two decades later, the Supreme Court opined in *Crystalline Investments*:¹⁴

43 The appellant submits that the English bankruptcy statute that was applied in *Hindcastle* clearly stated that disclaimer will not “affect the rights or liabilities of any other person”, and that s. 65.2 of the Act has no similar wording. I agree with the respondents’ rebuttal to this argument that the English wording affirms the ordinary construction of the statute. In other words, explicit statutory language is required to divest persons of rights they otherwise enjoy at law.

[Emphasis added.]

16. What right was removed by the impugned Order? Not only the statutory right expressly provided for in section 14 of the *Quarantine Act*, but the longstanding common law right of bodily autonomy.

From the Supreme Court in *Ewanchuk* in 1999:¹⁵

28 The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society’s determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual’s right to physical integrity is a fundamental principle, “every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner”: see Blackstone’s Commentaries on the Laws of England (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.

¹³ *Morguard Properties Ltd. v. City of Winnipeg*, 1983 CanLII 33 (SCC), [1983] 2 SCR 493 at pp. 508 and 509

¹⁴ *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 SCR 60 at para. 43; aff’d by *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII), [2006] 2 SCR 123 at para. 51

¹⁵ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 28, 36 and 37

[Emphasis added.]

17. The right of bodily autonomy cannot be removed by subordinate legislation. Similarly, individual rights cannot be removed and replaced by collective rights. Not without express, statutory language clearly indicating the intent by Parliament or the legislature to interfere with said rights. Even the impugned Order contains language at s. 6.1 that make it absolutely clear that there was never any such intent. These are fundamental tenets of British common law doctrine, tradition and practice.

D. THE CROWN'S CITED CASE LAW IS INAPPLICABLE TO THIS APPEAL

18. None of the case law cited by the prosecution is applicable to this appeal:

- *Spencer* (FC 621) contained no discussion at all regarding the doctrine of conflict of law.

Section 14 of the *Quarantine Act* was not mentioned, argued or considered. Only section 1(a) of the *Canadian Bill of Rights* was argued, but the Chief Justice concluded without addressing its validity or applicability, or the statute as a whole:

“...the RNN applicants stated that its argument on this issue would “fall away” if I concluded that: the [February Order](#) does not breach the [Charter](#); is *intra vires* of [subsection 58\(1\)](#) of the *Quarantine Act*; and is *intra vires* of Parliament’s authority. Given my conclusions on these issues and given that the only breaches of the Charter I have found pertain to the January Order, which was not challenged by the RNN applicants, I will not further address this issue.”¹⁶

- *Spencer* (FC 381) sought injunctive relief, which is governed by the *RJR – MacDonald* tripartite test. The only other legal arguments raised were *Charter*-related.
- *Hung* is an application of *Spencer* in the Ontario Court of Justice in a provincial offences context. It contains nothing extra that would bind the Court in the adjudication of this appeal.
- The CCF case (2021 ONSC 2117) is another decision denying injunctive relief with “the narrowest of serious issues to be tried raised under *s. 7* of the *Charter*“ (at para. 18).
- *Lauterpacht* contains nothing regarding the *Canadian Bill of Rights* or section 14 of the *Quarantine Act*. Naturally, it leans heavily on *Spencer*. There is no application.

¹⁶ *Spencer v. Canada (Health)*, 2021 FC 621 (CanLII), [2021] 3 FCR 581 at para. 298

- Lastly, *Haxby*¹⁷ is a partial rehash of *Lauterpacht* by the same presiding judge. Not only is it inapplicable to this appeal, but it is riddled with plain and obvious errors of law:
 - “The Bill of Rights is not legislation that the court can grant a remedy under. It provides interpretative guidance.” (at para. 33)
 - The court does not have the power to grant a stay. (at paras. 17 and 18)
 - She disappeared any mention of section 14 of the *Quarantine Act*, despite it being argued comprehensively by way of application and then orally by the defendant's paralegal, and applied an *Oakes* analysis when the *Charter* was never brought up. (at paras. 27-32)
 - She applied an *Oakes* analysis yet again when the *Canadian Bill of Rights* was similarly argued by way of application and then orally. (at paras. 33-36)
 - She interpreted the double usage of the word 'shall' by Parliament in section 5(4) of the *Quarantine Act* as meaning something other than 'shall', converting strict obligations into discretionary exercises.¹⁸ This is silly and invokes Alice in Wonderland. She also misused the *Interpretation Act* to subvert the express statutory language and intent of Parliament. Paragraphs 9-16 are a stunning, textbook example of legal butchery, the overturning of the separation of powers, and legislation from the bench. This is worthy of condemnation.
 - Finally, upon the prosecution receiving a decision fully in their favour, they followed through by immediately... withdrawing all charges against Mr. Haxby. There was no trial. And no conviction. Would this decision have survived appellate scrutiny had there were?

E. THE GOVERNMENT CANNOT BREAK THE LAW TO ENFORCE THE LAW

19. The position of the prosecution appears to be that “*the law is for thee, but it is not for me*”. The law applies to the Appellant, but not to the officers involved in charging her with a crime. Everyone is bound by the law in Canada. Officers discharged with enforcing it may not break the very laws they are

¹⁷ *R. v. Haxby*, 2024 ONCJ 127

¹⁸ *Guindon*, *supra*, at para. 119

tasked with enforcing. To do otherwise is arbitrary, capricious, tyrannical and, ultimately, fatal to the operation of our legal system, and our free and democratic society.

20. As a unanimous Supreme Court expressed in *McColman* last year:¹⁹

[50] Second, absent a successful constitutional challenge, this Court must respect the will of the legislature as expressed in valid legislation. It is not this Court’s role to rewrite the law or to ask what law it would have enacted itself. When read contextually, s. 48(1) of the HTA does not authorize police officers to conduct random sobriety stops on private property. This Court is duty-bound to respect the legislature’s will. If the legislature believes that police officers ought to wield wider powers under s. 48(1), it may amend the provision.

...

[63] Ultimately, however, the police officers in this case acted without legal justification. As outlined above, the HTA did not furnish them with authority to conduct a random sobriety stop on private property. Nor did they have reasonable and probable grounds. Given the legal uncertainty at play, the police officers had a duty to act cautiously and to question the limits of their authority. As Dickson C.J. noted in dissent in *Dedman v. The Queen*, 1985 CanLII 41 (SCC), [1985] 2 S.C.R. 2, at p. 10, “[i]t has always been a fundamental tenet of the rule of law in this country that the police, in carrying out their general duties as law enforcement officers of the state, have limited powers and are only entitled to interfere with the liberty or property of the citizen to the extent authorized by law”. Although Dickson C.J. was speaking in the context of the police common law power, his remarks apply equally to the police exercise of statutory power. Police officers can only exercise the powers granted to them by the law. In situations marked by legal uncertainty, police officers should not rely on that uncertainty but instead should err on the side of caution.

[Emphasis added.]

21. The Appellant had the right to refuse testing per s. 14. Testing that involves entry into the Appellant's body is expressly forbidden by Parliament per s. 14. No such method of testing that involves entry into the Appellant's body is stipulated in the impugned Order. The government broke the law to obtain a charge and conviction against the Appellant on the basis that she was not permitted to:

a) refuse a test

and

b) must undergo a type of test that is expressly forbidden by Parliament

Clearly, the conviction cannot stand.

F. THE COURT HAS THE JURISDICTION TO ENTERTAIN LEGAL ARGUMENTS OUTSIDE OF THE CONSTITUTION AND ITS *CHARTER*

22. To be absolutely clear, fully binding law is not “interpretative guidance”. The oft-repeated axiom,

¹⁹ *R. v. McColman*, 2023 SCC 8 at paras. 50 and 63

“where there is a right, there is a remedy” grants the Court the power to apply rights-based arguments outside of the *Charter*. Longstanding power. Per the Supreme Court in one of the first *Charter* decisions rendered, *Big M Drug Mart*:²⁰

45. Advancing the first view, the Crown argues that Big M should not have been able to bring a s. 52 application in a provincial court because it does not have prerogative powers. Even under the Crown's interpretation of "court of competent jurisdiction" the majority of the Alberta Court of Appeal held that the Provincial Court has independent jurisdiction, aside from the *Charter*, in the case at bar.

46. The appellant overlooks the fact that it has always been open to provincial courts to declare legislation invalid in criminal cases. No one may be convicted of an offence under an invalid statute.

47. The respondent Big M was commanded by Her Majesty The Queen to face prosecution for a violation of an Act of Parliament. It came to court, not for the purpose of having the Act declared unconstitutional, but in order to secure a dismissal of the charges against it. The Provincial Court Judge was not called upon to make either a prerogative declaration or a s. 24(1) order. He simply was asked to prevent a violation of the fundamental principle of constitutional law embodied in s. 52(1) by dismissing the charges.

[Emphasis added.]

23. An overturning of the Appellant's conviction and entering in an acquittal in its place is similarly sought. The Appellant's rights were repeatedly denied. No one may be convicted under invalid legislation, regardless of whether declaratory relief is available in this legal forum, or not.

Melani Fernando

The Appellant, Meththa Melani Fernando

²⁰ *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 at paras. 44-47 (pp. 315-316)

SCHEDULE A – AUTHORITIES CITED

1. *Courts of Justice Act*, RSO 1990, c C.43 at ss. 95(3) and 109
2. *Rules of the Ontario Court (Provincial Division) in Provincial Offences Proceedings, Reg. 200*
3. *Criminal Rules of the Ontario Court of Justice*, SI/2012-30
4. *Guide for Defendants in Provincial Offences Cases*
5. *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01 at s. 13.1
6. *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 at ss. 4-8 and 52
7. *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3 at paras. 95-97, 119, 125, 127 and 130
8. *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 (CanLII), [2017] 1 SCR 3 at para. 100
9. *Criminal Law Handbook* at page 6
10. *Statement of Principles on Self-represented Litigants and Accused Persons* at page 4
11. *Morwald-Benevides v. Benevides*, 2019 ONCA 1023 (CanLII) at para. 34
12. *Sanzone v. Schechter*, 2016 ONCA 566 (CanLII) at para. 21
13. *Gionet v. Pingue*, 2018 ONCA 1040 (CanLII) at paras. 30 and 31
14. *Pintea v. Johns*, 2017 SCC 23 (CanLII), [2017] 1 SCR 470 at paras. 2 and 4
15. *Morguard Properties Ltd. v. City of Winnipeg*, 1983 CanLII 33 (SCC), [1983] 2 SCR 493 at pp. 508 and 509
16. *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 SCR 60 at para. 43
17. *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35 (CanLII), [2006] 2 SCR 123 at para. 51
18. *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 28, 36 and 37
19. *Spencer v. Canada (Health)*, 2021 FC 621 (CanLII), [2021] 3 FCR 581 at para. 298
20. *R. v. Haxby*, 2024 ONCJ 127
21. *R. v. McColman*, 2023 SCC 8 at paras. 50 and 63
22. *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295 at paras. 44-47 (pp. 315-316)

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

Meththa Melani Fernando

Appellant

HIS MAJESTY THE KING

Respondent

ONTARIO
COURT OF JUSTICE

PROCEEDINGS COMMENCED AT BRAMPTON

REPLY FACTUM OF THE APPELLANT

Meththa Melani Fernando

5464 Elgar Court

Mississauga, ON L5M 5C9

Tel: (416) 525-4062

E-mail: melani_fernando@hotmail.com