

Federal Court



Cour fédérale

Ottawa, June 18, 2021 – A decision was issued today by the Honourable Chief Justice Paul S. Crampton of the Federal Court in files T-340-21, T-366-21, T-341-21 and T-480-21:

**IN THE MATTER OF
T-340-21 BARBARA SPENCER et al v.
ATTORNEY GENERAL OF CANADA;
T-366-21 STEVEN DUESING and NICOLE MATHIS v.
ATTORNEY GENERAL OF CANADA;
T-341-21 DOMINIC COLVIN v. ATTORNEY GENERAL OF CANADA;
T-480-21 REBEL NEWS NETWORK LTD and KEEAN BEXTE v.
ATTORNEY GENERAL OF CANADA**

Summary: The Applicants in these consolidated proceedings challenge certain requirements imposed on travellers arriving in Canada by air to restrict the importation and spread of COVID-19 and Variants of Concern.

Most notably, the Applicants challenge the requirement that non-exempt individuals await the results of their on-entry COVID-19 test (“Day 1 Test”) at a Government Authorized Accommodation (“GAA”) or a Designated Quarantine Facility (“DQF”). This requirement was included in the Order in Council (“OIC”) titled *Minimizing the Risk of Exposure to COVID-19 in Canada (Quarantine, Isolation and Other Obligations)*, issued on February 14, 2021, and subsequently reissued every month or so.

The Applicants variously submit: that the Administrator in Council (“AIC”) did not satisfy the statutory pre-requirements under section 58 of the *Quarantine Act* in issuing the OIC; that the OIC is unreasonable; that the OIC violates their rights under sections 6, 7, 8, 9, 10, 11, and 12 of the *Charter*; that the OIC impermissibly intrudes on exclusive provincial jurisdiction; and that the OIC violated their property rights under the *Canadian Bill of Rights*. Two of the Applicants also challenge a prior OIC with the same title, issued on January 20, 2021. Among other things, that OIC required returning air travellers to quarantine in a DQF if they did not arrive in Canada with a negative result for a recent COVID-19 molecular test.

Upon review, the Court concludes that, with two limited exceptions discussed below, the Applicants’ did not establish their allegations.

First, the evidence demonstrates that the AIC did in fact form the opinion that there were no reasonable alternatives to adopting the impugned measures, as required under subsection 58(1) of the *Quarantine Act*. Moreover, the Applicants failed to demonstrate that this opinion or the OICs themselves are unreasonable.

Second, the Applicants have failed to establish that their *Charter* rights were infringed. In particular, they have failed to demonstrate any infringement of their mobility rights under section 6; their right to be secure against unreasonable search and seizure under section 8; the right to counsel under section 10(b); their rights under section 11 to be presumed innocent and not to be denied reasonable bail without just cause; or their right under section 12 not to be subjected to any cruel and unusual punishment. Although the Court agreed with the Applicants that the impugned measures constitute a deprivation of liberty

within the meaning of section 7, it found that the deprivation was in accordance with the principles of fundamental justice. Therefore, there was no violation of section 7. Likewise, while the Court concluded that the requirement to reside at a GAA or DQF pending receipt of the Day 1 Test constitutes a detention, such detention is not arbitrary. Consequently, there is no infringement of section 9 of the *Charter*.

The two exceptions to the Court's conclusions pertain to the Applicant, Ms. Mathis. The Court found that her rights under sections 9 and 10(b) of the *Charter* were infringed by *the manner in which* the January OIC was implemented. The location of the DQF facility where she was obliged to stay while awaiting the results of her Day 1 Test was withheld from her and she was not appropriately advised of her right to retain and instruct counsel. Such infringements cannot be justified in a free and democratic society. However, the appropriate remedy lies under section 24(1) of the *Charter*, rather than under section 52 of the *Constitution Act*. Ms. Mathis did not mention section 24(1) in her Notice of Constitutional Question or in her submissions. Accordingly, no relief will be granted.

As a practical matter, nothing turns on this, because the evidence establishes that the first of the two violations of Ms. Mathis' rights has been remedied. Under the February Order and its successors, travellers who are required to stay in a GAA must book their own reservation there (so they will know its location), while travellers who are required to stay in a DQF are provided with the relevant details pertaining to that facility. As to the second violation, border control officials will now be aware that they must clearly communicate the right to retain and instruct counsel in a manner that is readily understood, at the outset of the detention.

Third, the OICs fall squarely within the federal government's jurisdiction under section 91(11). It is axiomatic that the power to quarantine was conferred specifically for the purpose of preventing or reducing the introduction and spread of communicable diseases from outside the country.

Finally, the OIC was promulgated in accordance with the due process requirements under the *Bill of Rights*. Therefore, there is no violation of the Applicants' rights under that legislation.

In concluding, the Court observed that the principles of fundamental justice would permit the imposition of stronger border control measures, should the AIC become of the opinion that the preconditions set forth in paragraphs 58(1)(a) – (d) of the *Quarantine Act* are met.

Given that the current OIC expires on Monday, June 21, 2021, the decision is available in English only, as a delay of its issuance would be prejudicial to the public interest. A French language summary of the conclusions is available. In accordance with paragraph 20(2)(b) of the *Official Languages Act*, a certified translation will be provided at the earliest possible time.

A copy of the decision can be obtained via the Federal Court website:
<https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/499093/index.do>.