

Court File No. 3111-999-00-3261751F-00

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ONTARIO COURT OF JUSTICE

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HIS MAJESTY THE KING

v.

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METHTHA FERNANDO

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R U L I N G

BEFORE THE HONOURABLE JUSTICE PAUL MONAHAN
on June 26th, 2024 at BRAMPTON, Ontario

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APPEARANCES:

30

A. Gurpersaud

Counsel for The Crown

C. Weisdorf

Agent for Meththa Fernando

(i)
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L E G E N D

[*sic*]

Indicates preceding word has been reproduced verbatim and is not a transcription error.

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(ph)

Indicates preceding word has been spelled phonetically.

[Indiscernible]

Indicates an inaudible or impossible to understand spoken word/phrase

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WEDNESDAY JUNE 26, 2024

C O M M E N C E D

MONAHAN, J. (Orally):

5 **INTRODUCTION**

This is the case of Ms. Meththa Fernando, M-E-T-H-T-H-A, Fernando. Ms. Meththa Fernando was charged with failing to comply with an order under Section 58 of the *Quarantine Act*. (S.C. 2005, c. 20)

10 In particular, Ms. Fernando took an airplane flight to her home in Mississauga, arriving at Pearson Airport on April 9th, 2022. She was apparently vaccinated, but she refused the COVID test, which was randomly selected to be performed on her.

15 In particular, she was asked by a screening officer, Mr. Aliel, A-L-I-E-L, Joshua, J-O-S-H-U-A, Roxas, R-O-X-A-S, employed by the Public Health Agency of Canada, to undergo a nasal swab COVID-19 test, and she refused.

20 The actual test was to be performed by another person (see trial testimony of Roxas at page 12). The evidence from Mr. Roxas is that he was requiring Ms. Fernando to submit to a nasal swab test.

25 Ms. Fernando was convicted at trial of failing to comply with an order under Section 58 of the *Quarantine Act* (the "Act") and fined \$5,000 with additional charges, taking it to a fine of \$6,255. She appeals now to this Court.

DISCUSSION AND ANALYSIS

Ms. Fernando appealed to this Court; she was assisted in her appeal by a non-lawyer, Mr. Weisdorf, who was helpful to her and to the Court. Ms. Fernando sought to rely on the *Canadian Bill of Rights* before the Justice of the Peace and before me. She was not permitted by the Justice of the Peace to rely on the *Canadian Bill of Rights* because there was no application before the Court. Whether the Justice of the Peace should have let the defence argue about whether the *Canadian Bill of Rights* was violated or not is not necessary for me to decide, given my view regarding Section 14 of the *Quarantine Act*.

The defence raised an argument before the Justice of the Peace and before me which has merit. The Justice of the Peace did not address this argument. The argument, simply put, is that the Act did not authorize a screening officer to use a screening test which involved the entry into the traveller's body of an instrument or other foreign body.

The screening test that Mr. Roxas proposed involved the insertion of a nasal swab into Ms. Fernando's nasal cavity, contrary to Section 14 of the *Quarantine Act*.

The relevant provisions are as follows, quoting Section 14 of the *Quarantine Act*:

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Screening Technology

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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.*

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Refusal to be Screened

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14(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 the screening officer or quarantine officer of the refusal.*

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Section 58 of the *Quarantine Act* provides, in part, as follows:

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[58(1)] *The Governor in Council may make an order prohibiting or subjecting to any condition the entry into Canada of any class of persons who have been in a foreign country or specified part of a foreign country if the Governor in Council is of the opinion that*

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(a) *there is an outbreak of communicable disease in the foreign country;*
(b) *the introduction or spread of the disease would pose an imminent and severe risk to public health in Canada;*
(c) *the entry of members of that class of*

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persons into Canada may introduce or contribute to the spread of the communicable disease in Canada; and
(d) *no reasonable alternatives to prevent the introduction or spread of the disease are available.*

The Governor in Council made numerous orders during COVID. It appears common ground that the order in force on April the 11th, 2022, was "PC2022-0321," which I will refer to as the "Order." The Order is over a hundred pages long. It provides for, among other things, pre-arrival COVID tests and arrival tests, including random tests: see Section 2.3(1.2).

It provides for a polymerase chain reaction "(PCR)" test in these circumstances. The COVID-19 molecular test is defined in the Order:

Covid-19 molecular test means a Covid-19 screening or diagnostic test, including a test performed using the method of polymerase chain reaction (PCR) or reverse transcription loop-mediated isothermal amplification (RT-LAMP), that is

- (a) *if the test is self-administered, observed and the result is verified*
 - (i) *in person by an accredited laboratory or testing provider, or*
 - (ii) *in real time by remote audio-visual means by the accredited laboratory or*

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*testing provider who provided the test;
or*

*(b) if the test is not self-administered,
performed by an accredited laboratory or
testing provider.*

I return to Section 14(1) of the *Quarantine Act*.
It provides that the screening test cannot involve
the insertion into the traveller's body of any
instrument or foreign body.

The prosecution raised the point that perhaps the
insertion into the nasal cavity did not involve the
entry into the body. I disagree. The insertion of
a nasal swab into the nasal cavity is most
definitely an insertion into the body.

Another question arises as to whether a nasal swab
is an "instrument" or "foreign body." "Instrument"
is defined in the Canadian Oxford Dictionary, 2nd
Edition, as "a tool or implement." A "foreign body"
is defined in the Oxford Languages Online
Dictionary, as "an object or piece of extraneous
matter that has entered the body by design or
accident."

In my view, a nasal swab is "an instrument" or
"foreign body." In my view, the *Quarantine Act* did
not permit a screening officer in this case, Mr.
Roxas, to require Ms. Fernando to be tested at the
airport by insertion into her nasal cavity of a

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nasal swab.

5 I am also of the view that the Order did not purport to expand the powers of the screening officers, and it could not do so as a matter of law. The governing legislation is the *Quarantine Act*. An Order made under Section 58 of the Act could not add to the legislative powers. Indeed, Section 6.1 of the the Order provides as follows:

10 [6.1] For greater certainty
(a) this Order does not affect any of the powers and obligations set out in the *Quarantine Act*.

15 I am not called upon to decide, and I do not decide whether the requirement for pre-arrival COVID tests performed outside of Canada by persons who were not screening officers under the *Quarantine Act* was a violation of the Act.

20 I do decide that the nasal swab test, which the screening officer in this case required or demanded Ms. Fernando submit to, was an unlawful requirement or demand. Ms. Fernando's refusal to comply with the requirement or demand was lawful on her part. Because the requirement or demand made of her by the screening officer was not lawful, Ms. Fernando should not have been found guilty by the Justice of the Peace.

25 I am reversing the Justice of the Peace's decision

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and entering a finding of not guilty. Those are my
reasons.

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* * * E N D O F T R A N S C R I P T * * *

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