

COURT FILE NO:

FEDERAL COURT

BETWEEN

STEVEN DUESING and NICOLE MATHIS

Applicants

-and-

THE ATTORNEY GENERAL OF CANADA

Respondents

APPLICATION UNDER SECTION 18(1) & 18.1 OF THE FEDERAL COURT ACT and
RULE 300 (a) OF THE FEDERAL COURT RULES

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEDURE HAS BEEN COMMENCED by the Applicants. The relief claimed by the Applicants appears in the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by Judicial Administrator, unless the Court orders otherwise, the place of hearing will be requested by the Applicant. The Applicant requests that this Application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the Application, you or a solicitor acting for you must prepare a Notice of Appearance in Form 305 prescribed by the *Federal Court Rules* and serve it on the Applicants solicitor WITHIN 10 DAYS after being served with the Notice of Application.

Copies of the *Federal Court Rules*, information concerning the local officers of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE this Application, Judgement maybe given in your absence and without further notice to you.

Date: _____

Issued By: _____

(Registry Officer)

Address of local office: Federal Court Canada

180 Queen St W

Toronto, ON M5V 1Z4

TO: THE ATTORNEY GENERAL
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

APPLICATION

1. This is an Application for Judicial Review pursuant to section 18(1) and 18.1 of the *Federal Courts Act* against a decision of the Minister of Health dated January 20, 2021 in the form of Order in Counsel PC Number 2021-0011.¹ The Decision was communicated to Mr. Duesing on January 31, 2021 and to Mrs. Mathis on January 28, 2021. The Decision results in the detention of Canadian citizens in federal facilities grossly violating their *Charter* rights, and suspending their rights to due process.

THE APPLICANT SEEKS:

2. The Applicants seek the following relief:
 - a. An interlocutory injunction in the nature of *mandamus* pursuant to s. 18(1) and section 18.2 of the *Federal Courts Act* and section 24(1) of the *Charter* directing the Minister to immediately:
 - i. Suspend the requirement for the mandatory confinement of returning air travelers in federal facilities pending a determination of its constitutionality by this Honourable Court; and
 - ii. Release all such individuals who are currently so confined.
 - b. A Declaration pursuant to section 24(1) of the *Charter* that the Decision to forcibly quarantine asymptomatic Canadians, who are in possession of a negative Covid-19 test (Polymerase Chain Reaction [“PCR”] or Antigen) and have reasonable quarantine plans, in federal facilities without due process is a breach of sections 7, 9, 10(b), 11(d), 11(e) and 12 of the *Charter* and a breach of the principles of fundamental justice;
 - c. Further, a Declaration pursuant to section 24(1) of the *Charter* that the Decision is unreasonable because it does not proportionately balance rights and freedoms protected under the *Charter* including sections 6, 7, 9, 10 (b), 11(d), 11(e) and 12, and violates section 503 of the Criminal Code (right to appear before a Justice within 24 hours upon arrest);

¹ <https://orders-in-council.canada.ca/attachment.php?attach=40172&lang=en> PC Number 2021-0011

- d. An Order pursuant to section 18(1) of the *Federal Courts Act* and Section 24(1) of the *Charter* in the nature of *certiorari* quashing the Decision;
- e. Costs; and
- f. Such further and other relief as counsel may advise and this Honorable Court considers just and necessary.

THE GROUNDS OF THE APPLICATION ARE:

3. **Section 58(d) of the Quarantine Act² states :**

Order prohibiting entry into Canada

- (a) there is an outbreak of a 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 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.

4. **Section 1.2(1) of the Order states:**

Entering by aircraft — COVID-19 molecular test and quarantine plan

1.2 (1) Every person who enters Canada by aircraft must meet the following requirements:

(a) before boarding the aircraft for the flight to Canada, they must

(i) subject to subsection (2), if the person is five years of age or older, provide to the aircraft operator evidence containing the following elements that they received either a negative result for a COVID-19 molecular test that was performed on a specimen that was collected no more than 72 hours, or no more than another period set out under the *Aeronautics Act*, before the aircraft's initial scheduled departure time or a positive result of the test that was performed on a specimen that was collected at least 14 days and no more than 90 days before the aircraft's initial scheduled departure time:

(A) the person's name and date of birth,

(B) the name and civic address of the laboratory that administered the test,

² S.C. 2005, c. 20

(C) the date the specimen was collected and the test method used, and

(D) the test result,

(ii) subject to subsection (3), provide to the Minister of Health a quarantine plan that includes, among other things, the civic address of the place where they plan to quarantine themselves during the 14-day period that begins on the day on which they enter Canada and their contact information for that period, and

(iii) provide the quarantine plan by electronic means specified by the Minister of Health, unless they are in a class of persons who, as determined by the Minister of Health, are unable to submit their quarantine plans by electronic means for a reason such as a disability, inadequate infrastructure, a service disruption or a natural disaster, in which case the quarantine plan may be provided in a form and manner and at a time specified by the Minister of Health; and

(b) they must retain the evidence referred to in subparagraph (a)(i) for the 14-day period that begins on the day on which they enter Canada or that begins again under subsection 3(2) or 4(4), if applicable.

5. **Section 4 of the Order States:**

Unable to quarantine themselves

4 (1) A person referred to in section 3 is considered unable to quarantine themselves if

(a) the person has not provided the evidence referred to in subparagraph 1.2(1)(a)(i), unless the person is excepted from this requirement by virtue of subsection 1.2(2);

(b) the person refused to undergo a COVID-19 molecular test in accordance with paragraph 1.2(4)(a);

(c) the person is referred to in paragraph 1.2(2)(i) and it is necessary for the person to use a public means of transportation, including aircraft, bus, train, subway, taxi or ride-sharing service, to travel from the place where they enter Canada to the place where they will quarantine themselves; or

(d) the person cannot quarantine themselves in accordance with paragraph 3(1)(a).

Requirements — quarantine at quarantine facility

(2) A person who, at the time of entry into Canada or at any other time during the 14-day period referred to in section 3, is considered unable to quarantine themselves must,

(a) if directed by a screening officer or quarantine officer, board any means of transportation provided by the Government of Canada for the purpose of transporting them to a quarantine facility or transferring them between quarantine facilities;

- (b) enter into quarantine without delay
 - (i) at the quarantine facility in accordance with instructions provided by a screening officer or quarantine officer and remain in quarantine at the facility or at any other quarantine facility to which they are subsequently transferred until the expiry of that 14-day period, or
 - (ii) at any other place that the quarantine officer considers suitable in accordance with instructions provided by the quarantine officer and remain in quarantine at the place or at any other place to which they are subsequently transferred until the expiry of that 14-day period;
 - (c) in the case of a person who is considered unable to quarantine themselves within 48 hours after entering Canada, report their arrival at the quarantine facility to a screening officer or quarantine officer at that facility within 48 hours after entering Canada, unless the person has already reported their arrival at their place of quarantine under paragraph 3(1)(b);
 - (d) subject to subsection (3), until the end of that 14-day period,
 - (i) monitor for signs and symptoms of COVID-19,
 - (ii) report daily to a screening officer or quarantine officer at the quarantine facility on their health status relating to signs and symptoms of COVID-19, and
 - (iii) in the event that they develop signs and symptoms of COVID-19 or test positive for COVID-19 under any type of COVID-19 test, follow instructions provided by the public health authority specified by a screening officer or quarantine officer; and
 - (e) while they remain at a quarantine facility, undergo any health assessments that a quarantine officer requires.
6. Pursuant to section 58, the federal government must ensure that there is no reasonable alternative to prevent the introduction of disease before issuing an order to detain Canadians in federal facilities against their will and contrary to their constitutional rights and freedoms. According to section 58, the facilities are to be used as a last resort for travellers who have no other option of meeting quarantine requirements.
 7. In the Case before this Honourable Court all Applicants had or have reasonable quarantine plans which involves quarantining in their own private residence where they would have access to necessities of life and would not be in contact with vulnerable persons as required by section 1.2 and section 4 of the January 20 2021 Order.
 8. However the Applicants were detained against their will or alternatively, will be detained upon arrival to Canada, and forced to quarantine in federal facilities in violation of their *Charter* including section 6 (of the *Charter* that protects the right to

enter and leave Canada), section 7 (which protects liberty and security of the person), section 9 (protecting the right not be arbitrarily detained or imprisoned), section 10 (b) (the right to retain and instruct counsel without delay upon arrest and detention), section 11(d) (the right to the presumption of innocence, section 11(e) (the right not to be denied reasonable bail) and section 12 (the right not to be subjected to cruel and unusual punishment), and violates section 503 of the Criminal Code (right to appear before a Justice within 24 hours).

Charter Right Violations:

Section 6: The Right to Leave and Enter Canada

9. The section 6 *Charter* right to be able to freely leave and re-enter Canada is not a right to be bestowed upon citizens when it is convenient. As the Supreme Court of Canada has ruled “the right of a Canadian citizen to enter and to remain in Canada is therefore a fundamental right associated with citizenship. The right applies equally to all Canadian citizens regardless of whether the reason they want to travel are considered more “essential” than others or otherwise considered more “valid” by the government.”³

Section 7: The Right to Life, Liberty and Security of Person

10. Section 7 of the *Charter* protects individual liberty, including the right to be free of state interference with physical movement. Quarantining all citizens re-entering Canada, in addition to mandating negative test results in advance of boarding, impairs liberty in a manner that is arbitrary, disproportionate, and overbroad, and therefore violates the principles of fundamental justice. The government has not presented compelling evidence to demonstrate that asymptomatic Canadians are significant spreaders of the virus, or that there is any link between international travel and Covid deaths. The onus is on the government, not Canadian citizens, to justify its violation of *Charter* rights and freedoms with evidence.

³ *Divito v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 47 at para 21.

Section 9: The Right not to be Detained Arbitrarily

11. Section 9 of the *Charter* protects individuals against arbitrary detention, however the Decision allows for the arbitrary detention of healthy, asymptomatic air travellers already in possession of negative Covid test results, which is not justifiable in a free and democratic society.

Section 10(b) The Right to Counsel

12. Section 10(b) guarantees the right to counsel without delay, when an individual is arrested OR detained. The courts have recognized that a situation of vulnerability relative to the state is created at the outset of a detention and accordingly, the concerns about self-incrimination and interference with liberty that section 10(b) seeks to address are present as soon as a detention begins.⁴ Because individuals are being arrested and detained in these facilities, their s.10(b) right to counsel is being violated as they are not being informed that they have the right to speak to a lawyer.

Section 11(d) The Right to be presumed innocent

13. Section 11(d) of the *Charter* reads that “any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.”⁵ Section 11(d) helps to ensure that only those who are guilty are ultimately condemned by the criminal justice system. Section 11(d) guarantees the right of any person charged with an offence to be presumed innocent until proven guilty beyond a reasonable doubt.
14. However in the case before this Honourable Court the government presumes that individuals who are detained will not abide by quarantine rules and forces them into mandatory quarantine in federal facilities, therefore violating section 11(d) of the Charter.

⁴ *R. v. Suberu*, [2009] 2 S.C.R. 460

⁵ <https://laws-lois.justice.gc.ca/eng/const/page-15.html>

Section 11(e) The Right to Reasonable Bail

15. This section guarantees the right to reasonable bail, however the Decision breach the right to reasonable bail by not allowing individuals to appear before a Justice to contest their detention and obtain reasonable bail. They are forced against their will to stay in these facilities for a minimum of three days, and in case of individuals who test positive for 14 days.

Section 12: The Right to be free from Cruel and Unusual Treatment

16. Section 12 of the *Charter* reads, “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.” Section 12 prohibits treatment or punishment that is “grossly disproportionate” in the circumstances. The federal government is disproportionately punishing Canadians who travel, something which they have a constitutional right to do. Moreover, the challenged measures and their implementation are calculated to intimidate Canadians. The threat of forced quarantine, away from family and their loved ones’ knowledge even of where they are, is meant to instill maximum fear. The removal of the ability to challenge detention and the profound infringement of their rights and freedoms elevates the measures to the level of cruel and unusual punishment and shocks the public conscience.
17. The uncertainty of the measures is causing stress and anxiety for Canadians. There is no transparency, accountability or oversight when it comes to these travel restrictions. At this point the public has no information about the new travel restrictions including whether there are medical personnel at these locations, information about how the special needs of individuals including medication or dietary needs will be met. There is no information about whether couples and families can quarantine together or if they will be separated and what will happen to individuals with pets who may have special needs.
18. Ordinary law-abiding Canadians are being detained at the border and detained in secret federal facilities without any due process and no justification. This is unacceptable in a free and democratic society such a Canada.

19. It is respectfully submitted that the Decision are unreasonable and unlawful. The infringement on individual *Charter* rights is not justifiable. They do not proportionately balance the *Charter* right to leave Canada with any relevant statutory objective. There is no statutory objective achieved by continuing to force healthy law-abiding Canadians into forced quarantine in federal facilities and suspending all of their *Charter* protected rights and freedoms at their own expense. Any statutory objective the Minister could potentially rely on for the continuance of this situation is not proportionately balanced against the continued effective deprivation of section(s) 6, 7, 9, 10 (b) and 11(e) *Charter* rights. The Minister is obligated by section(s) 6, 7, 9, 10(b) and 11 (d) and (e) of the *Charter* to immediately cease the Orders allowing the arbitrary detention.

THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

20. Affidavit of Steven Duesing
21. Affidavit of Nicole Mathis
22. Exhibits to the Affidavit of Steven Duesing
23. Exhibits to the Affidavit of Nicole Mathis
24. The affidavit of such other person as counsel may advise and this Honourable Court permit; and/or
25. Such other material as counsel may advise and this Honourable Court may permit.

The Applicant requests that the Director General send a certified copy of the material that is in their possession and relevant to the appeal decision under review to the Applicant and to the Registry, pursuant to Rules 317 and 318 of the Federal Rules.

Dated at Toronto this Day of 25th February 2021.

Sayeh Hassan

**Sayeh Hassan
Henna Parmar**

Justice Centre for Constitutional Freedoms

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Calgary, Alberta T2V 1K2

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Counsel for the Applicants