

Defence Pre-Trial Memo

Accused: GRUBB, Aaron
KRAAYENBRINK, Evan
SLY-HOOTON, Elim
SPENCE, Mark

Date / Time: May 9, 2024 at 11 am (Courtroom M1)

Counsel: Chris Fleury
Darren Leung

Prosecutor: Ruarri Patterson

Overview

The four accused before the Court are charged with the same offence and have each filed a notice of constitutional question raising identical issues. Each accused is relying on the expert evidence of Dr. Thomas Warren in support their position on the constitutional questions. The defendants have requested a pretrial for the purposes of narrowing trial issues, potentially consolidating the proceedings, and setting timelines to get these matters to trial quickly and efficiently.

Each of the four defendants are accused of breaching an Order made under section 58 of the *Quarantine Act* (the Act). Section 58 of the Act allows the Governor-in-Council to make emergency Orders which create conditions of entry into Canada in order to prevent the introduction or spread of a communicable disease, where no other reasonable alternatives are available.

Each of the four defendants is accused of breaching the same provision of the same Order, namely: Order in Council 2022-0836 ("the Order") Division: 3 Part:3 Section:19(4): The particular provision reads as follows: "(4) *A person who enters Canada must provide their suitable quarantine plan or their contact information by electronic means specified by the Minister of Health...*"

The Order was in place from June 25, 2022, to October 1, 2022. Each of the four defendants was returning from international travel by way of the Pearson International Airport during that time. Each defendant did eventually provide some quarantine plan or

contact information, as outlined below. Their alleged liability is for failing to download and utilize the ArriveCan application to provide that information.

In addition to the above charge, Mr. Kraayenbrink is also charged with failure to comply under section 15(1) of the *Act* for allegedly refusing to disclose his vaccination status.

Each of the four defendants have served and filed a Notice of Constitutional Question which challenges the constitutionality of the Order. They allege breaches of their rights and sections 8, 9, and 10(b) of the *Charter*. They each seek a stay of proceedings under section 24(1) of the *Charter*.

Each of the four defendants rely on the expert evidence of Dr. Thomas Warren, an expert in infectious disease and microbiology. He will provide expert evidence on the effectiveness of vaccines on reducing infection and transmissibility of SARVS CoV2.

The Accused

Aaron Grubb

On September 19, 2022, Mr. Aaron Grubb was returning to Canada from the United Kingdom. Mr. Grubb was detained by Peel Regional Police officers. He eventually provided his passport as well as his address and phone number to PHAC officers. He was issued a Certificate of Offence for his failure to complete the ArriveCan application.

He received a notice of trial on Feb 2, 2024, with a scheduled trial date of April 17, 2024. The matter was brought forward by counsel and adjourned to this pretrial date.

Evan Kraayenbrink

On August 10, 2022, Mr. Evan Krayenbrink was returning to Canada from Germany. He initially refused to use ArriveCan and provide contact information. When confronted by Peel Regional Police officers he disclosed his driver's license and home address. He received two Certificates of Offence: the first was for failure to use the ArriveCan application and the second was for refusing to disclose his vaccination status.

After missing a first Early Resolution Meeting, Mr. Kraayenbrink's matter was reopened. Eventually a trial date of March 27, 2024, was set. The matter was brought forward by counsel and adjourned to this pretrial date.

Elim Sly-Hooton

On July 30, 2022, Mr. Elim Sly-Hooton was returning to Canada from the Netherlands. When confronted by PHAC and CBSA officers he refused to use ArriveCan or to disclose his quarantine address. He advised officers he was going “up north”. Eventually Mr. Sly-Hooton agreed to provide his British Columbia driver’s license which indicated an address in British Columbia.

He received a notice of trial dated December 8, 2023, with a scheduled trial date of March 1, 2024. The matter was brought forward by counsel and adjourned to this pretrial date.

Mark Spence

On August 26, 2022, Mr. Mark Spence was returning to Canada from Costa Rica. While he declined to provide his vaccination status, Mr. Spence did in fact provide a quarantine address (his home address) to the PHAC officer via a web browser version of ArriveCAN on a computer provided by PHAC. He ultimately declined to complete the full application.

He received a Certificate of Offence. A trial date was eventually provided. The initial trial date was adjourned due to outstanding disclosure of Peel Regional Police officers. The matter was brought forward in advance of the second scheduled trial date of March 1, 2024, by counsel, and adjourned to this pretrial date. The disclosure requested by Mr. Spence is outstanding as of the filing of this memorandum.

Charter Issues

Section 9

Where each of the defendants declined to provide their vaccination status via ArriveCan, each was subject to a mandatory 14-day quarantine under the Order. The defendants will argue that this 14-day quarantine was: 1) a detention within the meaning of section 9; and 2) arbitrary.

The defendants will argue that by June of 2022, 18 months following the release of the COVID19 vaccines in Canada, it was widely understood by both governments and medical professionals that the COVID19 vaccines did not provide any lasting immunity or prevent transmission of the disease. In short, there was no medical rationale for imposing

the quarantine on the defendants or any other unvaccinated Canadian. In this regard, the defendants will rely on the expert opinion of Dr. Thomas Warren.

Section 7

The defendants' arguments regarding section 7 rely on the same logic as the section 9 argument above. The 14-day quarantine was an infringement on the defendants' liberty. Where there was no medical rationale for the quarantine, it was contrary to the principles of fundamental justice.

Section 8

Each defendant was compelled by the legislation to disclose their vaccination status. The request of this private medical information constituted a search under section 8 of the *Charter*. Where there is no public health basis to distinguish between individuals who have a primary dose of a COVID19 vaccine, and those who do not, the search was not reasonable.

Section 10

While each of the defendants was held in the custody of PHAC officers and/or Peel Regional Police longer than a usual border stop, none of the accused were informed of their right to counsel. Further, none of the defendants were notified of their right to counsel at any point during their 14-day detention. The defendants argue that this breach of right to counsel was systemic and widespread.

Section 24(1)

As a remedy to the above Charter breaches, each of the defendants seek a stay of proceedings pursuant to section 24(1) of the *Charter*.

Other Defence Issues

Ultra vires

At trial the defendants will further argue that Division: 3 Part:3 Section:19(4) of the Order was ultra vires the Governor-in-Council's authority under section 58 of the *Act*.

Section 58 of the Act permits the Governor-in-Council to subject international travellers to certain conditions, only if it is of the opinion that: “no reasonable alternatives to prevent the introduction or spread of the disease are available.”

The Federal Government could legislate the use of ArriveCan in other circumstances. But it was improper and ultra vires to rely on an Order-in-Council made by way of section 58 of the Act to do it. “Reasonable alternatives to prevent the introduction or spread of the disease” were available. For example: international travelers could provide their quarantine address and/or contact information verbally or on a written form. As noted above, each of the defendants did in fact provide this information in one form or another.

Procedural Issues

Where the defendants raise identical issues in their defence, and there will be a quadruplication of expert opinion evidence, the defendants are open to means of simplifying or joining the proceedings. It is in the interests of the prosecution, defence, and the Court that issues are not argued four separate times and that Dr. Warren not be called as a witness at four separate trials. The defendants may make an application for joinder pursuant to section 38 of the *Provincial Offences Act* and are seeking judicial input in this regard.

Counsel’s understanding of the prosecution’s position on the *Charter* issues is that these issues have already been decided by other Courts, including the Federal Court. If the prosecution does take this position, it ought to bring a summary dismissal application prior to trial per *R v Haevischer*, [2023 SCC 11](#). This is discussed in further detail below.

Defendants Understanding of the Crown’s Position

Counsel’s understanding of the prosecution’s position on the *Charter* issues is that these issues have already been decided by other Courts, including the Federal Court.

Counsel has been sent a number of cases by the prosecution. This line of cases relies on the Federal Court’s decision in *Spencer v Canada*, [2021 FC 361](#). *Spencer* and the related cases challenge the 2021 requirement that all passengers returning from international travel quarantine at a designated facility (IE a “quarantine hotel”). In contrast, each of the defendants before the Court challenge the 2022 requirement that only unvaccinated individuals quarantine. The 2022 requirement has not been considered by a Court to date. *Spencer* is not determinative of the issues before the Court.

The most analogous issue in *Spencer* to the issues raised by the defendants is the right to counsel issue (IE 10(b) of the *Charter*). The Federal Court in *Spencer* actually found that Ms. Spencer's right to counsel was breached when she was forced into a mandatory 14-day quarantine without being informed of her right to counsel. To the extent that *Spencer* is binding, it actually supports the defendant's position.

To Counsel's knowledge only one case raises the issue of the constitutionality of mandatory quarantine on the basis of vaccination status: *Yates v Canada*, [2023 FC 985](#). Ms. Yates, along with 10 others, attempted to pool their resources and seek a determination at the Federal Court of a common issue, namely the precise issues raised by the defendants before the Court. The Federal Court rejected this approach, determining the application moot and not deciding the case on its merits. One aspect of the mootness analysis specifically determined that the "...*Applicants are free to seek a determination on the constitutionality of the impugned provisions in those prosecutions if they so choose.*" The Federal Court was obviously aware of its own decision in *Spencer* when it wrote this.

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