Federal Court  Cour fédérale

Date: 20210423

Docket: T-340-21

Citation: 2021 FC 361

Ottawa, Ontario, April 23, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

BARBARA SPENCER, SABRY BELHOUCHET, BLAIN GOWING, DENNIS WARD, REID NEHRING, CINDY CRANE, DENISE THOMSON, NORMAN THOMSON, and MICHEL LAFONTAINE

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicants seek an interlocutory injunction to prohibit the Government of Canada from enforcing the mandatory quarantine of travellers arriving by air at designated facilities while they await the results of the COVID-19 tests they must take upon arrival.

[2] They argue that the rules violate their rights under the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982 c 11 [*Charter*] because they are law-abiding individuals who can safely quarantine at home. Most of the Applicants left Canada under a different set of rules, and now face extra expenses and fear that their security may be jeopardized under the current rules. They submit that the measures are not justified and should not be left in place pending the hearing of their *Charter* challenge.

[3] The essence of the Applicants' argument for an interlocutory injunction is set out in the following passage from their factum (Written Representations of the Applicants at para 7, Applicants' Record [AR] at p 113):

> The Applicants, and countless Canadians have been and continue to be unjustifiably detained in federal facilities without due process and in breach of their right to the presumption of innocence, to counsel, to appear before a judge to seek release, and in interference with their right to enter and leave the country. As a result, both the plethora of individuals that are directly affected by this Order, and Canadian democracy itself, are grossly and adversely impacted… The Federal government has presented no or inadequate evidence that it is necessary to forcibly detain returning Canadians, as opposed to the reasonable and minimally impairing alternative of allowing them to quarantine in their own homes.

[4] The Respondent argues that the Applicants have not met the very high threshold that applies to an application to suspend the operation of a law or regulation on an interlocutory basis. They submit that the Court should be cautious in interfering with the operation of a public health measure prior to a full constitutional review on the merits.

[5] The Respondent submits that the fact that the Applicants may have to change their travel plans and may have to incur extra costs because of the current rules is not a basis to suspend

important public health measures that have been adopted based on current scientific advice in response to the threats associated with the emergence of new variants of concern. Any suspension of these measures would have a significant negative impact on public health at a time when the COVID-19 pandemic is already posing significant challenges in Canada, with tragic consequences for thousands of people.

[6] The crux of the Respondent's position is expressed in its factum at paragraph 1 (Respondent's Record [RR], Vol V at p 879):

> It is difficult to overstate the global impacts of COVID-19, the infectious and potentially fatal disease caused by the SARS-CoV-2 virus. The introduction and spread of the virus and its variants into Canada poses an imminent and severe risk to public health in Canada. The Applicants seek to suspend public health measures implemented to reduce the introduction and further spread of COVID-19 and the new variants of the virus by decreasing the risk of importing cases from outside the country.

[7] For the reasons explained below, this application for an interlocutory injunction will be dismissed.

[8] Any harm to the Applicants' rights and freedoms from a temporary stay at a hotel is not a sufficient basis to suspend a significant public health measure that is based on the advice of scientific experts, and seeks to prevent or slow the spread of COVID-19 and its variants into Canada. The reasonable alternative proposed by the Applicants, namely immediately quarantining at their residence, does not take into account the evidence that 1-2% of air travellers arriving in Canada after having taken a COVID-19 test shortly prior to departure were nevertheless testing positive upon arrival in Canada, nor does it reflect the evidence that

individuals in quarantine continued to pose a risk of spreading the virus by their contact with others.

[9] The risk of importing one of the more transmissible and more dangerous COVID-19 variants is demonstrably significant. Based on the evidence before me, I conclude that it would not be just or equitable to suspend the operation of the challenged quarantine measures pending the determination of the merits of the Applicants' *Charter* claim.

II. Background

[10] In order to contextualize the Applicants' claims, it is helpful to set out some of the background facts regarding the COVID-19 pandemic and the emergence of new variants, as well as the impugned Order-in-Council, before reviewing the evidence of the Applicants.

A. *COVID-19 and its Diagnosis*

[11] COVID-19 was first detected in China in December 2019 and, by March 2020, the World Health Organization (WHO) had declared a global pandemic. Since then, the Government of Canada, as well as provincial and local governments, have adopted a wide range of public health measures to try to prevent or slow the spread of the SARS-CoV-2 virus – the virus that causes the potentially severe and life-threatening respiratory disease of COVID-19. As of March 11, 2021, one year after the WHO declared a global pandemic, there had been 899,757 known infections and 22,370 deaths resulting from COVID-19 in Canada. Over time, scientists have determined that people can transmit the virus while pre-symptomatic or asymptomatic.

[12] There are primarily two types of tests for COVID-19: (i) molecular tests; and (ii) antigen tests. The majority of molecular tests use the Polymerase Chain Reaction (PCR) method. The evidence indicates that PCR testing is more accurate and can the identify presence of genetic material before a person exhibits symptoms or when a person is asymptomatic. PCR tests allow for screening of the same sample for genetic markers to detect the presence of variants of concern, which will be discussed in further detail below. Other molecular testing technology exists and includes Reverse Transcription Loop-mediate isothermal AMPlification, which functions in a manner similar to PCR, but has slightly lower sensitivity and specificity.

[13] Antigen tests often do not require a laboratory, and a result can be determined in under 30 minutes. Antigen tests are useful to detect infected people with a high viral load, which is at the peak or near-peak of their infection. However, antigen tests are less reliable in identifying people who are newly infected when they can still pass on the virus to other people. Further, the evidence suggests that Antigen tests are far more prone to false-negative results if a person has low amounts of the virus in their body.

[14] Molecular tests, PCR in particular, are superior throughout the detection period since they can amplify small amounts of viral genomic material, as compared to the antigen tests, which do not have a similar amplification mechanism and therefore depend on a higher starting viral load. For this reason, the public health measures adopted rely on molecular testing.

B. *Emerging Variants of the COVID-19 Virus*

[15] As with other viruses, the virus that causes COVID-19 naturally mutates over time through a change in its genetic material. While not all variants are of public health concern, some

variants cause increased transmissibility, and an increase in virulence (*i.e.* the severity of the disease), or a decrease in the effectiveness of available diagnostics, vaccines, and treatments. These are known as variants of concern (VOC). At the time of the hearing, the record reflected three such VOC having been identified for COVID-19, while other variants remained under study.

[16] On December 18, 2020, Public Health England designated a new VOC identified as B.1.1.7, which had been circulating in the United Kingdom since at least September 2020. On December 18, 2020, South Africa also reported a new VOC, which was ultimately labelled as B.1.351. By December 29, 2020, the European Centre for Disease Prevention and Control assessed that the introduction of the B.1.1.7 and B.1.351 variants was concerning and could result in an increase in hospitalizations and deaths. Evidence emerged that the B.1.1.7 VOC is up to 70% more transmissible than the previously circulating virus.

[17] A further new VOC originating from Brazil was identified on January 9, 2021, and was labelled the P.1 variant. Evidence emerged from scientific studies that both the P.1 and B.1.351 variants were more transmissible than earlier strains of the virus, and that vaccines were potentially less effective against them. It was also revealed that the P.1 variant might evade protective immunity from prior infection, so that people were susceptible to reinfection even if they had previously recovered from an earlier strain of COVID-19.

[18] The emergence of the COVID-19 VOC triggered a series of responses in Canada and abroad.

[19] As of December 27, 2020, there were six known or suspected cases of the B.1.1.7 variant in Canada. The Government of Canada suspended all incoming flights from the United Kingdom until January 6, 2021, and implemented a pre-departure testing requirement for all travellers entering Canada by air on January 7, 2021. As of that date, travellers entering Canada were required to provide written proof of a negative COVID-19 molecular test performed no more than 72 hours prior to boarding their flight to Canada, or a positive test result from between 14 to 90 days prior to departure.

[20] By February 11, 2021, there were 458 known COVID-19 cases in Canada involving a VOC, including the first detected case of the P.1 variant from Brazil. In addition, data from two studies of incoming travellers to Canada showed a threefold increase in the number of flights with at least one positive case between September 2020 and January 2021. This data confirmed that these numbers had increased despite a relatively stable volume of international air passengers arriving into Canada during this period (*i.e.* the increase showed that a higher proportion of travellers were infected when they arrived in Canada).

[21] Several other important data points also emerged during this period. Between September and December 2020, after the requirement for pre-departure testing was imposed, approximately 2% of travellers were testing positive for COVID-19. Evidence from an Alberta pilot project, which was conducted at the Calgary International Airport and the Coutts land border crossing, showed that international travellers arriving in Canada were exposing and potentially infecting others with whom they had contact during the period when they were instructed to remain in isolation and to quarantine at home. The Alberta study also revealed that, even after the pre-departure testing was implemented, 1.86% of participants tested positive within 14 days of their

return, 68% of whom tested positive on arrival. As one of the Respondent's affiants explains: "In other words, for every flight of 100 people arriving in Canada, on average one or two were infected with COVID-19" (Affidavit of Kimby Barton, RR, Vol 1 at p 10).

[22] Data from the Alberta study as well as a McMaster Health Labs testing pilot showed that the majority of imported COVID-19 cases were detected on arrival (67-69%), but a further 25.8% were only identified by testing at day seven, with the remaining 5.6% positive cases identified by testing at day 14. Additionally, data from testing of travellers on flights from January 10-18, 2021, arriving from a country lacking the resources to administer pre-departure testing showed a COVID-19 positivity rate of 6.8% in asymptomatic travellers.

C. *Public Health Measures and Orders-in-Council*

[23] To respond to the changing landscapes, since the start of the COVID-19 pandemic in March 2020, the Governor-in-Council or Administrator-in-Council has issued 47 Orders-in-Council pursuant to section 58 of the *Quarantine Act*, SC 2005, c 20, which sets out the following requirements for emergency orders:

Order prohibiting entry into Canada	**Interdiction d'entrer**
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 a specified part of a foreign country if the Governor in Council is of the opinion that	**58 (1)** Le gouverneur en conseil peut, par décret, interdire ou assujettir à des conditions l'entrée au Canada de toute catégorie de personnes qui ont séjourné dans un pays étranger ou dans une région donnée d'un pays étranger s'il est d'avis :
(a) there is an outbreak of a communicable disease in the foreign country;	**a)** que le pays du séjour est aux prises avec l'apparition d'une maladie transmissible;

(b) the introduction or spread of the disease would pose an imminent and severe risk to public health in Canada;	**b)** que l'introduction ou la propagation de cette maladie présenterait un danger grave et imminent pour la santé publique au 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	**c)** que l'entrée au Canada de ces personnes favoriserait l'introduction ou la propagation de la maladie au Canada;
(d) no reasonable alternatives to prevent the introduction or spread of the disease are available.	**d)** qu'il n'existe aucune autre solution raisonnable permettant de prévenir l'introduction ou la propagation de la maladie au Canada.

[24] Of relevance to this injunction application is the Order-in-Council adopted in response to the rapid rise in the number of detected cases and VOC in Canada and the cumulative evidence gathered by the Alberta and McMaster Health Lab studies, which spurred government officials to consider further preventive measures.

[25] On February 14, 2021, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation, and Other Obligations)*, PC 2021-75, (2021) C Gaz, Part 1, Vol 155, No 8, 673, as corrected by C Gaz, Part 1, Vol 144, No 9, 854 [PC 2021-75] came into effect, establishing a number of requirements intended to add to the existing protections against the importation of new variants of COVID-19 into the country. These measures include:

a) pre-departure COVID-19 molecular testing;

b) COVID-19 molecular testing upon arrival in Canada;

c) a suitable 14-day quarantine plan;

d) a requirement to book prepaid accommodation at a government-authorized accommodation for a three-night period, beginning on the day of arrival in Canada;

e) daily reporting of symptoms following arrival in Canada;

f) a further COVID-19 molecular test on or about day 10 after arrival.

[26] Two types of government-approved facilities are contemplated for air travellers under the measures in PC 2021-75: (i) a government-authorized accommodation (GAA) and (ii) a designated quarantine facility (DQF). First, air travellers must go to a GAA near their first port of entry where they wait for the results of their molecular testing, which they are required to take upon arrival. GAAs are hotels that air travellers must pre-book and prepay for a three-night stay at their own expense. Asymptomatic travellers may check-out of the GAA upon receiving a negative result from their COVID-19 test taken upon arrival (they must complete the remainder of the 14-day quarantine at home, however). Those who test positive are contacted by a Public Health Agency of Canada (PHAC) Quarantine Officer to verify that they continue to have a suitable isolation plan and are able to get there by a private mode of transportation. If travellers do not have a suitable place to isolate, the Quarantine Officer will direct them to a DQF to isolate for the remainder of their 14-day mandatory isolation.

[27] In addition to housing COVID-19 positive air travellers who do not have a suitable isolation plan, DQFs are for air travellers who are showing symptoms of COVID-19 upon arrival, those who arrive without an approved pre-departure test (*i.e.* a molecular COVID-19 test), or those who refuse to be tested upon arrival.

[28] On March 21, 2021, Order-in-Council PC 2021-75 was replaced by a virtually identical one: *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation, and Other Obligations)*, PC 2021-174, (2021) C Gaz, Part 1, Vol 144, No 14, 1499 [PC 2021-174], which was set to expire on April 21, 2021. PC 2021-174 has the same purpose and largely

mirrors PC 2021-75. Additionally, it sets out limited exceptions to the requirements for air travellers to stay at a GAA. These exceptions include persons entering Canada to receive essential medical treatment or those returning to Canada after having received essential medical treatment elsewhere, and persons entering Canada for the purposes of providing emergency services within 14 days of entry.

[29] Although PC 2021-174 and PC 2021-75 are necessarily related, the injunctive relief sought by the Applicants asks this Court to suspend PC 2021-174 pending the determination of their application on its merits, given that PC 2021-75 was repealed when PC 2021-174 came into effect. Specifically, the Applicants impugn the requirement to stay at a GAA while awaiting test results and the stipulation that certain individuals would have to go to a DQF upon arrival if they had symptoms of COVID-19, or had failed to obtain a molecular pre-departure test and/or refused to undergo a test upon arrival.

[30] At this juncture, a brief description of the individual circumstances of the Applicants will be useful, before turning to an analysis of the legal issues that arise.

D. *The Applicants*

[31] Barbara Spencer is a former resident of Ontario who moved to Mexico on a permanent basis in 2011 after her retirement. Since then, she has returned to Canada each year to visit family and friends. She was scheduled to return in June 2020, but the airline on which she had booked tickets declared bankruptcy. Ms. Spencer wants to return to Canada to see her family, most notably her first great-grandchild, and also because she has a medical concern and wants to

see her family doctor to discuss it. She says that she strongly fears for her safety and does not feel comfortable remaining at a federal facility.

[32] Sabry Mohammad Belhouchet is a resident of Ontario. His father passed away on January 15, 2021, and Mr. Belhouchet went to Algeria to attend to his father's estate and to help his mother through this difficult period. He had planned to return on or about April 1, 2021, subject to completing the arrangements for his father's estate and securing a suitable flight. He indicates that he objects to being required to submit to a COVID-19 test upon his arrival because he will have been tested prior to boarding his flight from Algeria, and again during the course of his travels back to Canada. He says that the fees associated with staying at a federal facility will create financial hardship for him as he has paid for travel expenses to and from Algeria and has not worked for the duration of his visit, which is approximately three months.

[33] Cindy Crane is a resident of Ontario who moved to La Paz, Mexico with her husband in the hope that the warmer climate would improve her chronic pain from certain health conditions. She typically spends summers in Canada and winters in Mexico. She left for Mexico in November 2019, expecting to return in spring 2020, but she has not been able to do so because of pandemic-related travel restrictions. Ms. Crane wants to return to Canada to visit her family and, in particular, because she needs to visit her doctor for some follow-up appointments relating to a cancer diagnosis she received. She says that she has safety concerns about staying at a federal facility and that the fee will impose an undue financial burden on her as a retiree.

[34] Norman and Denise Thomson are residents of Saskatchewan who travelled to their home in Mexico on October 31, 2020.When they left they understood that they would need to have a COVID-19 test prior to their return to Canada and that they would have to quarantine for 14 days

following their arrival. They initially planned to return in the first or second week of March to accommodate the quarantine requirements so that Mr. Thomson could commence his training on April 25 and would be able to safely resume his seasonal employment as a water bomber pilot for the Government of Saskatchewan. However, upon hearing that the requirements were changing, Ms. Thomson changed her plans and returned to Canada early in order to avoid the mandatory quarantine stay at a government-approved facility because her concerns about doing so had had a negative impact on her mental health. Mr. Thomson stayed past their initial return date because his physical presence was required in Mexico to finalize the purchase of a property. As of the date of the hearing, Mr. Thomson was still in Mexico.

[35] Dennis Ward is a resident of Alberta who went to his home in Mazatlán, Mexico on January 16, 2021. At the time he left, the rules required him to take a COVID-19 test prior to returning and to quarantine at his home for 14 days. He explains that he went to Mexico for his mental and physical health and to have dental work completed because it is less expensive there than in Canada. Mr. Ward had planned to return to Alberta once he had recovered from his dental surgery, but now faces the extra expense and restrictions associated with a mandatory stay at a government-approved facility before he is allowed to quarantine at home. Mr. Ward states that if these rules remain in place, he will look into the possibility of driving across the border because the land crossing rules do not impose the same costs or restrictions.

[36] Reid Nehring is a resident of Alberta who travelled with his wife to their second home in Mazatlán, Mexico on December 26, 2020. He had planned to return to Alberta in February to attend to some business-related issues, but was unable to do so because of flight cancellations and uncertainty about the rules. He says that he objects to having to quarantine upon his arrival at

the Calgary airport before returning to his home in Leduc, Alberta. He also objects to the government "insert[ing] a foreign object into [his] body under the guise of testing", when he will have had a PCR test just prior to his departure from Mexico.

[37] Michel Lafontaine is a resident of Quebec who went to Florida with his wife on December 29, 2020, intending to return towards the end of April 2021.He says they left Canada because they were alarmed by the increasingly dire statements by government officials about the risks of COVID-19, including concerns that the health care system might be overwhelmed by an upsurge in cases. While in Florida, Mr. Lafontaine and his wife have received both doses of a COVID-19 vaccine. Mr. Lafontaine states that they wish to return to Canada because they do not want to be in the United States for an extended period of time so as to be subject to the scrutiny of the Internal Revenue Service or the Canada Revenue Agency. They also wish to visit friends and renew prescription medication. Mr. Lafontaine objects to being forced to stay at a government-approved facility when he returns because he says these rules ignore the fact that he and his wife have been fully vaccinated at the time of their return.

[38] The final Applicant, like Ms. Thomson, filed evidence in support of the injunction application, but has since returned to Canada. Blain Gowing is a resident of Alberta who travelled with his wife to their second home in Mazatlán, Mexico on January 16, 2021. He says they were concerned with the alarming rise of COVID-19 in Alberta and felt safer being in Mazatlán because it has a very low COVID-19 rate and it has implemented several public health measures to control the spread of the virus. While they were in Mexico, Canadian airlines cancelled all direct flights between Canada and Mexico, so their only way home was to fly to the United States and from there to take a connecting flight to Canada. Shortly prior to the hearing,

counsel for the Applicants learned that Mr. Gowing had returned to Canada and had stayed at a government-approved facility while waiting for his test results; no evidence was submitted about his experience.

[39] In addition, the Applicants filed affidavits from Steven Duesing and Nicole Mathis, who are applicants in a companion proceeding. Both had left Canada and were required to enter a DQF when they returned because the COVID-19 tests they had obtained were not approved under the Order that was then in force (a prior version of the Order was in effect when they had returned, but it included the same terms being challenged here regarding a mandatory stay at a government-approved facility).

[40] Nicole Mathis is a resident of Alberta and she and her husband are pastors at their church. Each year they have recorded a music album that they distribute to their congregates; this music is produced in Dallas, Texas. Although their plans were somewhat disrupted by the pandemic, Ms. Mathis made arrangements to fly to Dallas to work with the music producers on an album; the singers remained in Edmonton and participated remotely. Ms. Mathis planned to fly to Dallas on January 24, 2021, and return to Canada on January 28, 2021. Prior to booking these arrangements, she confirmed that she would be required to take a COVID-19 test prior to her departure from Texas and that she would then be eligible for a reduced quarantine period under the International Border Testing Program had been implemented at the Calgary airport at that time. She took a COVID-19 test in Dallas, as planned, but when she arrived in Canada she was advised that the antigen test she had taken was not approved under the Canadian program, and she was therefore required to undergo a new test at her own expense and to remain in a DQF pending the results of that test.

[41] Ms. Mathis states that she asked what would happen if she did not go to the DQF and was advised by police officers that she would be detained and put into a police cruiser and escorted to the DQF. She had called her husband to tell him what was happening and she states that neither of them were advised of the name or location of the DQF. She was not offered the opportunity to speak with a lawyer. When she arrived at the hotel that was serving as the DQF, she called the PHAC and asked what would happen if she decided to leave the facility; she was advised that there was a penalty of up to six months incarceration and/or a fine of up to $750,000.

[42] In the end, Ms. Mathis decided to pay for a test that would deliver results within 12 hours, and she was able to obtain her negative test results later that night. However, there were no PHAC officials at the DQF by that time and so she had to remain in the facility overnight before she could be discharged. In her affidavit, Ms. Mathis states: “This ordeal has been very traumatic, as all my *Charter* rights were suspended and I was taken to a secret location where even my husband was not informed of my whereabouts. I was being guarded by a security guard and threatened with jail time and six figure fines if I did not comply. I feel abused and betrayed by my government” (AR pp 69-70).

[43] Steven Duesing is a resident of Ontario. On December 25, 2020, he travelled to South Carolina in the United States to visit his girlfriend, whom he had not seen since July 2020. He was planning to return on January 31, 2021. While Mr. Duesing was in the United States, the rules changed and he was required to have a COVID-19 test prior to his return. The Canadian websites he consulted did not advise which type of test was acceptable. He then contacted a general public health number in the United States and was advised of the two types of testing options. He made arrangements to have an antigen test, because it provided results faster than a

molecular PCR test. When Mr. Duesing arrived at the Toronto airport, he was advised that his COVID-19 test was not valid because it was not a PCR test, and that he had to take a PCR test and quarantine at a federal facility for 48 hours while awaiting the results of that test.

[44] Mr. Duesing says that his passport was taken from him and only returned when he boarded the vehicle taking him to the federal facility; he also states that he asked where he was being taken but was not informed of the name or location. He says that he witnessed others being treated similarly, including a young woman who was upset and in tears when she was told she would have to go to a DQF. Mr. Duesing asked what would happen if he chose not to board the shuttle to the DQF and he was told he would be arrested. He observed police officers, a police vehicle, and a court services vehicle nearby. Mr. Duesing then went to the DQF, which turned out to be a Radisson Hotel near the airport, where he stayed until he received his negative test result. During his two-night stay at the hotel, he says that he received substandard food and was told on several occasions not to take any pictures of the facility.

[45] Mr. Duesing explains his reasons for joining in the legal proceedings in the following way: “I decided to speak to the media and join this action because I do not want what happened to me to happen to other people…. I believe what happened to me was wrong, and it’s certainly not something I expected would ever happen in Canada…. I believe it is important for Canadians to know about these federal quarantine facilities and that’s why I have decided to speak out” (AR at p 88).

[46] This is the evidence submitted by the Applicants in support of their application.

[47] With this background, we turn to the legal issues in this case.

III. Issues

[48] The only issue at this stage of the proceeding is whether the Applicants have met their burden of establishing that it is just and equitable to issue an interlocutory injunction pending a full hearing of the merits of their *Charter* challenge to the Orders.

[49] It should be noted that the hearing of the Applicants' case on its merits, together with several other similar challenges, is now scheduled for June 1-3, 2021.

IV. Analysis

[50] The familiar three-part test for the grant of an interlocutory injunction was recently summarized by the Supreme Court of Canada in *R v Canadian Broadcasting Corp*, 2018 SCC 5 at paragraph 12 [*CBC*]:

> … At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
>
> [Footnotes omitted.]

[51] The three elements of the test are cumulative, but strength in one factor may overcome weakness on another (see *Monsanto v Canada (Health)*, 2020 FC 1053 at para 50 [*Monsanto*]). It is important to remember that an interlocutory injunction is equitable relief, and a degree of flexibility must be preserved in order to ensure that the remedy can be effective when it is

needed to prevent a risk of imminent harm pending a ruling on the merits of the dispute. This was reaffirmed in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paragraph 1, where the Supreme Court of Canada noted that "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case."

[52] There are certain special considerations that apply in cases like this one, where the claimants seek to suspend the operation of legal measures adopted pursuant to statute. The "careful balancing process" that must be undertaken in a case such as this was described by the Supreme Court of Canada in *RJR – MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR – MacDonald*] at pp 333-34:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation must be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly the final resolution of the dispute.

[53] As the Supreme Court of Canada stated in *Harper v Canada (Attorney General)*, 2000 SCC 57 [*Harper*] at paragraph 9: "[c]ourts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."

A. *Serious issue to be tried*

[54] In most interlocutory injunction cases, the "serious issue to be tried" threshold is not a high bar – it is often summarized as merely requiring the judge to make a preliminary assessment of the case to ensure that the claim is neither "vexatious nor frivolous" (*RJR – MacDonald* at p 337). There are exceptions, including where the interlocutory injunction would provide the same relief as sought at trial, such that granting it would "impose such hardship on one party as to remove any potential benefit from proceeding to trial" (*RJR – MacDonald* at p 338; see also *Monsanto* at paras 44 and 56).

[55] The Respondent submits that this case should be assessed against the higher standard of whether the Applicants have established that they are likely to prevail, because the Applicants seek the same remedy as they are pursuing in the underlying application – namely, an Order to suspend the operation of the requirement that incoming air travellers stay at a GAA or DQF while awaiting the results of their COVID-19 test.

[56] The Applicants contend that the lower threshold applies because the decision on this motion will not put an end to the litigation. They say that there is no doubt that their case, as well as the other similar challenges that are scheduled to be heard at the same time, will proceed whether or not they receive an interlocutory injunction. They also submit that it would be unfair to hold them to the higher threshold in light of the fact that the Respondent's evidence is "at its highest" in the sense that it has not been subjected to cross-examination. They urge that it would not be appropriate to engage in any serious assessment of the strength of their case at this stage and that doing so would unfairly prejudice their interests.

[57] In light of my findings on the two other elements of the test for an interlocutory injunction, as well as my overall assessment of the equities of the case, it is not necessary to engage in a lengthy review of the merits of the Applicants' case.

[58] The Respondent concedes that this is a "suspension" case and so the higher threshold that applies when a party seeks a mandatory injunction does not apply. While there is force to the Respondent's contention that a higher threshold should be applied at the first stage of the analysis, because granting the remedy the Applicants seek on this motion would in substance provide them with much of the relief they seek in the underling application, for the reasons set out below I am not prepared to dismiss the application on this basis alone.

[59] I accept that in the circumstances of this case, the strength of the Applicants' case must be a significant factor in the outcome of their motion for interlocutory relief (see *Monsanto* at para 57). However, it is not the only factor. In light of the early stage of the litigation, the fact that the underlying application will soon come on for a full hearing where the *Charter* issues can be fully presented and considered and the fact that I have found that at least one of the Applicants' arguments is worthy of further consideration, this is not an appropriate case to dismiss the application solely on the basis that they have not made out a sufficiently strong case on the merits for the purposes of the first stage in the interlocutory injunction test.

[60] Turning to a review of the substance of the claims, the Applicants argue that the Order infringes their rights under sections 6, 7, 9, 10(b), 11(d) and (e), as well as section 12 of the *Charter*. As will become evident below, I find that two elements of the Applicants' claim are sufficient to meet the threshold to establish a serious issue for the underlying application.

[61] To begin, section 7 of the *Charter* guarantees the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Respondent concedes that the mandatory quarantine provisions in the Orders requiring stays at DQFs or GAAs engage the Applicants' liberty interests under section 7, but claim that this is done in a manner that is consistent with the principles of fundamental justice.

[62] The Respondent points out that the jurisprudence has found that section 7 is fundamentally concerned with "capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a manner that runs afoul of our basic values" (*Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 96 [*Bedford*]). In *Bedford*, the Supreme Court of Canada identified the basic values against arbitrariness, overbreadth and gross disproportionality (see also *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 72 [*Carter*]).

[63] It is not necessary to conduct an exhaustive analysis of all of these elements of fundamental justice. The focus of the Applicants' attack under section 7 relates to the argument that the Order is arbitrary.

[64] The Applicants submit that the Order draws arbitrary distinctions between air travellers who are prepared and able to quarantine at home, and those arriving at the land border who pose similar risks but are not forced to pay to stay at a GAA while they await the results of their COVID-19 test. This would include individuals who fly to an American border city and cross the land border by car. They go further to argue that the arbitrariness of the Order is made even clearer when the treatment of air travellers is contrasted with the requirements imposed on

residents of Canada who actually test positive for COVID-19. Asymptomatic, law-abiding Canadians arriving by air are required to stay at a GAA for up to three days waiting for the results of their COVID-19 test, rather than being allowed to stay in the comfort and security of their own homes. At the same time, Canadians who have tested positive are not subjected to mandatory quarantine at a government-approved facility; instead they are simply required to quarantine at home.

[65] The Applicants pose this as a matter of trust: they say the Order shows that the Government of Canada has less trust in air travellers than it shows for Canadians arriving by car, or those already present here, and they argue that there is no evidence to support an Order that is based on a presumption that air travellers will not follow the rules.

[66] The Respondent argues that in *Bedford*, the Supreme Court of Canada ruled that arbitrariness under section 7 describes "the situation where there is no connection between the effect and the object of the law" (at para 98). To a similar effect, in *Carter* the Supreme Court of Canada found that "the principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person" (at para 83).

[67] Because there is a direct connection between the provisions requiring air travellers to stay at a GAA or DQF pending the receipt of their test results and the serious public health protection goal of reducing the importation and spread of COVID-19 and its variants into Canada, the Respondent submits that the Order is not arbitrary. The Respondent also argues that the Order is not overbroad because it does not "g[o] too far by sweeping conduct into its ambit that bears no relation to its objective" (*Bedford* at para 117). Finally, the Respondent says that the challenged

provisions are not grossly disproportionate because the measures are directly in response to a significant and potentially deadly public health threat, and therefore the restrictions are not so totally out of proportion to their purposes such that they cannot rationally be supported (*Bedford* at para 120).

[68] The Respondent contends that the Government of Canada determined that air travellers posed a greater threat of importing the virus than travellers arriving at the land border because most of those people were driving in their own personal vehicle and would proceed from the land border directly to their place of residence where they would be required to quarantine for 14 days. In contrast, many air travellers would either catch connecting flights to other locations in Canada or take public transportation to their place of residence; in either case, they would potentially expose other Canadians to the virus while en route to self-quarantine at home.

[69] The difference in the perceived risk posed by air and land travellers is a rational basis for the distinct requirements imposed on the two groups of travellers, and the Respondent argues that this is sufficient to show that the challenged measures do not contravene the principles of fundamental justice. The Respondent also argues that the fact that different provinces have not banned travel within or between provinces and that they do not require people who test positive for COVID-19 to quarantine at government-approved facilities is not an appropriate basis for comparison in a section 7 analysis of a federal measure, since these matters fall within provincial jurisdiction.

[70] At this stage of the case, I am not prepared to reject out of hand the Applicants' argument that their liberty has been constrained in a manner that is not in accordance with the principles of fundamental justice. The Respondent has conceded that the Applicants' liberty interests are

engaged by the challenged provisions, and I agree with that concession. Indeed, there can be little doubt that a government rule that requires individuals to go to, and to remain at, a particular location on pain of fine or jail will engage section 7 liberty interests.

[71] The question is whether the Applicants' argument that the law is arbitrary meets the threshold to support a "serious issue" at the first stage of the analysis. I find that it does meet this threshold, and I therefore reject the Respondent's argument that the motion should be dismissed on this basis alone. A law can be found to be arbitrary on a number of grounds. In *Bedford* and *Carter*, the focus was on the connection between the purpose of the law and its impact on section 7 rights, and in particular the question of whether the laws being challenged in these cases were overly broad because they swept into their purview conduct which fell outside of the asserted purpose of the provisions. That is not what the Applicants assert here.

[72] Instead, they point to the arbitrariness of a public health measure that treats two groups of travellers differently. They argue that the evidence does not show why this difference in treatment is justified, and therefore the measure should be found to be arbitrary. This is an argument that the law is under-inclusive – that it only punishes one group of people despite the fact that others who pose a similar risk are not subjected to the same restrictions on their liberty.

[73] It is neither necessary nor appropriate to pronounce on the merits of this argument at this early stage of the litigation and in view of the fact that the Applicants' case will proceed to a hearing notwithstanding the result of this motion. I simply note that an argument that a law is arbitrary because it is under-inclusive may be found to support a claim under section 7 of the *Charter*. In such a situation, it is not that the law is overbroad, the problem is that it is irrationally under-inclusive.

[74] At this stage, I find that the Applicants' argument that their section 7 liberty interests are infringed by the Order in a manner that does not comply with the principles of fundamental justice meets the threshold to support a finding that they have raised a serious issue.

[75] The Applicants also argued that the arbitrariness of the Order supported their claim under section 9 of the *Charter*, which states that "[e]veryone has the right not to be arbitrarily detained or imprisoned." They argue that the provisions in the Order forcing them to go to, and remain in, a GAA or DQF amount to detention and are arbitrary for the same reasons they put forward under their section 7 claim.

[76] The Respondent challenges both elements of the Applicants' section 9 claim, arguing that the quarantine measures are neither detention nor arbitrary. It has long been accepted that persons entering Canada will be subject to a number of screening measures at the border that may temporarily interfere with their independence and privacy, and according to the Respondent, the quarantine requirements in the Order are simply an extension of this. The requirement to stay at a GAA has no stigma attached to it, and is simply a public health measure akin to the routine process of entering Canada.

[77] Once again, it is not necessary to engage in a detailed analysis of this claim. I find that the Applicants' argument that the challenged measures impose requirements on air travellers that amount to detention, while similar restrictions are not imposed on travellers arriving by the land border is a distinction that contravenes section 9 because it is arbitrary, meets the threshold for establishing a serious issue. I repeat, however, that this is not – and should not be understood to be – a pronouncement on the merits of the argument; rather, it is a finding that the Applicants' argument on this ground should not be dismissed at this early stage of the proceeding.

[78] In light of my findings on the claims under sections 7 and 9, it is not necessary to analyze the Applicants' other *Charter* claims for the purposes of this motion.

[79] Based on my findings in regard to the Applicants' claims under sections 7 and 9, I will not dismiss the Applicants' motion because they have failed to establish a serious issue. Once again, it bears repeating that this is not a finding on the merits of these claims, because this will only be done after a full hearing on the merits of the arguments on the underlying applications.

[80] With this, we turn to a consideration of the final two elements of the test for an interlocutory injunction: whether the Applicants will suffer irreparable harm, and an assessment of the balance of (in)convenience.

B. *Irreparable Harm*

[81] The term irreparable harm refers to the nature of the harm rather than its scope or reach; it is generally described as a harm that cannot adequately be compensated in damages or cured (*RJR – MacDonald* at p 341). It has often been stated that this harm cannot be based on mere speculation, it must be established through evidence at a convincing level of particularity (see *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31 [*Glooscap*]; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16; *Newbould v Canada (Attorney General)*, 2017 FCA 106 at paras 28-29). In addition, the evidence must demonstrate a high likelihood that the harm will occur, not that it is merely possible. This will obviously depend on the circumstances of each case (see the discussion in *Letnes v Canada (Attorney General)*, 2020 FC 636 at paras 49-58).

[82] However, equitable relief must retain its necessary flexibility and it must be admitted that some forms of harm do not readily admit of proof, especially in interlocutory proceedings where speed is of the essence and the ability to prepare a complete evidentiary record is necessarily somewhat limited. What is required, at the end of the day, is a "sound evidentiary foundation" for the assessment of the harm; mere assertions or speculation on the part of an applicant will never be sufficient (see *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395 at para 60; *Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC 1116 at paras 87-88).

[83] In addition, the jurisprudence is clear that mere allegations of *Charter* violations are not sufficient to establish irreparable harm (*International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 33). In *Professional Institute of the Public Service of Canada v Canada (Attorney General*), 2015 FC 1101, Justice Catherine Kane confirmed at paragraph 154 that " irreparable harm must be established independently of arguments regarding the constitutionality of the measure at issue and cannot be inferred based on a potential Charter breach that has yet to be determined" (see also *Right to Life Association of Toronto and Area v Canada (Employment, Workforce and Labour)*, 2018 FC 102 at paras 59-64).

[84] The Applicants submit that their *Charter* rights will be breached in a manner that can never be repaired, and this constitutes irreparable harm.

[85] Although the Applicants' written submissions advanced arguments about the harms experienced by Mr. Duesing and Ms. Mathis, these cannot be considered in this motion because these individuals are not applicants in this proceeding. In *RJR – MacDonald*, the Supreme Court

of Canada ruled that in regard to irreparable harm, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied…" (at p 341). This has recently been affirmed by the Federal Court of Appeal in two recent decisions: *Air Passengers Rights v Canada (Transportation Agency)*, 2020 FCA 92 at para 30 (leave to appeal to SCC refused, 39266 (23 December 2020); and *Arctic Cat, Inc v Bombardier Recreational Products Inc*, 2020 FCA 116 at para 32.

[86] The Applicants in this motion submit that they will suffer irreparable harm in the form of mandatory detention in a federal facility with questionable safety and COVID-19 protocols. They say that the loss of their *Charter* rights will lead to "devastating emotional, relational, and spiritual harm that categorically cannot be financially compensated and is irreparable" (Written Representations of the Applicants at para 41, AR at p 122).

[87] The Applicants argue that they travelled for reasons that were essential to them, and "they now face an Order that suspends several of their *Charter*-protected rights by detaining them against their will and adds insult to injury by forcing them to pay for their own detention" (Written Representations of the Applicants at para 42, AR at p 122).

[88] The Respondent meets this argument in several ways. First, the Respondent notes that some of the Applicants will not be returning to Canada between the date of this motion and the hearing of the underlying application. For these individuals, an injunction is not necessary; any harm they experience can be dealt with at the hearing on the merits. They also note that two of the remaining Applicants (Ms. Thomson and Mr. Gowing) have already returned to Canada, and they have already complied with the challenged requirements in the Order. An injunction would serve no purpose in preventing any harm to them.

[89] Other Applicants may be returning to Canada after the current Order expires, and so any alleged harm to them remains speculative because it is not possible to know what rules will apply on the date they actually arrive in Canada.

[90] Finally, the Respondent argues that any harm the Applicants may experience on their return to Canada was avoidable, because they travelled despite the increasingly strong warnings against international travel from public officials, including the Prime Minister of Canada. These statements advised Canadians not to travel, to return home if they were already abroad, and to cancel any travel plans they may have made. The Respondent notes that several of the Applicants travelled mere days after such warnings were issued, and therefore any impediment they may face upon returning to Canada cannot constitute irreparable harm because the Applicants knowingly took a risk, and now face a harm that they could have avoided.

[91] I find that the Applicants have not met their burden of showing that they will experience irreparable harm as a result of complying with the challenged provisions of the Orders.

[92] In regard to the Applicants who have already returned to Canada (Ms. Thomson and Mr. Gowing), there are two problems. First, given that they have already returned to Canada, the injunctive relief sought will serve no practical purpose. Second, if their *Charter* claims are upheld on the merits, they may be able to establish a claim for *Charter* damages for the harm associated with the cost of paying for the GAA stay (see *Henry v British Columbia (Attorney General)*, 2015 SCC 24). In that sense, these harms for which they may recover *Charter* damages are, by definition, not “irreparable” as that term is understood in the context of an interlocutory injunction.

[93] For the other Applicants, I am not prepared to accede to the Respondent's argument that the feared harms are speculative because the current Order will likely have expired before they return to Canada. There is no indication – and counsel for the Respondent did not suggest – that the current Order is likely to be repealed or significantly modified over the short term. Instead, all of the evidence before me suggests that the risks of importing the previously circulating COVID-19 virus or a VOC into Canada remain high, and in regard to other emerging variants it may be that new risks will present themselves. In the face of this evidence, it is not tenable to argue that the alleged harm is entirely speculative.

[94] However, I do agree with the Respondent's argument that the Applicants have failed to lead evidence to support their claim that being required to stay at a GAA or DQF while they wait for the results of their COVID-19 test will cause them "devastating emotional, relational, and spiritual harm". The jurisprudence is clear: the harm alleged must be "real, definite, unavoidable harm—not hypothetical and speculative harm— that cannot be repaired later" (*Canada (Attorney General) v Oshkosh Defense Canada Inc*, 2018 FCA 102 at para 25). The Applicants' evidence does not address this aspect of the harm in any detail, and it is not self-evident why a short stay in a hotel prior to spending a further period in quarantine at home will inevitably cause such harms.

[95] In *Glooscap*, the Court of Appeal found that the applicant's inability to establish an unavoidable harm was fatal to its application. Unavoidable was defined as "irreparable harm that will be caused by the failure to get a stay, not harm caused by its own conduct in running a clearly-known risk that it actually knew about, could have avoided, but deliberately chose to accept" (*Glooscap* at para 39).

[96] Glooscap had argued that if its charity registration status was revoked, it would suffer irreparable harm. However, the Court concluded that Glooscap was warned at an early stage that it might lose its advantageous charitable status if it associated with a tax shelter and chose to continue its association with the tax shelter despite knowing of the risks. The Court also noted that:

> If Glooscap blundered itself into involvement in this tax shelter, oblivious to any real risk, the irreparable harm might not be fairly laid at its feet. Similarly, circumstances such as mistaken advice, mistake as to the facts, trickery, duress or unauthorized conduct by someone wrongly purporting to act for Glooscap might cause a different view to be taken of the matter. But in this case none of these circumstances are present.

(*Glooscap* at para 43; see, to a similar effect, *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at paras 153-163.)

[97] In this case, it is relevant that the Applicants were all exercising their *Charter* right to leave Canada and seek to exercise the same right to return. However, it cannot be ignored that they each acknowledge that they were aware of certain restrictions and requirements that applied when they left or that came into effect while they were away. Indeed, several point to the alarming coverage of the impact of the pandemic in Canada as one of the elements that spurred them to leave the country. None of them can now claim complete surprise that the Government of Canada has imposed more stringent public health measures to returning travellers in response to the evolving nature of the threat posed by COVID-19 and the VOC.

[98] For all of these reasons, I do not find that the Applicants have established irreparable harm on the evidence before me.

C. *Balance of Convenience*

[99] The third stage of the test "requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits" (*CBC* at para 12). The expression often used is "balance of inconvenience" (*RJR – MacDonald* at p 342). The factors that must be considered in assessing this element of the test are numerous and will vary with the circumstances of each case; it is at this stage that any public interest considerations may come into play (*RJR – MacDonald* at pp 342-43).

[100] This element of the test takes on special significance in a case involving a request to suspend the operation of a law, regulation, or Order-in-Council. In *Harper*, the Supreme Court of Canada emphasized that "in assessing the balance of convenience, the motions judge must proceed on the assumption that the law… is directed to the public good and serves a valid public purpose" (at para 9). The Court noted that this assumption "weighs heavily in the balance" and that "[c]ourts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter" (*Harper* at para 9).

[101] The Applicants do not dispute this general principle, but point out that the presumption described in *Harper* is rebuttable, citing *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 163 [*British Columbia (AG)*]). The Applicants say that the balance of convenience weighs in their favour, for reasons explained in their written submissions:

> 45. The Applicants, and countless Canadian residents have been and will continue to be detained in federal facilities while their *Charter* rights are suspended, suffering irreparable harm if the injunction is refused pending a decision on the merits. Not only the plethora of individuals that are directly affected by this, but our democracy will be grossly affected if the Government continues to violate the *Charter* rights of Canadians with impunity and without justification.
>
> 46. This is especially true considering the availability of a reasonable alternative as prescribed by section 58 of the *Quarantine Act*, which allows for detention only when there is no reasonable alternative. In this case, all Applicants have a reasonable plan to quarantine at their private residences…. Further, […] the Order already allows for the Government to monitor people who are quarantining at home through daily reporting, recording their address, and doing random checks where necessary.

[102] The Applicants contend that the mandatory hotel quarantine rules are not data-driven and therefore are not justified in a free and democratic society. They say that the evidence does not show that quarantining at a hotel is more effective than quarantining at one's own private residence. The Applicants also suggest that placing otherwise-healthy asymptomatic Canadians in a hotel setting where they may be in proximity to other travellers who are carrying COVID-19 may pose a greater risk than if these people were allowed to proceed directly to their own residences.

[103] The Applicants reject the Government of Canada's reliance on the precautionary principle. They argue that after more than a year of dealing with COVID-19 there is sufficient data on which to make policy decisions such that the precautionary principle is no longer applicable. As well, the Applicants point to certain media reports about a sexual assault allegation at a quarantine facility in support of their argument that the measures unjustifiably interfere with *Charter* rights while doing nothing to prevent the spread of COVID-19.

[104] Finally, the Applicants argue that the Order is not based on scientific evidence, that the Government of Canada has not made available empirical evidence to support the decision to detain returning travellers as a means of decreasing the spread of COVID-19, and therefore the public interest lies in protecting the *Charter* rights of law-abiding Canadians who simply want to return home. They say that it is against the public interest to fail to protect the *Charter* rights of "thousands of Canadians, who are being forced into federal quarantine facilities, at a great personal, financial, and emotional cost, based on what appear to be political decisions that are not based on data or evidence" (Written Representations of the Applicants at para 58, AR at p 126).

[105] The Applicants argue that the balance of convenience weighs in their favour, because they have rebutted the presumption against suspending the operation of democratically enacted legislation prior to the determination of its constitutionality.

[106] I am not persuaded.

[107] The harms the Applicants say they will suffer were discussed in the previous section. It is not necessary to repeat that analysis here. At this stage, it is sufficient to note that the liberty interest that the Applicants identify as part of the harm they will suffer is a significant interest, and, like Justice Andrew Little in *Monsanto*, "I accept that loss of liberty even for a short period is a factor of considerable force in the assessment of balance of convenience" (at para 98).

[108] The Applicants claim that the harm is increased because they will have to pay for their mandatory stay. If the injunction is refused, some of them have not yet returned to Canada, and so if they decide to come back between the date of this motion and the determination of the

underlying applications, they will likely be required to pay to stay at a GAA while awaiting the results of the COVID-19 test they will take upon arrival, or they will go to a DQF if they have symptoms or refuse to take a COVID-19 test. If they go to a GAA, they will be forced to prepay for a three –night stay; if they go to a DQF, there will be no charge to them.

[109] The Applicants also claim that their fears are exacerbated by the prospect of being forced to go to a secret government-approved facility where they may be exposed to risks to their personal safety or forced to mingle with other travellers who may be infected with COVID-19.

[110] I agree with the Respondent that the evidence does not support a finding that there is any meaningful risk to personal safety associated with staying at a GAA or DQF. The evidence shows that the facilities are equipped with multiple mechanisms to lock doors, as well as security personnel present on-site. The allegation of sexual assault relating to a DQF in Quebec is an isolated incident, which is the subject of a criminal investigation, and there is no evidence that COVID-19 has been spread within these facilities.

[111] In regard to GAAs, the Applicants' fear of being sent to an undisclosed location is undermined by the fact that the Applicants will be given the opportunity to book the particular hotel at which they will stay and so they will know in advance the name and location of the facility in which they will be staying. In respect of DQFs, while the location is not disclosed in advance, travellers will know the location once they get there because it is a hotel facility. Travellers are asked to not communicate the location of the DQF more broadly in order to ensure the safety and security of individuals staying and working there, in light of the experiences of demonstrators appearing to protest measures aimed at reducing the spread of COVID-19.

Individuals staying in a DQF have access to telephones, Wi-Fi, and their own personal devices, so they will be able to contact family or friends if they choose to do so.

[112] Turning to the wider public interest, the evidence demonstrates why the challenged measures were adopted. I find that the evidence amply supports the Respondent's position that the challenged measures provide an additional layer of protection against the importation and spread of COVID-19 and its variants into Canada.

[113] Specifically, I reject the Applicants' arguments regarding the precautionary principle. The precautionary principle is a foundational approach to decision-making under uncertainty, that points to the importance of acting on the best available information to protect the health of Canadians. The Order is a public health measure that was adopted based on available scientific evidence from Canada and abroad, and it gives effect to the precautionary principle in a manner that reflects the Government of Canada's overall assessment of the risks posed by the previously circulating virus and variants, and the lack of alternatives to mitigate it given the current state of knowledge of the virus.

[114] Viewed in light of the precautionary principle, the fact that the Order may not provide perfect protection is not particularly significant. The evidence shows that the challenged measures are a rational response to a real and imminent threat to public health, and any temporary suspension of them would inevitably reduce the effectiveness of this additional layer of protection. This, in turn, would have a significant – perhaps deadly – effect on the wider Canadian public, based on the experience thus far.

[115] The crux of the Applicants' argument against the challenged measures is that there is a reasonable alternative that will not jeopardize public health – namely, allowing air travellers to quarantine at home. The Applicants do not dispute the general quarantine requirement, nor do they take issue with the requirement that travellers demonstrate that they have a suitable quarantine plan. Instead, the Applicants all submit that they each have such a plan and are law-abiding citizens who can be trusted to follow it.

[116] The core of the Respondent's position on this is that the evidence shows that otherwise well-meaning, asymptomatic individuals have imported and spread the COVID-19 virus and variants into Canada, despite the prior rules requiring pre-departure testing as well as a 14-day quarantine at home.

[117] The building blocks of the Government of Canada's analysis that led to the adoption of the challenged measures include the following elements:

- COVID-19 is a potentially life-threatening, respiratory disease that can be spread by asymptomatic persons during the initial 14-day period after contact with the virus. Therefore, a 14-day quarantine measure was adopted to slow the importation of the virus into Canada;
- The emergence of the B.1.1.7 variant, as well as other VOC, and the evidence suggesting these VOC were both more transmissible and possibly more serious than the previously circulating virus indicated that further measures were required. This included instituting a requirement for pre-departure testing for incoming travellers;
- Evidence emerged that even with pre-departure testing, approximately 1-2% of incoming travellers continued to test positive on arrival. In practical terms, this meant that on every

international flight with 100 passengers, on average one or two were testing positive for the virus;

- The evidence showed that approximately two thirds of positive tests showed up on arrival, with the remainder of positive tests at some point during the quarantine period;
- In February 2021, the European Union Agency for Law Enforcement Cooperation distributed a warning on the illicit sale of false negative COVID-19 test certificates in the United Kingdom, France, and Spain. In addition, some countries lacked the facilities to carry out pre-departure testing;
- In addition, evidence showed that well-meaning people quarantining at home continued to pose a risk of infecting others. A study done of passengers entering Canada through the Calgary International Airport and the Coutts land crossing showed that 359 individuals who tested positive on arrival and then quarantined at home had contact with 436 people while they were in quarantine and supposed to be isolating from others;
- It is not yet fully understood whether individuals who have been fully vaccinated can still become infected and spread the virus, even if they do not become sick themselves; and
- New variants continue to emerge, and the international medical community continues to review the data to determine which, if any, may evolve into VOC (in the sense that they are more transmissible and/or more serious than the previously circulating virus).

[118] The Respondent underlines one particularly tragic circumstance in support of its argument that the challenged measures represent an important public health response to a potentially deadly virus. In January 2021, a COVID-19 outbreak was declared at the Roberta Place Facility, a long-term care home in Barrie, Ontario. In that instance, it was discovered that an employee at the facility contracted the B.1.1.7 variant from a returning traveller who did their

14-day quarantine in the same household as the employee. As a result, and reflecting the danger posed by the more highly transmissible variants, all the residents and 105 of the employees at Roberta Place were infected. As of February 25, 2021, 71 deaths had resulted from that outbreak.

[119] The Applicants submit that this is not a persuasive example, because under the Order, a returning traveller is now prohibited from quarantining at home if there is a health care provider living in the same residence. That does not, however, blunt the force of the Respondent's argument that this is an example of why the precautionary principle supports the adoption of stricter measures for returning air travellers. It is precisely because of the uncertainty associated with the previously circulating virus and its variants that the Government of Canada has adopted stricter rules over time, as new evidence of emerging risks has come to light.

[120] In response to this evolving threat, and taking into account international evidence from countries that had already adopted stricter rules for incoming travellers, the Government of Canada adopted new rules, including the challenged measures requiring quarantine at a GAA or DQF pending the results of a COVID-19 test travellers were required to take upon arriving in the country.

[121] This brief summary of the evidence provided by the Respondent demonstrates both the urgency of the situation and the importance of taking steps to prevent or slow the spread of COVID-19 and the VOC. The fact that these measures may not be a perfect defence, and that there is evidence that the VOC are already in Canada, may be regrettable from a public policy perspective, but is not particularly relevant in assessing the balance of convenience. There is ample support in the evidence for the Respondent's assertion that any suspension or disruption of the existing regime would have a serious, immediate negative impact on public health.

[122] In my view, the evidence leads inexorably to the conclusion that the balance of convenience weighs heavily in favour of the Respondent.

V. Conclusion

[123] At the end of the day, the key question before me is whether it is "just and equitable" to grant the interlocutory injunction.

[124] I accept without reserve the Applicants' reminder that in a time of emergency, the role of an independent judiciary in safeguarding the rights and freedoms guaranteed to Canadians by the *Charter* takes on additional importance. History demonstrates why the bulwark of the robust protection of *Charter* rights by an independent judiciary is so important in times of crisis.

[125] A public health emergency, like the global pandemic caused by COVID-19, is in one sense simply another emergency. However, it must also be recognized that it is a type of situation that can inspire irrational fears and passions, which may in turn provoke a government to adopt excessive measures that trench unduly on the rights and freedoms of individuals. It is necessary, therefore, to subject government rationale for any emergency measures to a degree of scrutiny that is proportional to the risk that *Charter* rights may have been impaired by actions based on irrational fears rather than the careful weighing of competing interests based on the evidence.

[126] One consideration in deciding whether to suspend a measure because it tramples on *Charter* rights is whether it is contained in a law, duly enacted after public debate by Parliament or a legislature, or it is a type of legal measure that is adopted without such public scrutiny (*RJR*

– *MacDonald* and *Harper* both involved challenges to legislation). Another factor is the impact of the measure and the degree to which it has already been implemented, including the demonstrable impact of the measure on rights and freedoms and whether it addresses an urgent situation (see for example *British Columbia (AG)*; *National Council of Canadian Muslims (NCCM) v Attorney General of Québec*, 2018 QCCS 2766). As in all cases involving interlocutory relief, each case will turn on its particular facts.

[127] For the reasons set out above, I find that it would not be just or equitable to grant the interlocutory injunction in this case. I do not doubt that the Applicants, and other travellers, may be vexed and inconvenienced by the requirement to pay to stay at a hotel while they wait for the results of their COVID-19 test. However, I do not accept that doing so exposes these travellers to any significant security risk, given the evidence of the measures that have been put in place at these facilities.

[128] Against this, however, lies the very real risk that some of these travellers will unknowingly bring into Canada a potentially deadly virus, or one of the newly-emerging, more transmissible and perhaps more dangerous variants of concern. The evidence shows that the virus can be spread by asymptomatic people, that some travellers who test negative 72 hours prior to their flight will test positive when they arrive in Canada, and that well-meaning individuals who quarantined at home for 14 days nevertheless had contact with a great number of others and thereby, perhaps spread the virus during that time. This evidence amply demonstrates that the public interest lies in not suspending the challenged measures.

[129] For all of the reasons set out above, the Applicants' motion for an interlocutory injunction is dismissed.

[130] Neither party sought their costs, and in the circumstances no costs are awarded.

ORDER in T-340-21

THIS COURT ORDERS that:

1. The Applicants' motion for an interlocutory injunction is dismissed.

2. Each party shall bear its own costs.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-340-21
STYLE OF CAUSE:	BARBARA SPENCER, SABRY BELHOUCHET, BLAIN GOWING, DENNIS WARD, REID NEHRING, CINDY CRANE, DENISE THOMSON, NORMAN THOMSON, and MICHEL LAFONTAINE v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE IN OTTAWA, ONTARIO, CALGARY, ALBERTA, AND WINNIPEG, MANITOBA
DATE OF HEARING:	APRIL 14, 2021
ORDER AND REASONS:	PENTNEY J.
DATED:	APRIL 23, 2021

APPEARANCES:

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Sharlene Telles-Langdon Sharon Stewart Guthrie Mahan Keramati	FOR THE RESPONDENT

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