

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**CANADIAN CONSTITUTION FOUNDATION,
SHANE O'NEILL, TOMISLAV ALEXANDER RADONJIC,
YANN LE HERITTE, WILLIAM HARPER FORMAN III and
CRISTINA PAULA TEIXEIRA**

Applicants

-and-

ATTORNEY GENERAL OF CANADA

Respondent

**FACTUM OF THE MOVING PARTIES,
CANADIAN CONSTITUTION FOUNDATION,
SHANE O'NEILL, TOMISLAV ALEXANDER RADONJIC,
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1. The Applicants seek urgent injunctive relief in this *Charter* challenge to the provisions of a federal Order in Council by which air travellers entering Canada with a negative COVID-19 test and a suitable quarantine plan must nevertheless quarantine in government-approved accommodation for up to three days, at their own expense.
2. The Applicants meet all three criteria for an interim injunction. There is a serious issue to be tried; the provisions in question deprive the Applicants of their liberty and mobility rights, and

thus engage ss. 6(1), 7, 9 and 12 of the *Charter*. There are real questions as to the application of s. 1 of the *Charter*, including whether less restrictive means like home quarantine are sufficient.

3. If an injunction is denied, the individual Applicants will suffer irreparable harm, both in terms of harm that cannot be quantified and monetary harm that is unlikely to be recovered if the provisions at issue are indeed unconstitutional. With respect to the former, multiple Applicants have cancelled or delayed travel for compassionate reasons due to the hotel quarantine rules. The consequences are intensely personal and cannot be quantified. As for the latter, for those Applicants that will travel despite the Order-in-Council, it is not at all clear that they will be entitled to *Charter* damages – a unique public law remedy – if the Application succeeds on the merits.

4. Finally, this is a rare case in which the public interest (and, by extension, the balance of convenience) favours the Applicants. Whereas the harms flowing from the hotel quarantine requirements are known and certain, the public health benefits of the requirements are entirely speculative. The federal government has acknowledged the lack of data supporting hotel quarantine. In fact, there are data and reasons to believe that home quarantine is *better* than hotel quarantine from a public health perspective. In any event, if the injunction is granted, only travellers entering Canada with a negative COVID-19 test and a suitable 14-day home quarantine plan will avoid hotel quarantine.

I. FACTS

(a) The Order in Council

5. On February 14, 2021, the Governor in Council, on the recommendation of the federal Minister of Health, made Order in Council 2021-0075, *Minimizing the Risk of Exposure to*

COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations) (the “Order”). The Order was made pursuant to s. 58 of the *Quarantine Act*, S.C. 2005, c. 20.

6. With the exception of s. 1.3(a)(i) and ss. 15 through 30 of the Order (which came into force on February 21, 2021), the Order came into force on February 14, 2021, the day it was made.

7. Subject to its exceptions, the Order requires all persons entering Canada without symptoms of COVID-19 to obtain a COVID-19 test prior to entry and to quarantine themselves for a 14-day period upon arrival.

8. In addition, subject to limited exceptions, every person who enters Canada *by aircraft* must, before boarding their flight, provide evidence of prepaid accommodation allowing the person to remain in quarantine at a government-authorized accommodation (“GAA”) for a three-day period beginning upon entry into Canada.¹

9. Also subject to limited exceptions, every person who enters Canada *by aircraft* without signs and symptoms of COVID-19 must immediately quarantine at a GAA in accordance with the instructions provided by a screening officer or quarantine officer, and must remain in quarantine until receiving the result of a COVID-19 test in accordance with the Order.² Unless the GAA is provided by the Government of Canada, it must be paid for by the traveller.³

¹ Order in Council P.C. Number 2021-0075, *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)* (the “Order”), s. 1.2(1)(a)(ii)(B), Moving Parties’ Motion Record (“MR”), Tab 3A.

² Order, s. 3(1)(a), MR, Tab 3A

³ Order, s. 3(1.3), MR, Tab 3A.

10. The combined effect of ss. 1.2(1)(a)(ii)(B), 3(1)(a) and 3(1.3) of the Order (the “Hotel Quarantine Requirements”) is to force, subject to limited exceptions, all non-symptomatic persons entering Canada by aircraft to quarantine in a GAA at their own expense.

(b) The Applicants

11. The Applicant, the Canadian Constitution Foundation, is an independent and non-partisan registered Canadian charity that defends the constitutional rights and freedoms of Canadians, including before the Courts. The Canadian Constitution Foundation has been active throughout the COVID-19 pandemic to help ensure that government intervention is reasonable based on the scientific evidence and interferes with the rights of Canadians only to the extent necessary and justifiable.⁴

12. The individual Applicants include citizens of Canada who have travelled outside of Canada, wish to travel outside of Canada or intend to imminently travel outside of Canada, all for compassionate reasons, and who must return to Canada by aircraft, but cannot or do not wish to quarantine upon return in a GAA at their own expense.

13. At least two of the individual Applicants have cancelled or delayed travel for compassionate reasons due to the Hotel Quarantine Requirements. One Applicant, Tomislav Alexander (TJ) Radonjic, has delayed travel to the United States where his wife requires surgery and assistance with basic tasks owing to a workplace injury.⁵ TJ has been supporting both himself

⁴ Affidavit of Christine Van Geyn sworn March 14, 2021 (“Van Geyn Affidavit”), paras. 2-4, MR, Tab 3.

⁵ Affidavit of Tomislav Radonjic sworn March 11, 2021 (“Radonjic Affidavit”), paras. 4-5, MR, Tab 4.

and his wife since her injury prevents her from working.⁶ Another, Yann Le Heritte, has delayed travel to France where his mother – who is 92 years old and suffers from dementia – has just returned from hospital with a serious lung infection.⁷ Yann is his mother’s legal guardian.⁸ A third, William Forman, does plan to travel to see his father in New Orleans, who has stage-four lung cancer, but the cost of hotel quarantine is a substantial burden for him and his family.⁹

(c) Lack of data to support the Hotel Quarantine Requirements

14. On March 10, 2021, the federal Ministers of Health and Public Safety appeared at the House of Commons Standing Committee on Public Safety and National Security. The Minister of Health was asked whether the Minister had data showing that hotel quarantine is a more effective public health policy than home quarantine together with testing.

15. The Minister responded as follows:

I will just say this. The data is incomplete internationally. We are, as a world, trying to figure out what the best approach is to prevent the importation of COVID-19 and the accommodation of quarantine and testing. It is understudied [...] the data is incomplete in terms of what combination of measures are needed.¹⁰

⁶ Radonjic Affidavit, para. 7, MR, Tab 4.

⁷ Affidavit of Yann Le Heritte, sworn March 11, 2021 (“Le Heritte Affidavit”), paras. 4-6, MR, Tab 5.

⁸ Le Heritte Affidavit, para. 2, MR, Tab 5.

⁹ Affidavit of William Harper Forman III sworn March 12, 2021, paras. 4-7, MR, Tab 6.

¹⁰ Canada, Parliament, House of Commons, Standing Committee on Public Safety and National Security, Unedited Transcript of Evidence (March 10, 2021) (“Standing Committee Evidence”), MR, Tab 3B, pp. 132-33.

16. Later, the Minister again acknowledged the lack of complete data with respect to the Hotel Quarantine Requirements:

What I'm saying is that the data is incomplete to determine the best approach at the border to manage COVID-19. We do know that mandatory quarantine has been an essential component of controlling COVID-19 domestically, and we do know that mandatory quarantine has reduced significantly the infiltration of COVID-19.¹¹

17. A physician and scientist affiliated with Toronto General Hospital and the University of Toronto – invited so that the Committee would hear from an independent witness¹² – agreed with the Minister's position on the lack of data:

How helpful is this? How helpful are the quarantine hotels? Emerging data will answer this and address if we truly are getting incremental benefit from them and, if so, how much [...] I would imagine there would be no binder full of data, because that data either does not exist or is in the process of being collected [...] To my knowledge, there has not been a head-to-head comparison [of home quarantine and hotel quarantine].¹³

18. Also at the Standing Committee on Public Safety and National Security, at least one Public Health Agency of Canada ("PHAC") senior official appeared to suggest that home quarantine is to be preferred over hotel quarantine. That official told the Committee that although certain other

¹¹ Standing Committee Evidence, MR, Tab 3B, p. 138.

¹² Standing Committee Evidence, MR, Tab 3B, p. 163.

¹³ Standing Committee Evidence, MR, Tab 3B, pp. 142, 148, 160.

jurisdictions are using hotels for the entire period of quarantine, “[i]n Canada, we prefer the people quarantining at home for the 14 days being the best situation for quarantine.”¹⁴

(d) Hotel quarantine in practice

19. The Applicants’ evidence demonstrates that, in practice, there are real risks associated with hotel quarantine – both in Canada and in jurisdictions that previously implemented hotel quarantine.

20. The evidence of one of the Applicants who has quarantined at a GAA is that dozens of guests were congregating in the hotel lobby with minimal social distancing, creating an environment of “complete pandemonium”. Not all of the guests at the hotel were wearing masks.¹⁵

21. The evidence from other jurisdictions is equally or more worrisome; several outbreaks in Australia and New Zealand – including Victoria’s second-wave outbreak that led to nearly 20,000 cases and a 112-day lockdown – have been traced to hotel staff who unknowingly contracted COVID-19 at quarantine hotels and then introduced it into the community.¹⁶ The risk is particularly acute where quarantine hotels are located in dense urban centres.

22. Guest-to-guest transmission within quarantine hotels has also been reported.

¹⁴ Standing Committee Evidence, MR, Tab 3B, p. 172.

¹⁵ Affidavit of Cristina Paula Teixeira, to be sworn, para. 14, MR, Tab 8.

¹⁶ Grout, Leah et al., “Estimating the Failure Risk of Hotel-based Quarantine for Preventing COVID-19 Outbreaks in Australia and New Zealand” (19 February 2021), MR, Tab 3E, pp. 201-03.

II. ISSUES & LAW

23. The issue on this motion is whether interim injunctive relief should be granted to the Applicants based on the tripartite test set out in *RJR-MacDonald*. For the reasons that follow, the Applicants satisfy all three criteria for an injunction.

(a) The Application raises a serious issue to be tried

24. The first of the *RJR-MacDonald* factors considers whether the Applicants' matter raises a serious issue to be tried. In *Charter* cases, this factor requires only that the case not be frivolous or vexatious.¹⁷ The threshold is a low one.¹⁸ Although a higher standard applies in certain circumstances, those circumstances are "exceedingly rare"¹⁹ and do not arise here.

25. The Application easily satisfies this first element of the test. The Order effectively holds air travellers entering Canada, including Canadian citizens, against their will for a period of up to three days. It does so even where those travellers have a suitable home quarantine plan and a negative COVID-19 test prior to boarding their flight. Legislation of this nature plainly engages a number of constitutional rights, including mobility rights (the right to enter and leave Canada) and legal rights (the right to liberty, the right not to be arbitrarily detained and the right not to be subjected to cruel and unusual treatment).

26. There is good reason to believe that if any of these constitutional rights is engaged, the Hotel Quarantine Requirements will not survive scrutiny under s. 1 of the *Charter*. In particular,

¹⁷ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ["*RJR*"] at 337 [[RJR-MacDonald Inc. v. Canada \(Attorney General\)](#)].

¹⁸ *RJR* at 337.

¹⁹ *RJR* at 348.

there is limited or no evidence that hotel quarantine is better than home quarantine coupled with COVID-19 testing. Even if such evidence existed – or, alternatively, if hotel quarantine requirements were based on the precautionary principle – other, less restrictive means are apparent to achieve the same public health objective. For example, if quarantine at a GAA were at the government’s expense rather than the traveller’s, those Applicants who have cancelled or delayed their travel would not have been forced to do so.

27. Whether or not constitutional rights have been violated, and, if so, whether the violations are justified under the *Charter*, are questions to be determined on the Application on the merits. It is nevertheless clear that these are serious questions to be determined.

(b) The Applicants will suffer irreparable harm if the injunction is denied

28. The second *RJR-MacDonald* factor requires an Applicant to show that it will suffer irreparable harm if the injunction is not granted. The issue is whether a refusal to grant relief will “so adversely affect the applicants’ own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.”²⁰ It is not the magnitude of the harm that is relevant; it is the nature of the harm. Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured (for example, because the applicant cannot obtain damages from the respondent).²¹

29. Here, both types of irreparable harm will flow to the Applicants if the injunction is denied. First, with respect to harm that cannot be quantified, multiple Applicants have cancelled or delayed travel for compassionate reasons. They have done so because of the Hotel Quarantine

²⁰ *RJR* at 341.

²¹ *RJR* at 341.

Requirements. For example, as noted above, TJ Radonjic has cancelled plans to travel to the United States to assist his wife, who suffered a workplace injury and requires both surgery and assistance to perform basic tasks. Yann le Heritte, another of the Applicants, has delayed travel to France to be with – and care for – his 92-year-old mother, who suffers from dementia and whose health situation is highly precarious. Deprivations of this nature are intensely personal – they are not susceptible to quantification.

30. The other category of irreparable harm also arises in this case. At least one of the Applicants intends to travel despite the burden imposed by the Hotel Quarantine Requirements. This Applicant – and others if they eventually do travel by air – will have to quarantine in a GAA at their own expense. If it turns out that the Hotel Quarantine Requirements are unconstitutional, it will be very difficult for these Applicants to recover their expenses. Although Charter *damages* are, in theory, available, the award of such damages depends on considerations other than those applied in ordinary civil disputes.

31. The Court in *RJR-MacDonald* recognized the difficulties associated with obtaining damages in *Charter* cases:

[I]t will in most [*Charter*] cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.²²

²² *RJR* at 342.

32. Although the state of the law on *Charter* damages has developed in the period since *RJR-MacDonald*, it remains the case that *Charter* damages do not necessarily follow an unjustified violation of *Charter* rights.²³ *Charter* damages are a “unique public law remedy”.²⁴ Even where there is a violation of *Charter* rights, *Charter* damages must be a just and appropriate remedy in the circumstances, and there can be no countervailing factors defeating the rationale for damages.²⁵ There can be no guarantee that the Applicants will obtain monetary relief if the injunction is denied and the Hotel Quarantine Requirements are subsequently found to be unconstitutional.

(c) The balance of convenience favours the Applicants

33. Finally, and most importantly, the balance of convenience favours the Applicants. Whereas the harm from the Hotel Quarantine Requirements is known and certain, the public health benefits of those requirements are entirely speculative.

34. The factors relevant to the assessment of the balance of convenience are numerous and variable. They and their relative weight will depend on the individual case.²⁶ Although it is well-established that in all *Charter* cases the public interest is relevant to the balance of convenience, the government “does not have a monopoly on the public interest”.²⁷

The Attorney General is not the exclusive representative of a monolithic “public” in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

²³ *Brown v. Canada (Public Safety)*, 2018 ONCA 14, para. 54 [[Brown v. Canada \(Public Safety\)](#)]; *Vancouver (City) v. Ward*, 2010 SCC 27 [“*Ward*”] [[Vancouver \(City\) v. Ward](#)].

²⁴ *Ward*, para. 31.

²⁵ *Ward*, para. 4.

²⁶ *RJR* at 342.

²⁷ *RJR* at 343.

represent one vision of the “public interest”. Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.²⁸

35. Here, both the interests of the Applicants (as outlined in the section of the Factum dealing with irreparable harm) and the public interest support the grant of injunctive relief, including for the following reasons:

- a. ***Other public health requirements including home quarantine.*** If the injunction is granted, air travellers will still have to abide by all other aspects of the Order, including the requirement to obtain a COVID-19 test prior to departing and again upon arrival, and the requirement to quarantine themselves for a 14-day period. The only change will be that air travellers who have no symptoms of COVID-19, tested negative for COVID-19 prior to boarding their flight and have a suitable quarantine plan will proceed directly to their home quarantine. Those who have symptoms of COVID-19 or are unable to quarantine themselves will remain subject to the provisions of the Order addressing those situations by way of quarantine in a designated quarantine facility.
- b. ***No data to prefer hotel quarantine to home quarantine.*** As noted above, the federal Minister of Health has conceded that the data on the benefits of hotel quarantine, if any, are “incomplete internationally”. In the absence of this data, it is not possible to “determine the best approach at the border to manage COVID-19.” Put differently, there is no reason to believe that hotel quarantine is more effective

²⁸ *RJR* at 343, quoting Jamie Cassels, “An Inconvenient Balance: The Injunction as a Charter Remedy”, in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at 303.

than home quarantine to prevent the spread of COVID-19. If anything, common sense suggests that corralling large numbers of travellers into hotel shuttles, lobbies, hallways and elevators only serves to increase the risk of exposure. If the guiding principle of the pandemic has been social distancing, it follows that individual home quarantine is safer than collective hotel quarantine. This common sense hypothesis is borne out by the limited information that is available, which includes reports of multiple outbreaks traced to hotel staff who unknowingly acquired COVID-19 in quarantine hotels.

c. *Delay in making the Order.* Canada managed the COVID-19 pandemic for nearly a year before implementing the Hotel Quarantine Requirements. The World Health Organization declared a public health emergency on March 11, 2020. The Order was made on February 14, 2021 – some 11 months later. To the extent that Canada submits that a further delay of a few weeks is contrary to the public interest, its position is undermined by its own delay in making the Order.

d. *No hotel quarantine for other travellers.* The Hotel Quarantine Requirements apply only to travellers entering Canada by air. Travellers crossing the U.S.-Canada land border are not subject to the Hotel Quarantine Requirements. In effect, this means that travellers entering Canada at any of the 117 land border crossings are exempt from hotel quarantine. If the injunction is granted, the result will simply be to treat air travellers and other travellers alike.

III. RELIEF REQUESTED

36. The Applicants seek:

- a. an Order granting an interim injunction suspending the application and/or operation of the Hotel Quarantine Requirements until such time as a motion for an interlocutory injunction can be scheduled and heard;
- b. their costs of this motion; and
- c. such other relief as Counsel for the Applicants may request and this Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 15, 2021

“Jonathan Roth” (Original Signed)

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