

Motion to enjoin hotel quarantine law denied

COVID-19 | Charter of Rights and Freedoms | Constitutional Law | Litigation | Litigation & Dispute Resolution

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The COVID-19 pandemic has caused our governments to implement laws aimed at stopping the spread of the virus. While many of those laws arguably have a minimal effect or none at all on mobility or liberty rights, some laws, as evidenced by chatter on social media, have been viewed as being draconian. The federal government's decision to implement a brief mandatory hotel quarantine law for air travellers entering Canada is a law that has been viewed as being draconian and unconstitutional, and accordingly a constitutional challenge to its validity is currently before the court.

In a recent decision, *Canadian Constitution Foundation v. Canada (Attorney General)*, 2021 ONSC 2117, Justice Myers denied an interim injunction to restrain the law. This decision does not however mean that the law is constitutional. It simply means at this stage that the test for an interim injunction was not met.

The law at issue is s. 1.2(1)(a)(ii)(B), s. 3(1)(a) and s. 3(1.3) of the Order in Council PC No. 2021-0075, dated 14 February 2021, entitled *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)*.

Under the law, an air traveller entering Canada must get a negative COVID-19 test before travelling to Canada and then obtain a second COVID-19 test upon arrival. While awaiting their test result, the air traveller is mandated to quarantine in a government-approved hotel accommodation at their own cost. Once the test result is obtained, regardless of whether it is negative or positive, the traveller is free to leave the hotel and to quarantine at home for the government-mandated 14 day quarantine period that applies to all returning travellers to Canada. For some, the cost of the mandatory hotel stay is prohibitive.

To obtain an injunction, a three-part test applies. First, the moving party must demonstrate that there is a serious issue to be tried. Second, the moving party must show irreparable harm. Third, the moving party must show that the balance of convenience weighs in favour of granting the injunction. Here, the moving party was unable to satisfy two-parts of the three-part test.

With respect to the serious issue to be tried component, the applicants led evidence to show that the law negatively impacted their respective travel plans. The travellers raised issues related to costs, inconvenience and stress. The applicants argued that the law restricted their mobility (unders. 6 of the *Canadian Charter of Rights and Freedoms*) by imposing limits on their ability to enter and leave Canada, and that the law deprived them of personal liberty in violation of the principles of fundamental justice under s. 7 of the *Charter*. The applicants also contended that the law was arbitrary, of no use and of no public benefit, and that the hotel quarantine was cruel and unusual punishment.

Justice Myers rejected arguments that the law violated section 6 of the *Charter* and that the law imposed some form of cruel and unusual punishment on air travellers. Although the law did not apply to travellers entering into Canada by car, Justice Myers accepted the evidence led by the Attorney General that car travellers did not present the same risk of spreading COVID-19 as air travellers. The Attorney General led other evidence, including scientific and public policy evidence, to support the law. This evidence showed that there were serious increased risks related to the proportion of air travellers arriving in Canada with COVID-19 and new variants and that quarantining at home had not proven as safe or effective at preventing the spread of the virus as was necessary.

Justice Myers found that there was no serious issue with respect to a breach of mobility rights. As well, he found the claim that the quarantine was an arbitrary detention or cruel and unusual punishment was frivolous.

However given that the evidence led by government was not definitive and that cross-examinations on it had not yet taken place, His Honour accepted, narrowly, that there was a serious issue to be tried on whether the law breached s. 7 of the *Charter*.

With respect to irreparable harm, there was no non-speculative evidence that the applicants were likely to suffer harm before the hearing of the constitutional issues that could not be compensated in money damages. The applicants, indeed, had claimed damages against the government and if their Charter rights were breached they would be entitled to compensation.

With respect to balance of convenience, Justice Myers found that the evidence led on the motion did not show that the law was draconian. Rather the law was in the public interest. As well, among other reasons, an interim injunction could expose Canadians to risks of further spread of the virus given the views expressed in the scientific and public policy evidence which showed that the law was necessary and appropriate to prevent the influx and spread of COVID-19.

This case shows that even where an applicant raises a potential Charter issue in connection with a law, an interim injunction will not be easily granted. The applicant must be prepared to lead evidence to satisfy each stage of the three-part injunction test. While the applicants have already announced that they will be proceeding with their Charter challenge, it will be interesting to see if the government extends the hotel quarantine law beyond its intended expiry date. The law will expire on 21 April 2021. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **Stephen Thiele** at 416.865.6651.

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