Federal Courts Reports

Recueil des décisions des Cours fédérales

Please note that following an erratum published in [2022] Volume 1, Part 3, eight endnotes have been added to *Spencer v. Canada (Health)*, [2021] 3 F.C.R. 621 (F.C.). Also, at paragraph 157, line 1 was modified slightly. The corrections have been brought to the present document.

2021 FC 621

T-340-21

Barbara Spencer, Sabry Belhouchet, Blain Gowing, Dennis Ward, Reid Nehring, Cindy Crane, Denise Thomson, Norman Thomson, Jordan Hammond, and **Michel Lafontaine** (*Applicants*)

v.

Canada (Minister of Health) and **the Attorney General of Canada** (*Respondents*)

T-341-21

Dominic Colvin (*Applicant*)

v.

The Attorney General of Canada (*Respondent*)

T-366-21

Steven Duesing and **Nicole Mathis** (*Applicants*)

v.

The Attorney General of Canada (*Respondent*)

T-480-21

Rebel News Network Ltd and **Keean Bexte** (*Applicants*)

v.

The Attorney General of Canada (*Respondent*)

INDEXED AS: SPENCER V. CANADA (HEALTH)

Federal Court, Crampton C.J.—By videoconference, June 1–3; Ottawa, June 18, 2021.

Health and Welfare — Quarantine Act — Consolidated judicial reviews challenging measures imposed by federal government to prevent spread of COVID-19 by returning international air travelers — Non-exempt individuals required to be tested for COVID-19 upon arrival in Canada, stay at government approved accommodation (GAA) or designated quarantine facility (DQF) while awaiting results of test — Applicants asserting, inter alia, that Governor in Council (or Administrator in Council (AIC)) not having authority to impose impugned measures — Challenging certain provisions in Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations) (Order) issued by AIC pursuant to Quarantine Act, s. 58(1), including list of isolation provisions — Impugned measures included in each of successors to Order — Applicants also maintaining GAA constituting arbitrary impediment — Whether Orders ultra vires authority delegated to Governor in Council under Quarantine Act, s. 58(1) — Orders containing impugned measures not ultra vires AIC — Dispute turning on whether AIC considered reasonable alternatives — Recitals to Order, other materials revealing AIC reached opinion that no reasonable alternatives to impugned measures available to prevent spread of COVID-19 — Recitals, Explanatory Notes providing reasonable basic justification for Order — Measures consistent with rationale, purview of s. 58(1) —— Applications dismissed.

Constitutional Law — Distribution of Powers — Consolidated judicial reviews challenging measures imposed by federal government to prevent spread of COVID-19 by returning international air travelers — Non-exempt individuals required to be tested for COVID-19 upon arrival, stay at government approved accommodation (GAA) or designated quarantine facility (DQF) while awaiting results of test — Applicants challenging certain provisions in Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations) (Order) issued by Governor in Council (or Administrator in Council (AIC)) pursuant to Quarantine Act, s. 58(1), asserting that impugned measures infringing exclusive jurisdiction of provinces — Whether Orders ultra vires authority of federal government under Constitution Act, 1867, s. 91(11) — Measures consistent with rationale, purview of Quarantine Act, s. 58(1) — Essential character of Order not regulation of health per se, but rather reducing introduction, further spread of COVID-19 — That purpose consistent with Quarantine Act, falling within purview of Constitution Act, 1867, s. 91(11) — Applications dismissed.

Constitutional Law — Charter of Rights — Mobility Rights — Consolidated judicial reviews challenging measures imposed by federal government to prevent spread of COVID-19 by returning international air travelers — Non-exempt individuals required to be tested for COVID-19 upon arrival, stay at government approved accommodation (GAA) or designated quarantine facility (DQF) while awaiting results of test — Applicants challenging certain provisions in Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations) (Order) issued by Governor in Council (or Administrator in Council (AIC)) pursuant to Quarantine Act, s. 58(1) — Applicants maintaining that requirement to stay at a GAA constituting arbitrary impediment to right of returning air travellers to freely enter Canada — Whether impugned measures violating Charter, s. 6(1) — Impugned measures not inconsistent with central thrust or purpose of s. 6(1) — Not encroaching upon returning air travellers' membership in Canada's national community — Travellers not denied entry to Canada — Simply required to briefly isolate within Canada — Applications dismissed.

Constitutional Law — Charter of Rights — Life, Liberty and Security — Consolidated judicial reviews challenging measures imposed by federal government to prevent spread of COVID-19 by returning international air travelers — Non-exempt individuals required to be tested for COVID-19 upon arrival, stay at government approved accommodation (GAA) or designated quarantine facility (DQF) while awaiting results of test — Applicants challenging certain provisions in Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations) (Order) issued by Governor in Council (or Administrator in Council (AIC)) pursuant to Quarantine Act, s. 58(1) — Whether impugned measures violating Charter, s. 7 right to liberty, security of person — Alleged violations not engaging applicants' right to security of person — Evidence of risk, harm to applicants falling short of what is required to engage s. 7 — Requirement to stay at GAA engaging applicants' liberty interests — Evidence establishing valid basis for imposing special requirements on returning air travellers — Rationales for specific requirement to quarantine providing requisite

connection between objective of impugned measures, limits imposed on applicants' right to liberty — Impugned measure not overbroad — Not violating principles of fundamental justice on grounds of gross disproportionality — Rational basis existing to test all asymptomatic air travellers, to require stay in GAA — Brief deprivation of liberty not so significant as to be disproportionate to objective, rationales underlying impugned measures — Applications dismissed.

Constitutional Law — Charter of Rights — Unreasonable Search or Seizure — Consolidated judicial reviews challenging measures imposed by federal government to prevent spread of COVID-19 by returning international air travelers — Non-exempt individuals required to be tested for COVID-19 upon arrival, stay at government approved accommodation (GAA) or designated quarantine facility (DQF) while awaiting results of test — Applicants challenging certain provisions in Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations) (Order) issued by Governor in Council (or Administrator in Council (AIC)) pursuant to Quarantine Act, s. 58(1) — Whether impugned measures violating Charter, s. 8 — Requirement to pay for GAA not engaging applicants' interests under s. 8 — No reasonable expectation of privacy in money required to pay to book stay at GAA — Circumstances herein not constituting administrative or criminal investigation — Applications dismissed.

Constitutional Law — Charter of Rights — Arrest, Detention, Imprisonment — Consolidated judicial reviews challenging measures imposed by federal government to prevent spread of COVID-19 by returning international air travelers — Non-exempt individuals required to be tested for COVID-19 upon arrival, stay at government approved accommodation (GAA) or designated quarantine facility (DQF) while awaiting results of test — Applicants challenging certain provisions in Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations) (Order) issued by Governor in Council (or Administrator in Council (AIC)) pursuant to Quarantine Act, s. 58(1)— Whether impugned measures violating Charter ss. 9, 10(b), 11(d),(e), 12 — Impugned measures engaged applicants' Charter, s. 9 rights — Requirement to stay in GAA for 24–72 hours constituting "detention" within meaning of s. 9 — However, such detention not arbitrary except with respect to applicant Nicole Mathis — Latter's rights infringed because not informed of location to which she was being taken — That breach not saved under Charter, s. 1 — Applicants' rights under s. 10(b) engaged but not breached except with respect to Ms. Mathis— Ms. Mathis' right to be informed of right to retain, instruct counsel, without delay, violated — That breach also not saved under Charter, s. 1 — Providing brochure to arriving air travellers not sufficient — Applicants' rights under ss. 11(d),(e) not breached — That provision not applying unless person charged with offence — Applicants' rights under Charter, s. 12 also not breached — Impugned measures not constituting "punishment", not arising as consequence of conviction — Even assuming that requirement to stay at GAA "treatment", such "treatment" not "cruel and unusual" — Applications dismissed.

These were consolidated applications for judicial review challenging measures imposed by the federal government to prevent the spread of COVID-19 by returning international air travelers.

The measures included requirements that non-exempt individuals be tested for COVID-19 upon their arrival in Canada (the Day 1 Test) and then stay at either a government approved accommodation (GAA) or a designated quarantine facility (DQF) for 24–72 hours while awaiting the results of that test. The applicants, international air travellers impacted by the impugned measures, asserted that the requirement to stay at a GAA or a DQF while awaiting the results of their Day 1 Test contravened various sections of the *Canadian Charter of Rights and Freedoms*. They further asserted, *inter alia*, that the Governor in Council (in this context known as the Administrator in Council (AIC)) did not have the authority to impose the impugned measures, and that the impugned measures infringed the exclusive jurisdiction of the provinces. The applicants in Court file T-366-21 challenged certain provisions in the *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)* (the January Order) issued by the AIC pursuant to paragraph 58(1)(d) of the *Quarantine Act*. As a result of the continued evolution of COVID-19, the AIC repealed and replaced the January Order with the February Order, which included certain new measures that were imposed on non-exempt returning air travellers. The applicants challenged, *inter alia*, measures contained in the February Order that included a list of isolation provisions applicable

to air travellers who have reasonable grounds to suspect they have COVID-19. The February Order expired in April 2021. However, the impugned measures have been included in each of the successors to the February Order, including the May Order that was in force at the time of these proceedings and was scheduled to expire in June 2021. The applicant in Court file T-341-21 maintained that the requirement to stay at a GAA constitutes an arbitrary impediment to the right of returning air travellers to freely enter Canada. All of the applicants alleged that the requirement to stay in a GAA pending receipt of the results of the Day 1 Test constitutes an infringement of their right to liberty and security of the person under section 7 of the Charter.

The main issues were: (1) whether the impugned measures violated any of subsection 6(1), sections 7, 8, 9, paragraphs 10(b), 11(d), 11(e) or section 12 of the Charter; (2) if so, whether any such violation was demonstrably justified in a free and democratic society; (3) whether the Orders were *ultra vires* the authority delegated to the Governor in Council under subsection 58(1) of the *Quarantine Act*; and (4) whether the Orders were *ultra vires* the authority of the federal government under subsection 91(11) of the *Constitution Act*, *1867*.

Held, the applications should be dismissed.

The applicants failed to discharge their burden of demonstrating that the impugned measures violate subsection 6(1) of the Charter (the right to enter, remain in and leave Canada). The impugned measures are not inconsistent with the central thrust or purpose of subsection 6(1), which is against exile and banishment. Put differently, they do not encroach upon returning air travellers' membership in Canada's national community. Air travellers are not denied entry when they land at one of the four airports where international flights currently are permitted to arrive. Rather, they are required to briefly quarantine or isolate *within* Canada. The fact that some travellers may voluntarily alter their preferred times of travel to avoid the operation of the impugned measures does not imply that those measures infringe travellers' rights under subsection 6(1). The rights set forth in Article 12 of the *International Covenant on Civil and Political Rights* are subject to restrictions that, among other things, are necessary to protect public health or the rights and freedoms of others. To the extent that the impugned measures constitute such restrictions, the mobility rights contemplated by Article 12 are subject to them. The basis for treating air travellers differently from land travellers is not arbitrary. It is rooted in scientific data indicating that a higher percentage of asymptomatic returning air travellers test positive for COVID-19 than is the case for asymptomatic returning land travellers.

The alleged violations did not engage the applicants' right to security of the person pursuant to section 7 of the Charter. The evidence of the physical risk faced by the applicants and the psychological harm that they experienced falls short of what is required to engage section 7. In the absence of any evidence that any air traveller has ever been infected at a GAA or a DQF, it is reasonable to infer that the risks of contracting COVID-19 at those facilities are not significant. The requirement to stay at a GAA or a DQF facility engaged the applicants' liberty interests. The assessment of whether the infringement of the applicants' liberty interest was in accordance with the principles of fundamental justice involved an assessment of whether the impugned measures were arbitrary, overbroad or had consequences that were grossly disproportionate to their object. There was cogent evidence supporting the AIC's decision to target returning air travellers with special measures, including the specific requirement to stay in a GAA or a DQF. The evidence established a valid basis for imposing special requirements on returning air travellers. What was relevant here was the objective of the impugned measures, not their actual effectiveness. All that was required to demonstrate that the impugned measures were not arbitrary was the existence of some link between them and the objective(s) they were intended to achieve. The rationales for the specific requirement to quarantine in a GAA provided the requisite connection between the objective of the impugned measures and the limits imposed on the applicants' right to liberty. It is not unreasonable to require those who voluntarily assume travel-related risks to pay for costs associated with their port-of-entry quarantine, especially when they incur those risks in the face of repeated government advisories to avoid non-essential travel. The impugned measures, particularly the requirement to stay at a GAA or a DQF, were not overbroad. There is a rational connection between the objective of those measures and the effects on the individuals who the applicants suggest ought to have been exempted from

those measures. The impugned measures did not violate the principles of fundamental justice on grounds of gross disproportionality. There is a rational basis to test all asymptomatic air travellers and to require that they stay in a GAA or a DQF while they await their Day 1 Test result. These measures are not out of sync with the objective of reducing the introduction and spread of COVID-19 into Canada. In particular, the brief deprivation of liberty is not completely out of sync with this objective. It is not so significant as to be disproportionate, let alone grossly disproportionate, to the objective and the rationales underlying the impugned measures.

The requirement to pay for a booking at a GAA did not engage the applicants' interests under section 8 of the Charter (the right to be secure against unreasonable search or seizure). Arriving air travellers have no reasonable expectation of privacy in *the money* they are required to pay in order to book a stay at a GAA. The circumstances in which air travellers are required to stay at a GAA or a DQF plainly do not constitute "an administrative or criminal investigation".

The impugned measures, particularly the requirement to stay at a GAA or a DQF, engaged the applicants' section 9 rights (the right not to be arbitrarily detained or imprisoned) because they resulted in the detention of non-exempt persons arriving in Canada by air. However, with the exception of the applicant Nicole Mathis, the applicants' section 9 rights were not contravened because their detention was not arbitrary. In contrast to persons who are routinely questioned and even physically searched at the border, air travellers are not permitted to proceed home that same day. Given the penal nature of the sanctions to which they are subject if they refuse to stay in a GAA, or if they refuse to comply with the physical restrictions at the GAA, a reasonable person in that situation would likely conclude that they were not "free to go." Accordingly, the requirement to stay in a GAA or a DQF for 24–72 hours constitutes "detention" within the meaning of section 9. However, such detention is not "arbitrary." The various reasons for concluding that the restriction of the applicants' liberty interests is not arbitrary also weighed in favour of concluding that their detention was not arbitrary. The manner in which the detention was carried out was reasonable. In the case of Ms. Mathis, her section 9 rights were infringed because she was not informed of the location to which she was being taken. The breaches of her rights under section 9 and paragraph 10(b) of the Charter were not saved by section 1. Even considering the greater deference due to the government, those breaches could not be said to be demonstrably justified in a free and democratic society.

The applicants' rights under paragraph 10(b) of the Charter (the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right) were engaged. The purpose of section 10 of the Charter is to "ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay". In these consolidated proceedings, only Ms. Mathis provided sufficient evidence that her right to be informed of her right to retain and instruct counsel, *without delay*, was violated. That breach was not saved under section 1 of the Charter. The person detaining an individual must clearly communicate the right to retain and instruct counsel in a manner that it is readily understood, *at the outset of the detention*. Providing a long brochure to arriving air travellers that can reasonably be expected to be read at a later point in time is not sufficient.

The applicants' rights under paragraphs 11(d) and (e) of the Charter (the right to be presumed innocent until proven guilty and the right not to be denied reasonable bail without just cause) were not breached. That provision does not apply unless a person has been charged with an offence. Neither did the impugned measures violate the applicants' rights under section 12 of the Charter (the right not to be subjected to any cruel and unusual treatment or punishment). The impugned measures do not constitute "punishment". One of the conjunctive requirements of the test for punishment is that it be "a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence". This requirement clearly was not satisfied in the present context. Even assuming that the requirement to stay at a GAA or a DQF upon arrival in Canada is a "treatment" contemplated by section 12, such "treatment" does not rise to the very high threshold required to be considered "cruel and unusual".

The Orders containing the impugned measures were not *ultra vires* the AIC. The dispute between

the parties as to whether the AIC acted beyond its authority in promulgating the impugned measures turned on whether the AIC considered the potential existence of reasonable alternatives and then reached the opinion that there were none. The recitals to the February Order and other materials reveal that the AIC did in fact reach the opinion that no reasonable alternatives to the impugned measures were available to prevent the spread of COVID-19. The Explanatory Notes, together with the recitals to the February Order, provided a reasonable basic justification for that Order. Those passages and recitals also confirmed that the measures contemplated by the Order are consistent with the rationale and purview of subsection 58(1) of the *Quarantine Act*.

The AIC has received delegated authority from Parliament pursuant to subsection 58(1) of the *Quarantine Act*. There is nothing in the text of subsection 91(11) of the *Constitution Act*, *1867* (Quarantine and the Establishment and Maintenance of Marine Hospitals) to suggest that the meaning of the word “Quarantine” should be limited to marine or ship quarantines. The plain and ordinary meaning of the words “Quarantine and” is that Parliament has been given jurisdiction over quarantine *as well as* the other matter mentioned, namely, the establishment and maintenance of marine hospitals. The word “ship” does not appear in this head of power, and it is readily apparent that the word “maritime” qualifies only “hospitals”, and not also “quarantine.” The AIC’s purpose in enacting the February Order supports the view that the “pith and substance”, or the “essential character”, of that Order is not the regulation of health *per se*. Rather it is “reducing the introduction and further spread of COVID-19 and new variants of the virus into Canada by decreasing the risk of importing cases from outside the country”. That purpose is consistent with the *Quarantine Act*. Preventing or reducing the introduction and spread of COVID-19 is an objective that falls squarely within the purview of subsection 91(11). It is axiomatic that the power to quarantine was conferred specifically for the purpose of preventing or reducing the introduction and spread of communicable diseases from outside the country. To the extent that the overriding objective of subsection 91(11) may be said to be the prevention or reduction of the introduction and spread of diseases from abroad into Canada, it is entirely within the power of Parliament to legislate measures that apply to anyone entering Canada, even if they are only travelling a short distance after crossing the border. If it were otherwise, this important objective could be seriously undermined by even a single province or territory failing to act appropriately.

The appropriate remedy to the violations of Ms. Mathis’ rights laid under subsection 24(1) of the Charter. However, Ms. Mathis did not give notice of an intention to seek a remedy under that provision. It was therefore not appropriate to issue any remedy.

STATUTES AND REGULATIONS CITED

Canadian Bill of Rights, S.C. 1960, c. 44 [R.S.C., 1985, Appendix III], s. 1(a).

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 6, 7, 8, 9, 10(b), 11(d),(e), 12, 24(1), 33, 52.

Constitution Act, *1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5], ss. 91(11), 92(7),(13),(16).

Contraventions Act, S.C. 1992, c. 47.

Criminal Code, R.S.C., 1985, c. C-46, s. 503.

Federal Courts Act, R.S.C., 1985, c. F-7, s. 57(1).

Federal Court Rules, SOR/98-106, r. 317.

Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), P.C. 2021-11, (2021) *C. Gaz. I*, 362, ss. 1.2(1)(a)(i), 4(1)(a),(2).

Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), P.C. 2021-75, (2021) *C. Gaz. I*, 673, ss. 1 “isolation”, “quarantine”, 1.2(1)(a),(b), 1.3, 3(1)(a),(1.3), 4(1),(2), 5, 6(1), 6.2, 7(1), 7.1(1), 7.2(1), 9, 10(1),(2), 11.

Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), P.C. 2021-174, (2021) *C. Gaz. I*, 1499.

Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), P.C. 2021-313, (2021) *C. Gaz. I*, 1925.

Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), P.C. 2021-421, (2021) *C. Gaz. I*, 2402.

Official Languages Act, R.S.C., 1985 (4th Supp.), c. 31, ss. 20(1)(a),(2)(b).

Quarantine Act, S.C. 2005, c. 20, ss. 4, 58.

TREATIES AND OTHER INSTRUMENTS CITED

International Covenant on Civil and Political Rights, December 16, 1966, [1976] Can. T.S. No. 47, Art. 12.

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APPLIED:

R. v. Oakes, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531; *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783.

DISTINGUISHED:

R. v. Wigglesworth, [1987] 2 S.C.R. 541, (1987), 45 D.L.R. (4th) 235; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737.

CONSIDERED:

United States of America v. Cotroni; United States of America v. El Zein, [1989] 1 S.C.R. 1469, (1989), 23 Q.A.C. 182; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, (1999), 177 D.L.R. (4th) 124; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165; *Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708; *R. v. Hufsky*, [1988] 1 S.C.R. 621, (1988), 27 O.A.C. 103; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Therens*, [1985] 1 S.C.R. 613, (1985), 18 D.L.R. (4th) 655; *R. v. Nagle*, 2012 BCCA 373, 97 C.R. (6th) 346; *R. c. Simmons*, [1988] 2 R.C.S. 495; *Spencer v. Canada (Attorney General)*, 2021 FC 361, 490 C.R.R. (2d) 1; *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, (1989), 61 D.L.R. (4th) 385; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Nesathurai v. Schuyler Farms Ltd.*, 2020 ONSC 4711 (Div. Ct.); *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *Schneider v. The Queen*, [1982] 2 S.C.R. 112, (1982), 139 D.L.R. (3d) 417; *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125.

REFERRED TO:

Canadian Union of Public Employees v. Canada (Attorney General), 2018 FC 518; *Coldwater First Nation v. Canada (Attorney General)*, 2019 FCA 292; *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, [2021] 3 F.C.R. 294; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488; *Jones v. Zimmer GmbH*, 2013 BCCA 21, 358 D.L.R. (4th) 499; *R. v. P. (A.)* (1996), 109 C.C.C. (3d) 385, [1996] O.J. No. 2986 (QL), 1996 CarswellOnt 3150 (C.A.); *Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN) v. Canada (Attorney General)*, 2019 FCA 212, [2020] 1 F.C.R. 675; *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 15 C.E.L.R. (4th) 53, affd 2019 FCA 320, 32 C.E.L.R. (4th) 18; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *Smith v. Canada (Attorney General)* (2000), 73 C.R.R. (2d) 196, [2000] F.C.J. No. 174 (QL), 2000 CanLII 14930 (F.C.A.), affd [2001] 3 S.C.R. 902; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Dyment*, [1988] 2 S.C.R. 417, (1988), 73 Nfld. & P.E.I.R. 13; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *X (Re)*, 2017 FC 1047, [2018] 3 F.C.R. 111; *R. v. Edwards*, [1996] 1 S.C.R. 128, (1996), 26 O.R. (3d) 536; *R. v. Collins*, [1987] 1 S.C.R. 265, (1987), 38 D.L.R. (4th) 508; *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59; *Canadian Constitution Foundation v. Canada (Attorney General)*, 2021 ONSC 2117, 488 C.R.R. (2d) 106; *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, (1993), 125 N.S.R. (2d) 81; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Rinfret v. Pope* (1886), 10 L.N. 74, 12 Q.L.R. 303 (Que. C.A.); *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Jones* (2006), 81 O.R. (3d) 481, 2006 CanLII 28086 (Ont. C.A.).

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APPLICATIONS for judicial review challenging measures imposed by the federal government to prevent the spread of COVID-19 by returning international air travelers. Applications dismissed.

APPEARANCES

Sayeh Hassan and *Henna Parmar* for applicants in T-340-21 and T-366-21.

Jeffrey R. W. Rath for applicant in T-341-21.

Robert J. Hawkes, *QC* and *Sarah Miller* for applicants in T-480-21.

Sharlene Telles-Langdon, *Sharon Stewart Guthrie* and *Robert Drummond* for respondents in T-340-21, T-341-21, T-366-21 and T-480-21.

Justice Centre for Constitutional Freedoms, Calgary, for applicants in T-340-21, and T-366-21.

Rath & Company, Foothills, Alberta, for applicant in T-341-21.

Jensen Shawa Solomon Duguid Hawkes LLP, Calgary, for applicants in T-480-21.

Deputy Attorney General of Canada for respondents in T-340-21, T-341-21, T-366-21 and T-480-21.

The following are the reasons for judgment rendered in English by

CRAMPTON C.J.:

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I. Introduction [Back to TABLE OF CONTENTS]

[1] The COVID-19 pandemic has wrought much death and suffering in Canada and abroad. This has called for extraordinary measures from our governments as well as great sacrifices by one and all.

[2] Protecting us from the threat to our health and security is one of the most fundamental responsibilities of a state. However, it must do so within the bounds of law.

[3] At their core, the questions at issue in these consolidated applications go to whether certain measures that have been imposed by the federal government on returning international air travellers are lawful. Those measures include requirements that non-exempt individuals be tested for COVID-19 upon their arrival in Canada (the Day 1 Test) and then stay at either a government approved accommodation (GAA) or a designated quarantine facility (DQF) for 24–72 hours while they await the results of that test. Persons who are asymptomatic upon their arrival are required to stay at a GAA, while those who display symptoms are required to stay at a DQF. Persons who stay at a GAA must do so at their own cost, which can exceed $1,000. Failure to abide by these and related requirements is subject to a fine of several thousand dollars under the *Contraventions Act*, S.C. 1992, c. 47 (*Contraventions Act*). A failure to comply with the

Quarantine Act, S.C. 2005, c. 20 (the *Quarantine Act*) could lead up to three years in prison and/or $1,000,000 in fines.

[4] Upon receiving the results of their Day 1 Test, travellers who have stayed at a GAA or a DQF are directed to “quarantine” or to “isolate” for the remainder of their first 14 days back in Canada. They may do so at their home or other “suitable place of quarantine.” Those who test negative must quarantine in accordance with their quarantine plan, whereas those who test positive must isolate in accordance with an isolation plan. However, those who do not have a “suitable” quarantine or isolation plan, as the case may be, are required to isolate at a DQF. It is also possible to voluntarily choose to take that route.

[5] The applicants in these consolidated proceedings assert that the requirement to stay at a GAA or a DQF while they await the results of their Day 1 Test contravenes various sections of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44] (the Charter). They maintain that the alleged benefits associated with this requirement and other impugned measures are not demonstrably justified in a free and democratic society, as contemplated by section 1 of the Charter. This is in part because those benefits are not proportionate to the adverse impacts associated with the alleged violations of their Charter rights. In support of this submission, the applicants note that non-exempt international travellers who enter Canada by land are not subject to the impugned measures. Instead, they are given COVID-19 test kits to administer at their suitable place of quarantine or isolation. At the time the measures came into force, approximately 75 percent of all travellers arriving in Canada were exempted from the impugned measures.

[6] The applicants in Court file T-480-21 further assert that the Governor in Council (in this context known as the Administrator in Council (AIC)) did not have the authority to impose the impugned measures. This is because reasonable alternatives to prevent the introduction and spread of COVID-19 were and continue to be available. Accordingly, the requirement in paragraph 58(1)(d) of the *Quarantine Act* that no such alternatives be available was not satisfied. Those applicants further assert that the impugned measures infringe the exclusive jurisdiction of the provinces and are therefore beyond the authority of the federal government. Finally, those applicants submit that certain of the impugned measures contravene paragraph 1(a) of the *Canadian Bill of Rights*, S.C. 1960, c. 44 [R.S.C., 1985, Appendix III] (Bill of Rights).

[7] For the reasons that follow, and with two limited exceptions pertaining to *the manner in which* the impugned measures were implemented in relation to the applicant Nicole Mathis, I have concluded that the impugned measures do not contravene the Charter, as alleged by the applicants. Accordingly, it is not necessary to conduct the analysis contemplated by section 1 of the Charter, except in respect of the two above-noted exceptions.

[8] Those two exceptions pertained to Ms. Mathis’ rights under section 9 and paragraph 10(b) of the Charter. In particular, they concern (i) the refusal of border control officials to disclose to Ms. Mathis and her spouse the location of the DQF to which she was being taken, and (ii) the fact that she was not properly informed of her right to retain and instruct counsel without delay. Those violations of Ms. Mathis’ rights cannot be demonstrably justified in a free and democratic society. The evidence

establishes that the first of those violations has since been remedied by the requirement that travellers who are required to stay in a GAA must book their own reservation there. Therefore, they will know the location of the GAA hotel. Moreover, travellers who are required to stay in a DQF are provided with the relevant details pertaining to that facility. As to the second exception, border control officials will now be aware that they must clearly communicate the right to retain and instruct counsel in a manner that is readily understood, *at the outset of the detention*.

[9] I have also concluded that the impugned measures were within the authority of the AIC and were within the jurisdiction of the federal government. Finally, the impugned measures do not contravene paragraph 1(a) of the Bill of Rights. Accordingly, these applications will be dismissed.

[10] Given that the impugned measures are currently scheduled to expire on Monday, June 21, 2021, I am releasing this decision today solely in English. The French version will be released at the earliest possible time. I recognize that paragraph 20(1)(a) of the *Official Languages Act*, R.S.C., 1985 (4th Supp.), c. 31 provides that any final decision issued by a federal court shall be made available simultaneously in both official languages where it determines a question of law of general public interest or importance. However, pursuant to paragraph 20(2)(b) of that legislation, where the court is of the opinion that making a decision available simultaneously in both official languages would result in a delay prejudicial to the public interest, it shall be issued in the first instance in one of the official languages and thereafter, at the earliest possible time, in the other official language, each version to be effective from the time the first version is effective. Having regard to the pending expiry of the impugned measures, I am of the opinion that delaying the release of this judgment (and reasons) until they are available in both official languages would occasion a delay prejudicial to the public interest. I am therefore releasing the decision immediately in English and then in French at the earliest possible time.

II. The Parties [Back to TABLE OF CONTENTS]

A. *The Applicants* [Back to TABLE OF CONTENTS]

[11] Rebel News Networks (RNN) is an independent news media outlet with its head offices in Toronto, Ontario. Some of its journalists regularly travel to the United States to report on current events and political issues. One of those journalists, the applicant Keean Bexte, was required to stay at a GAA upon his return to Canada on February 28, 2021. Collectively, RNN and Mr. Bexte, who are the applicants in Court file T-480-21, will be referred to as the “RNN applicants”.

[12] In its written submissions, the respondent stated that it does not accept that RNN has standing to challenge the impugned measures. However, in its oral submissions the respondent noted that it did not bring a motion to challenge RNN’s standing. The respondent also agreed that, as a practical matter, nothing turns on the issue of RNN’s standing because its counsel confirmed during the hearing that all of the submissions that were made on behalf of RNN were also being made on behalf of Mr. Bexte. Accordingly, as requested by the respondent, I will refrain from making a ruling on whether RNN has standing in these proceedings.

[13] The other applicants are all international air travellers who have been impacted by the impugned measures. The eleven applicants in Court files T-340-21 and T-366-21 will be referred to as the “Spencer-Duesing applicants”. Mr. Colvin is the sole applicant in Court file T-341-21.

[14] Apart from Barbara Spencer and Cindy Crane, who are concerned about the prospect of having to quarantine at a GAA, the applicants have all returned to Canada.

[15] At the time of their applications, the other applicants shared those concerns. Indeed, Ms. Thomson stated that she experienced fear and anxiety about the prospect of having to stay at a GAA. As a result, she returned to Canada two days prior to the entry into force of the GAA requirement in February. Ms. Thompson added that even after her return, she continued to experience stress about the prospect of her spouse having to stay at a GAA upon his return to the country.

[16] With the exception of Mr. Bexte and the individuals mentioned immediately below, there is no evidence that any of the applicants ultimately stayed at a GAA or a DQF upon their arrival back in Canada.

[17] Mr. Duesing and Ms. Mathis were detained and transferred to a “federal facility” in January of this year, pursuant to provisions of an order that expired in February. As described below, those provisions have continued to appear in subsequent orders that have been promulgated.

[18] According to his counsel, Mr. Colvin was fined $3,000 “in lieu of an airport quarantine” upon his return to Canada in April. His counsel maintains that the determinations made on his application “are going to be germane to the defence of [that fine].”

III. COVID-19 [Back to TABLE OF CONTENTS]

[19] Unless otherwise indicated, the following evidence pertaining to COVID-19 does not appear to be contested. It was provided by one of the respondent’s affiants, Dr. Philippe Guillaume Poliquin, whose credentials are briefly discussed in Part IV below.

[20] COVID-19 is a disease caused by a coronavirus known as SARS-CoV-2. It was first detected in China in December 2019 and has since spread across the globe. It was declared a pandemic by the World Health Organization in March 2020. In the ensuing year, it was reported to have infected more than 118 million people, and to have been associated with 2.6 million deaths worldwide. In that same period, there were 899,757 infections and 22,370 deaths resulting from COVID-19 in Canada.

[21] As with other coronaviruses, SARS-CoV-2 is spread among humans primarily through human-to-human transmission. This occurs through the inhalation of infectious respiratory droplets and, in some situations, through aerosols created when an infected person coughs, sneezes, sings, shouts or talks.

[22] Some individuals infected with the virus remain asymptomatic (Asymptomatic Carriers), meaning that they show little or no symptoms and might therefore be unaware that they are infected. Despite showing no symptoms, Dr. Poliquin stated that such persons can still transmit COVID-19 to other people in their surroundings. This

statement was disputed by some of the applicants. However, they provided no evidence that contradicted Dr. Poliquin's evidence on this matter.

[23] Individuals who are infected but have not yet begun exhibiting symptoms are known as pre-symptomatic carriers (Pre-symptomatic Carriers). They can also spread the disease. The median incubation time, that is, the time between exposure to the virus and the development of COVID-19 symptoms, is five days. However, it is believed that symptoms can appear up to 14 days from the moment an individual has been exposed to COVID-19.

[24] The period of time during which a person can spread the disease is known as the window of communicability. This period starts in the pre-symptomatic period and usually lasts 10 days from the onset of symptoms.

[25] Like all viruses, the virus that causes COVID-19 naturally mutates over time, meaning that there will be a change in the genetic material in the virus. However, not all variants are of public health concern. It is only when a mutation causes an increase in transmissibility, an increase in virulence (severity of disease) or a decrease in effectiveness of the available diagnostics, vaccines or treatments that a variant of interest becomes a "variant of concern" (Variant of Concern). As of January of this year, three Variants of Concern had been identified. Those were B.1.1.7 (which was first identified in the United Kingdom), B.1351 (which was first identified in South Africa), and P.1 (which was first identified in Brazil).

[26] As of February 11, 2021, all three of those Variants of Concern had been identified in Canada. Collectively, they had infected approximately 458 individuals. The Public Health Agency of Canada (PHAC) was very concerned that the increased transmissibility of those variants, and their potential resistance to immunity and vaccines, risked substantially increasing the number of infections in the country. PHAC was also concerned that this would lead to a significant increase in the number of hospitalizations and deaths, and to a potential reduction in the effectiveness of vaccines.

[27] As of March 28, 2021, the B.1.1.7 variant had infected 7,725 people in Canada, whereas B.1.351 had infected 269 and P.1 had infected 272.

IV. Relevant Orders, Legislation and Charter Provisions [Back to TABLE OF CONTENTS]

A. *Relevant Orders* [Back to TABLE OF CONTENTS]

(1) *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)*, P.C. 2021-11[1] [Back to TABLE OF CONTENTS]

[28] Mr. Duesing and Ms. Mathis, the applicants in Court file T-366-21, challenge certain provisions in the January Order, dated January 20, 2021 [P.C. 2021-11, (2021), *C. Gaz. I*, 362] and issued by the AIC pursuant to paragraph 58(1)(d) of the *Quarantine Act*. Under the authority of paragraph 4(1)(a) and subsection 4(2) of that Order, Mr. Duesing and Ms. Mathis were required to quarantine in a DQF for three nights upon their return to Canada later that month. This is because they did not demonstrate that they had either a negative result for a COVID-19 molecular test taken within 72 hours of

their scheduled departure for Canada, or a positive test that had been performed between 14 and 90 days prior to that time, as required by subparagraph 1.2(1)(a)(i) of the Order. They simply had a pre-departure antigen test result. The full text of the above-mentioned provisions of the January Order is provided at Appendix 1 to these reasons. The requirement to obtain a pre-departure test is not contested in these applications.

[29] The January Order was repealed on February 14, 2021. However, the respondent explained during the hearing of these applications that it did not bring a motion to strike the application brought by Mr. Duesing and Ms. Mathis on the grounds of mootness because the above-described provisions have been included in each of the successors to the January Order, including the Order that is currently in force.

(2) *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)*, P.C. 2021-75[2] [Back to TABLE OF CONTENTS]

[30] As a result of the continued evolution of COVID-19 the AIC repealed and replaced the January Order with the February Order on February 14, 2021 [*Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations*, P.C. 2021-75, (2021) *C. Gaz. I*, 673]. The February Order was subsequently amended on February 21, 2021.[3]

[31] The new measures in the February Order included a requirement, applicable to all non-exempt travellers returning by air or land, to undergo molecular testing at the time of their entry to Canada—i.e. the Day 1 Test—and once again later in the 14-day post-entry period, while they are in quarantine. The applicants do not challenge that particular measure, or the prohibition on symptomatic people taking public transit.

[32] However, the applicants challenge certain new measures that were imposed on non-exempt returning air travellers, including the following:[4]

i. A requirement to stay, at their own expense, at a GAA for up to 72 hours while awaiting the result of their Day 1 Test (paragraph 3(1)(a) and subsection 3(1.3));

ii. A requirement to submit evidence electronically that they pre-booked and prepaid for that GAA (subparagraph 1.2(1)(a)(iii));

iii. A requirement to provide the evidence described immediately above upon their entry into Canada (clause 1.2(1)(a)(ii)(B));

iv. A requirement to retain that evidence for 14 days following their return to Canada (paragraph 1.2(1)(b));

v. A requirement to include, in their quarantine plan, the address of the GAA where they plan to stay while they await the results of their Day 1 Test, as well as certain unspecified additional information applicable only to air travellers (subparagraph 1.3(a)(ii));

vi. A requirement for travellers who are not eligible to stay in a GAA to quarantine at a DQF (subsections 4(1), 4(2) and 10(2)).

[33] Like Mr. Duesing and Ms. Mathis, the other applicants in these consolidated proceedings also challenge the requirement to provide pre-boarding evidence that they received either a negative result for a COVID-19 molecular test taken within 72 hours of their scheduled departure for Canada, or a positive test that had been performed between 14 and 90 days prior to that time. As with the January Order, that provision was contained in paragraph 1.2(1)(a) of the February Order. The related provisions requiring a person who fails to provide that evidence to stay in a DQF were contained in subsections 4(1) and 4(2).

[34] In addition, the Spencer-Duesing applicants challenge sections 5 and 11 of the February Order, which contains a list of factors to be considered in choosing a quarantine facility for the purposes of subsections 4(2) and 10(2). Those applicants also challenge section 9, which contains a list of isolation provisions applicable to air travellers who have reasonable grounds to suspect they have COVID-19, have signs and symptoms of COVID-19 or knows that they have COVID-19. Those provisions also apply to every person who travelled with such an air traveller.

[35] Finally, the Spencer-Duesing applicants challenge the provisions in subsection 10(1) of the February Order, which apply to persons who are considered to be unable to isolate themselves.

[36] The February Order expired on April 21, 2021. However, it appears to be common ground between the parties that the applications have not thereby been rendered moot. This is because the above-described provisions (the Impugned Measures) have been included in each of the successors to the February Order, including the Order that is currently in force.

(3) Subsequent Orders [Back to TABLE OF CONTENTS]

[37] The AIC repealed and replaced the February Order with an identically named Order (P.C. 2021-174 [(2021) *C. Gaz. I*, 1499]) on March 19, 2021. It then repealed and replaced the March Order with P.C. 2021-313 [(2021) *C. Gaz. I*, 1925], on April 21, 2021. Although the March and April orders were somewhat reorganized, the Impugned Measures continued to be included, albeit in differently numbered sections.

[38] P.C. 2021-313 was then repealed and replaced by P.C. 2021-421 [(2021) *C. Gaz. I*, 2402], an identically named Order, on May 21, 2021. Once again, that Order continues to contain the Impugned Measures. The May Order is scheduled to expire on June 21, 2021.

B. *Relevant Legislation* [Back to TABLE OF CONTENTS]

[39] The orders described above were made by the Governor in Council pursuant to section 58 of the *Quarantine Act*. That provision states as follows:

> **Order prohibiting entry into Canada**
>
> **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
>
> **(a)** there is an outbreak of a communicable disease in the foreign country;

> **(b)** the introduction or spread of the disease would pose an imminent and severe risk to public health in Canada;
>
> **(c)** the entry of members of that class of persons into Canada may introduce or contribute to the spread of the communicable disease in Canada; and
>
> **(d)** no reasonable alternatives to prevent the introduction or spread of the disease are available.

[40] Mr. Bexte submits that the requirement for returning air travellers to pay for their stay at a GAA constituted a deprivation of his property rights under paragraph 1(a) of the Bill of Rights. That provision states:

> **Recognition and declaration of rights and freedoms**
>
> **1** It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> **(a)** the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

[41] The Spencer-Duesing applicants maintain that some or all of the above-mentioned "travel restrictions" are contrary to section 503 of *Criminal Code*, R.S.C., 1985, c. C-46 (*Criminal Code*), which imposes certain obligations upon "a peace officer who arrests a person with or without a warrant."

C. *Relevant Provisions of the Charter* [Back to TABLE OF CONTENTS]

[42] All of the applicants maintain that the Impugned Measures violate sections 7 and 9 of the Charter. Section 7 enshrines 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. Section 9 provides the right not to be arbitrarily detained or imprisoned.

[43] Mr. Colvin and the Spencer-Duesing applicants also maintain that the Impugned Measures violate subsection 6(1) of the Charter, which provides that every citizen of Canada has the right to enter, remain in and leave Canada.

[44] The RNN applicants further assert that the Impugned Measures violate section 8 of the Charter, which provides that everyone has the right to be secure against unreasonable search or seizure.

[45] Finally, the Spencer-Duesing applicants submit that the Impugned Measures violate paragraphs 10(b), 11(d), 11(e) and section 12 of the Charter. Paragraph 10(b) provides that everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right. Paragraph 11(d) stipulates that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. Paragraph 11(e) provides such persons with the right not to be denied reasonable bail without just cause. Finally, section 12 states that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[46] Each of the above-mentioned Charter provisions is reproduced in Appendix 1 to these reasons.

V. Evidentiary Issues [Back to TABLE OF CONTENTS]

A. *Invocation of Cabinet Confidence* [Back to TABLE OF CONTENTS]

[47] Pursuant to rule 317 of the *Federal Court Rules*, SOR/98-106, Mr. Colvin requested the record of materials that were before the AIC when it made the February Order. He also requested copies of any non-privileged communications pertaining to any element of that Order. In response, Ms. Julie Adair, Assistant Clerk of the Privy Council, invoked Cabinet confidence on behalf of the AIC.

[48] Mr. Colvin requests that an adverse inference be drawn from this refusal to provide the requested materials. He adds that although the respondent is entitled to claim Cabinet confidence over those materials, proceeding in such a manner is procedurally unfair and also precludes the respondent from being able to justify the alleged infringements of the Charter, pursuant to section 1 and the test established in *R. v. Oakes*, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200 (*Oakes*).

[49] I disagree. The promulgation of subordinate legislation is a legislative act which does not attract the duty of procedural fairness: *Canadian Union of Public Employees v. Canada (Attorney General)*, 2018 FC 518 (*CUPE*), at paragraphs 157–158 and 163. In the absence of any assertion or evidence that the assertion of Cabinet confidence was improper, no adverse inference should be drawn: *CUPE*, above, at paragraphs 142 and 181. With respect to section 1 of the Charter, there are other ways in which the respondent can attempt to discharge its burden, if breaches of other sections of the Charter are established.

B. *The Respondent's Affiants* [Back to TABLE OF CONTENTS]

[50] In support of its response to the applicants, the respondent adduced affidavits from the following four senior government officials:

(i) Kimby Barton is the Director General of the Centre for Biosecurity with PHAC. She is primarily responsible for developing and implementing border control measures to prevent the spread of infectious diseases into Canada. She was identified as being PHAC's contact person in the Explanatory Note that accompanied each of the January Order, the February Order and its successors.

(ii) Dr. Guillaume Poliquin is the Acting Scientific Director General of the National Microbiology Laboratory (NML) within PHAC. He is primarily responsible for the research portfolio on vaccines and emerging pathogenic agents, including SARS-CoV-1. He leads a team of scientists responsible for supporting diagnostic screening in Canada, conducting research on SARS-CoV-2, creating models to predict the evolution of the pandemic, and managing the gathering of data to provide guidance on public health planning. He is also responsible for providing advice to support the Government of Canada in making decisions with respect to public health measures to be adopted to fight the COVID-19

pandemic and Canada's vaccination program, particularly regarding the scientific and clinical aspects of the pandemic.

(iii) Dr. Rachel Rodin is the Acting Director General of the Testing Directorate in the Infectious Disease Prevention and Control Branch of PHAC, which establishes pilot programs and testing initiatives. During the regular course of her duties from April 2, 2020, to the date of her affidavit, she provided advice on the provision of COVID-19 tests at the population level.

(iv) Michael Spowart is the Regional Director, Western Region (British Columbia and Alberta), with PHAC. He leads a multi-disciplinary team of public health professionals responsible for managing frontline operations for a range of health promotion, disease prevention, and health protection programs. Over the past year, he has almost exclusively focused on operationalizing elements of the Pandemic Emergency Preparedness and Response. In that role, he is responsible for the operationalization of border measures at the ports of entry in British Columbia and Alberta. He also regularly participates in, or is briefed on, nation-wide meetings on the operation of DQFs and GAAs.

[51] During the hearing of these applications, counsel to the respondent explained that, through inadvertence, none of the above-mentioned affiants were qualified as an expert witness or requested to sign the experts' certificate in Form 52.2. As a consequence, the respondent appears to concede to the applicants' position that its affiants ought not to be treated as experts.

[52] Nevertheless, the respondent maintains that government affiants who occupy elevated positions and have significant oversight within their departments or agencies have sufficient personal knowledge to testify first-hand about the conduct, activities and events in and around their departments or agencies.

[53] I agree. This is particularly so in a complex and highly expedited judicial review proceeding *(Coldwater First Nation v. Canada (Attorney General)*, 2019 FCA 292 (*Coldwater*), at paragraphs 46 and 58), and where the evidence concerns the basis for actions taken and advice provided by the affiants and those with whom they were closely working, as opposed to the "truth of the contents" of the information upon which they relied.

[54] Given the seniority of each of Ms. Barton, Dr. Poliquin, Dr. Rodin and Mr. Spowart, they are entitled to testify regarding the facts of which they have firsthand knowledge, the basis upon which decisions within their department or branch were taken and the basis upon which those departments or branches provided advice to the Government of Canada. Of course, to the extent that I have any concerns regarding the reliability of that testimony, that will be reflected in the weight accorded to the evidence.

[55] Some of the applicants maintained that the respondent's affiants provided selective information, were highly argumentative and were generally not impartial. I disagree. Upon reviewing their affidavits and the transcripts of their cross-examinations by counsel to the RNN applicants, the Spencer-Duesing applicants and Mr. Colvin, respectively, I find that those affiants were straightforward, frank, succinct and generally credible. Unless otherwise indicated, I have no concerns regarding their testimony.

C. *Media Reports & Academic Articles Tendered by the Applicants* [Back to TABLE OF CONTENTS]

[56] The respondent submits that certain media reports relied upon by the applicants are inadmissible. I agree. To the extent that these media reports are being relied upon for the truth of their contents, they are inadmissible under the general rule excluding hearsay evidence: *Canada (Citizenship and Immigration) v. Canadian Council for Refugees*, 2021 FCA 72, [2021] 0 F.C.R. 000, at paragraph 150.

[57] I also agree with the respondent that, as with academic articles attached to affidavits filed by the respondent's affiants, such articles attached to the applicants' affidavits cannot be relied upon as proof of the facts contained therein: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, 260 D.L.R. (4th) 488, at paragraph 41; *Jones v. Zimmer GmbH*, 2013 BCCA 21, 358 D.L.R. (4th) 499, at paragraphs 45–47. This stands in contrast to several other documents adduced by the various affiants, which benefit from the public document exception to the hearsay rule and can therefore be admitted as evidence of the truth of their content: *R. v. P. (A.)* (1996), 109 C.C.C. (3d) 385, [1996] O.J. No. 2986 (QL), 1996 CarswellOnt 3150 (C.A.), at paragraphs 14–15. As the admissibility of these public documents is not contested, I will not dwell on this matter.

[58] Based on the foregoing, the following exhibits are inadmissible:

(i) Exhibit A to the affidavit filed by Ms. Crane (the Crane Affidavit);

(ii) Exhibit A to the affidavit filed by Ms. Spencer (the Spencer Affidavit); and

(iii) Exhibits B, H and I to the affidavit filed by Mr. Levant (the Levant Affidavit).

[59] Likewise, the following passages of affidavits that reiterate the contents of media reports are inadmissible:

(i) Crane Affidavit, at paragraph 10, first sentence and second clause of third sentence;

(ii) Spencer Affidavit, at paragraph 14, first sentence and second clause of third sentence;

(iii) Levant Affidavit, at paragraph 14, second sentence, and paragraph 37;

(iv) Affidavit filed by Ms. Thomson, at paragraph 10, sixth sentence; and

(v) Affidavit filed by Mr. Thomson, at paragraph 9, first sentence.

[60] Nothing turns on this, as the conclusions I have reached on the issues raised in these applications would not be altered even if I were to admit the above-mentioned evidence and materials. This is because I would not have given that evidence and those materials significant weight.

D. *Report Issued on the Eve of the Hearing* [Back to TABLE OF CONTENTS]

[61] On May 29, 2021, the Spencer-Duesing applicants brought a motion seeking leave to serve and file a report entitled *Priority strategies to optimize testing and quarantine at Canada's borders* (the May Report). That report was issued on May 27, 2021, by the federal government's COVID-19 Testing and Screening Expert Advisory Panel. Among other things, the panel recommended replacing the requirement to quarantine at a GAA or a DQF with a stronger focus on adherence to quarantine in travellers' households or other suitable places of quarantine: May Report, at pages 9–10 and 15. That recommendation was based on the fact that the current approach to mandatory hotel quarantine is not applied equally to land and air travellers, is expensive to administer, provides opportunities for travellers to bypass by paying a fine, and is inconsistent with the incubation period of the virus.

[62] During the hearing the Spencer-Duesing applicants explained that they sought to introduce the May Report solely for the purposes of their submissions in relation to section 1 of the Charter. Given the respondent's consent to the document being admitted for this limited purpose, I granted the motion.

VI. Issues [Back to TABLE OF CONTENTS]

[63] The parties appear to agree on the issues raised in these consolidated applications, although they have articulated them somewhat differently. In my view, the issues are best expressed as follows:

1. Do the Impugned Measures violate any of subsection 6(1), sections 7, 8, 9, paragraphs 10(b), 11(d), 11(e) or section 12 of the Charter?

2. If so, is any such violation demonstrably justified in a free and democratic society?

3. Are the Orders containing the Impugned Measures *ultra vires* the authority delegated to the Governor in Council under subsection 58(1) of the *Quarantine Act*? If not, are the Impugned Measures nevertheless unreasonable?

4. Are the Orders containing the Impugned Measures *ultra vires* the authority of the federal government under subsection 91(11) of the *Constitution Act*, *1867*, 30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982,* 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5] (*Constitution Act, 1867*)?

5. Do the Impugned Measures violate paragraph 1(a) of the Bill of Rights?

6. What, if any, remedies are appropriate?

VII. Standard of Review [Back to TABLE OF CONTENTS]

[64] The standard applicable to the Court's review of the issues that have been raised with respect to the Charter, the *Constitution Act, 1867* and the *Canadian Bill of Rights* is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 (*Vavilov*), at paragraphs 53, 55 and 69; *Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN (UCCO-SACC-CSN) v. Canada (Attorney General)*, 2019 FCA 212, [2020] 1 F.C.R. 675, at

paragraphs 17 and 21; *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100, 15 C.E.L.R. (4th) 53, at paragraphs 49 and 54, affd 2019 FCA 320, 32 C.E.L.R. (4th) 18, at paragraphs 19 and 22.

[65] In reviewing whether the Impugned Measures are *ultra vires* the authority delegated to the AIC under subsection 58(1) of the *Quarantine Act*, the applicable standard is reasonableness: *Vavilov*, above, at paragraphs 65–68 and 109. This standard also applies in assessing whether the Impugned Measures are reasonable. I will address the principles applicable in assessing reasonableness in Part VIII.C. of these reasons below.

VIII. Analysis [Back to TABLE OF CONTENTS]

A. *Do the Impugned Measures Violate any of Subsection 6(1), sections 7, 8, 9, paragraphs 10(b), 11(d), 11(e) or section 12 of the Charter?* [Back to TABLE OF CONTENTS]

(1) Subsection 6(1) [Back to TABLE OF CONTENTS]

[66] Subsection 6(1) of the Charter states: “Every citizen of Canada has the right to enter, remain in and leave Canada.”

[67] Mr. Colvin maintains that the requirement to stay at a GAA constitutes an arbitrary impediment to the right of returning air travellers to freely enter Canada. He acknowledges that there may at times be a pressing need to detain or hold an individual at the border based on “suspicions of criminal activity, improper credentials, questionable purposes of entry, or even suspicions of communicable disease.” However, he asserts that no such need exists for persons such as himself, who have not been infected with COVID-19, have not had any contact with anyone infected with the virus, have tested negative prior to departing for Canada, and possess the means and ability to self-quarantine for 14 days at home.

[68] I disagree.

[69] I recognize that an expansive approach to subsection 6(1) is consistent with the fact that it is exempt from the legislative override in section 33 of the Charter and is not subject to any limitations, such as those set forth in subsections 6(3) and 6(4): *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157 (*Divito*), at paragraph 28. I further recognize that “rights under the *Charter* must be interpreted generously so as to fulfill its purpose of securing for the individual the full benefit of the *Charter*’s protections”: *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469, (1989), 23 Q.A.C. 182 (*Cotroni*), at page 1480. At the same time, “it is important not to overshoot the actual purpose of the right or freedom in question”: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321, at page 344.

[70] In *Cotroni*, above, at page 1482, the Supreme Court of Canada held that “the central thrust of s. 6(1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community.”

[71] The Impugned Measures are not in any way inconsistent with this central thrust or purpose. Put differently, they do not encroach upon returning air travellers’

membership in Canada's national community. Those travellers are not denied entry to Canada when they land at one of the four airports where international flights currently are permitted to arrive. Rather, they are required to briefly quarantine or isolate *within* Canada. Although the specific location in which they must isolate is different from where returning land travellers may isolate, it is still within Canada.

[72] The Spencer-Duesing applicants maintain that the essence of the rights afforded under subsection 6(1) of the Charter is "the ability for Canadians to move in and out of the country based on their own choice. The [Impugned Measures] have taken this choice away from Canadians, as the decisions of Canadians to travel or not and when to travel has been informed by [those measures]." In this regard, the Spencer-Duesing applicants rely on the following passage of Justice Wilson's dissenting reasons in *Cotroni*, above, at pages 1504–1505:

> … it is my view that s. 6(1) of the *Charter* was designed to protect a Canadian citizen's freedom of movement in and out of the country according to his own choice. He may come and go as he pleases …. [T]he right protected focuses on the liberty of a Canadian citizen to choose of his own volition whether he would like to enter, remain in or leave Canada. [Emphasis added.]

[73] However, this position has not been endorsed by a majority of the Supreme Court of Canada in any subsequent decision.

[74] In my view, the fact that some travellers may voluntarily alter their preferred times of travel to avoid the operation of the Impugned Measures does not imply that those measures infringe travellers' rights under subsection 6(1). One potential impact of validly enacted legislation, such as pertaining to income tax or employment insurance benefits, may be that it influences people's choices regarding when to travel. That does not bring such legislation into conflict with subsection 6(1): *Smith v. Canada (Attorney General)* (2000), 73 C.R.R. (2d) 196, [2000] F.C.J. No. 174 (QL), 2000 CanLII 14930 (F.C.A.), affd [2001] 3 S.C.R. 902, at paragraph 3.

[75] The Spencer-Duesing applicants further maintain that subsection 6(1) should be interpreted with regard to Article 12 of the *International Covenant on Civil and Political Rights*, December 16, 1966, [1976] Can. T.S. No. 47 (ICCPR). I agree: *Divito*, above, at paragraph 25. However, Article 12 does not assist them. Article 12 states as follows:

> *Article 12*
>
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
>
> 4. No one shall be arbitrarily deprived of the right to enter his own country. [Emphasis added.]

[76] As reflected in the highlighted passage of Article 12, paragraph 3 above, the rights set forth in Article 12 are subject to restrictions that, among other things, are necessary to protect public health or the rights and freedoms of others. To the extent that the Impugned Measures constitute such restrictions, the mobility rights contemplated by Article 12 are subject to them. The authority of the AIC to promulgate those measures is further discussed in part VIII.C of these reasons below.

[77] With respect to Article 12, paragraph 4 of the ICCPR, I do not accept Mr. Colvin's assertion that the Impugned Measures are arbitrary because they indiscriminately target every air traveller. I am very sympathetic to Mr. Colvin's evident sense of aggrievement at being treated differently from returning land travellers. However, the basis for treating air travellers differently from land travellers is not arbitrary. It is rooted in scientific data, which I accept, indicating that a higher percentage of asymptomatic returning air travellers (1.7 percent) test positive for COVID-19 than is the case for asymptomatic returning land travellers (0.3 percent): transcript of the cross-examination of Ms. Kimby Barton, conducted April 16, 2021 (Barton Transcript), at page 26, lines 7–12; transcript of the cross-examination of Dr. Rachel Rodin, conducted April 15, 2021 (Rodin Transcript), at page 37, lines 4–8.

[78] Mr. Colvin also submits that the Impugned Measures infringe the right to enter Canada because returning air travellers can only avail themselves of that right if they subject themselves to a violation of their rights in section 7 of the Charter. In this regard, he maintains that the threat of being arbitrarily detained at a GAA violates subsection 6(1) in the same way that deportation from Canada to a country where one would face torture or the death penalty violates section 7.

[79] I will address in the next section below the allegation that the Impugned Measures violate section 7. For now, I will confine myself to rejecting the analogy made between the Impugned Measures and deportation to a country where one would face torture or the death penalty.

[80] In summary, for the reasons set forth above, the applicants have failed to discharge their burden of demonstrating that the Impugned Measures violate subsection 6(1) of the Charter.

(2) Section 7 [Back to TABLE OF CONTENTS]

[81] Section 7 of the Charter states: "Everyone has 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."

[82] To demonstrate a violation of section 7, a claimant must establish two things: (i) that the law in question infringes their right to life, liberty or security of the person; and (ii) that the infringement is not in accordance with the principles of fundamental justice. This second requirement involves an evaluation of whether the law is arbitrary, overbroad or has consequences that are grossly disproportionate to their object: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (*Carter*), at paragraphs 55 and 72.

[83] All of the applicants allege that the requirement to stay in a GAA pending receipt of the results of the Day 1 Test constitutes an infringement of their right to liberty. The

Spencer-Duesing applicants and Mr. Colvin also claim that this requirement constitutes a violation of their right to security of the person. I will deal first with the latter claim.

(a) *Security of the Person* [Back to TABLE OF CONTENTS]

[84] The interests protected by the right to security of the person are alleged to be engaged due to the risk of exposure to the SARS CoV-2 virus at the GAA or DQF facilities, the risk of assault, and the "severe psychological harm" caused by the prospect of staying at a GAA.

[85] Regarding the risk of exposure to the virus, the Spencer-Duesing applicants rely on "reports that have circulated [that] clearly indicate congregations [in GAA facilities] in a way that is inconsistent with acceptable social distancing rules." They further note that Mr. Bexte, who has not alleged an infringement of his right to security of the person, stated that he was exposed to 14 individuals while at a GAA and was placed in close contact (within six feet) of others while in the custody of hotel staff.[5] In addition, they referred to evidence of outbreaks of COVID-19 among staff members at GAA facilities. Mr. Colvin adds that his right to security of the person was breached "by potentially exposing him to 'aerosol' COVID-19 virus at GAA facilities."

[86] With respect to assaults, the Spencer-Duesing applicants rely on a single incident of sexual assault at a DQF facility.

[87] Insofar as psychological harm is concerned, some of those same applicants allege that they experienced severe stress and anxiety over the "oppressive government measures". Ms. Mathis adds that she was traumatized when she was "taken to a secret location" and her husband was not able to find out where she had been brought. Ms. Thompson, who returned to Canada before the Impugned Measures went into effect, states that the "thought of being imprisoned by the federal government had a very negative impact on [her] mental health."

[88] I can certainly understand the concerns identified above and how they may well have caused stress and anxiety to the applicants in question. It is not difficult to readily apprehend how the prospect of having to stay at a GAA or a DQF, and then actually being at such a facility, would cause feelings of stress and anxiety in some people. However, I find that the alleged violations did not engage the applicants' right to security of the person.

[89] That right "encompasses 'a notion of personal autonomy involving … control over one's bodily integrity free from state interference' ... and … is engaged by …state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering" *Carter*, above, at paragraph 64.

[90] The evidence of the physical risk faced by the applicants and the psychological harm that they experienced falls short of what is required to engage section 7. There is no evidence that any of the applicants was physically harmed or infected by COVID-19 at a GAA or a DQF. Indeed, Mr. Spowart's unchallenged evidence is that while there have been some instances of *community-based* COVID-19 spread among staff at GAAs, there have not been any COVID-19 cases linked to traveller transmission in GAAs or DQFs. For greater certainty, there does not appear to be any evidence before

the Court that any returning air traveller has ever been infected by COVID-19 at such a facility. Mr. Spowart's evidence, which I accept, is that a broad range of measures and protocols have been implemented at GAAs and DQFs, as well as in relation to the transportation to those facilities, to help ensure the safety of travellers. In the absence of any evidence that any air traveller has ever been infected at such a facility, it is reasonable to infer that the risks of contracting COVID-19 at a GAA or a DQF are not significant.

[91] I will simply add that GAAs, which were the principal focus of the applicants' submissions, are for travellers who are asymptomatic, have met their pre-departure COVID-19 test requirement, have a suitable post-GAA quarantine plan, and are not or have not been in close contact with persons who are confirmed or probable cases of COVID-19.

[92] The fact that one person who is not a party to this application is reported to have been sexually assaulted at a DQF is not sufficient to engage the applicants' right to security of the person under section 7. I will observe in passing that rooms at GAAs and DQFs are equipped with locks and security personnel are present throughout those facilities: Affidavit of Michael Spowart, affirmed March 31, 2021 (Spowart Affidavit), at paragraphs 60–63.

[93] Turning to the psychological harm alleged by the applicants, the respondent accepts that the requirement to stay at a GAA could cause some stress and anxiety. However, the respondent maintains that the evidence adduced by the applicants does not rise to the level required to engage their right to security of the person under section 7. I agree.

[94] In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, (1999), 177 D.L.R. (4th) 124 (*G. (J.)*), at paragraphs 59–60, the level of psychological harm required in this regard was described as follows:

> …. It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected….
>
> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. [Emphasis added.]

[95] Cases in which the type of psychological harm required to meet this threshold has been found to have been met have included the harm which was brought on by: state removal of a child from parental custody (*G. (J.)*, above, at paragraph 61); preventing an individual from terminating their life at the time of their choosing (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pages 588–589); restrictions on obtaining a therapeutic abortion which increased the risk of complications and mortality (*R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pages 90–91);

and delays in obtaining critical care (*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (*Chaoulli*), at paragraphs 116–124).

[96] In my view, the foregoing circumstances and the psychological harm experienced by the individuals in question are of a qualitatively greater order of magnitude relative to the circumstances at issue in these applications, and the harm the applicants can objectively be understood to have experienced.

[97] Accordingly, and for the additional reasons provided above, I conclude that the applicants have not demonstrated that their right to security of the person under section 7 of the Charter has been or would likely be engaged by the Impugned Measures.

(b) *Right to Liberty* [Back to TABLE OF CONTENTS]

[98] The applicants submit that the Impugned Measures contravened their right to liberty by compelling them, under the threat of fine and/or imprisonment, to stay in a GAA while they awaited the results of their Day 1 Test.

[99] The respondent accepts that the requirement to stay at a GAA or a DQF facility engaged the applicants' liberty interests. However, in doing so, the respondent observes that the extent of the deprivation is markedly less substantial than the deprivations of liberty that were at issue in the cases upon which the applicants rely.

[100] I agree. None of the applicants challenge the validity of the mandatory 14-day quarantine requirement for returning travellers. Rather, they simply challenge the requirement to spend the initial 24–72 hours of that period at a GAA or a DQF while awaiting the results of their Day 1 Test. In my view, this falls towards the lower end of the spectrum of encroachments on an individual's liberty interests that are contemplated by section 7.

[101] Nevertheless, the requirement to stay at a GAA or a DQF for 24–72 hours plainly violated the liberty interests of those applicants who were required to stay there and will engage the liberty interests of the two applicants who remain outside Canada.

[102] Accordingly, it is necessary to move to the second stage of the analysis and assess whether the infringement of the applicants' liberty interest was or will be in accordance with the principles of fundamental justice. As noted at paragraph 82 above, this involves an assessment of whether the Impugned Measures are arbitrary, overbroad or have consequences that are grossly disproportionate to their object. These three principles "compare the rights infringement caused by the law with the objective or the law, not with the law's effectiveness": *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (*Bedford*), at paragraph 123.

(i) Arbitrariness [Back to TABLE OF CONTENTS]

[103] The RNN applicants submit that the infringement of their right to liberty is arbitrary for two reasons. First, they maintain that it is arbitrary to require an air traveller to stay in a GAA, while not requiring a land traveller coming from the same location to do so. The Spencer-Duesing applicants share this position.

[104] I disagree. There is cogent evidence supporting the AIC's decision to target returning air travellers with special measures, including the specific requirement to stay in a GAA or a DQF.

[105] The evidence establishes a valid basis for imposing special requirements on returning air travellers. As previously noted, Dr. Rodin and Ms. Barton provided evidence, which I accept, that a higher percentage (1.7 percent) of asymptomatic air travellers test positive for COVID-19 than is the case for asymptomatic land travellers (0.3 percent). Moreover, Dr. Poliquin stated that "based on the information that the NML currently has, all P.1 variant of concern cases have arrived in Canada via air travellers and the variant has been contained to the provinces of arrival. This indicates that so far the border measures have prevented the further onward spread of the P.1 variant of concern": Affidavit of Dr. Guillaume Poliquin, affirmed March 30, 2021 (Poliquin Affidavit), at paragraph 67. Dr. Poliquin also discussed a science brief, dated December 27, 2020, which reported upon the only six known or suspected cases of the B.1.1.7 variant in Canada at that time. According to that brief, all but one of those cases were linked to individuals who had an overseas travel history. The other was linked to an individual "with a clear travel history": Poliquin Affidavit, above, at paragraph 32. Dr. Poliquin proceeded to observe: "Limiting the importation and spread of variants of concern and other newly emerging variants will be key to containing the epidemic in Canada": Poliquin Affidavit, above, at paragraph 69.

[106] Dr. Poliquin also described a particularly tragic outbreak of the B.1.1.7 Variant of Concern at the Roberta Place Long Term Care Home in Barrie, Ontario. Ultimately, 100 percent of the residents and 105 of the employees at that facility became infected with B.1.1.7, resulting in 71 deaths: Poliquin Affidavit, above, at paragraph 48.

[107] I recognize that the applicants do not accept that any of the P.1, B.1.1.7 or B.1.351 Variants of Concern entered Canada by air. However, what is important for the present purpose is that Dr. Poliquin and his team at the NML, which advised the government on the Impugned Measures, had a valid basis for *believing* that at least the P.1 Variant of Concern had arrived by air and that this provided additional support for targeting measures at air travellers. This is further reflected in the following exchange between Mr. Colvin's counsel (Mr. Rath), and Dr. Poliquin:

> **[Mr. Rath] Q** Right. And with regard to these measures that you say work in concert, do you have any reason to think that the measures would be less effective if people arriving by air were simply allowed to go quarantine in their homes until such time as they can then have their second test?
>
> **A** It would be indirect evidence. But if you look at the extent of spread of B.1.1.7 and that represents likely multiple introduction events over a period of time to explain why B.1.1.7 has been able to spread and overtake the wild-type virus in the time that it has. We also see that with these variants, for example, P.1 in the context of the existing border measures, the number of cases of P.1 in Canada was 3 from January until mid March. And once it began to transmit domestically through a number of clusters, we saw significant spread.
>
> **Q** So your evidence—sorry, I didn't mean to cut you off. Go ahead and finish your answer; I'm sorry.
>
> **A** So, therefore, in the context of quarantining at home where there's a potential for quarantine escape and multiple introduction events, we have seen evidence that in the past

with B.1.1.7 that that facilitates a number of transmission chains and leads to rapid displacement of variant types; whereas, in a context of limited number of importation events, it at least delays the spread of variants.

(Transcript of the cross-examination transcript of Dr. Guillaume Poliquin. conducted April 19, 2021 (Poliquin Transcript), at page 94.)

[108] The AIC's concern regarding the specific risks posed by air travellers is reflected in the following passage of the Explanatory Notes to the February Order:

The Government of Canada has been working with provincial governments and industry stakeholders to gather data on testing travellers entering Canada at select airport and border crossings through pilot programs. These pilot programs have demonstrated that the frequency of people coming into Canada with COVID-19 is approximately 1–2%, meaning that at least one person on every flight with 100 passengers to Canada has the virus responsible for COVID-19.

(February Order, Explanatory Notes, above, at page 726.)

[109] Given the increased risks posed by air travellers, relative to land travellers, Ms. Barton explained on cross-examination that one of the rationales for the requirement to stay at a GAA is that people who tested positive on their Day 1 Test would likely modify their behaviour and therefore "would be less likely to infect people in their home" after their GAA stay: Barton Transcript, above, at page 137.

[110] Dr. Poliquin explained two additional rationales in the following terms:

51. The addition of a post-entry COVID-19 molecular test and the requirement to await the results of this test at a [GAA] are additional layers of protection that help protect against the introduction and spread of variants of concerns in the community and increase the overall protection of Canadians. 52. These additional requirements help to prevent asymptomatic infected travellers from immediately taking a domestic flight and potentially infecting other passengers, from using other forms of public transportation to travel to their homes to quarantine, or from infecting others in their household while quarantining before receiving the results of their post-entry COVID-19 molecular test.

(Poliquin Affidavit.)

[111] The latter of these two rationales relates to the PHAC's concern that not all returning international travellers can be trusted to properly quarantine in their home or other suitable place of quarantine. This concern was based on the results of two studies that revealed that international travellers arriving in Canada were exposing and infecting other individuals, even when they were instructed to quarantine: Affidavit of Dr. Rachel Rodin, affirmed March 30, 2021 (Rodin Affidavit), at paragraph 16(c).

[112] A fourth rationale for the GAA stay requirement is that it permits early identification and isolation of asymptomatic air travellers who are infected: February Order, Explanatory Notes, above, at pages 726–727.

[113] Regarding the RNN applicants' position that it is arbitrary to treat differently returning air travellers and returning land travellers *who come from the same location abroad*, I accept Ms. Barton's evidence that "[t]argeting border control measures only to travellers arriving from 'hotspots' has proven not to be effective at restricting the entry of COVID-19 into Canada as their efficacy depends significantly on the accuracy of

information from other countries about case rates.”: Affidavit of Kimby Barton, affirmed March 31, 2021 (Barton Affidavit), at paragraph 39. In this regard, Ms. Barton noted that PHAC was aware that criminal actors abroad had been producing false test result documents. For example, a report dated 1 February 2021 prepared by the European Union Agency for Law Enforcement Cooperation (Europol) warned about the sale of fraudulent negative COVID-19 test certificates in the United Kingdom, France and Spain: Barton Affidavit, above, at paragraph 16. Given all of the foregoing evidence, it is not arbitrary to treat air travellers and land travellers differently, even if they come to Canada from the same location.

[114] As a practical matter, a further basis for treating air travellers and land travellers differently, at least with respect to the requirement to stay at a GAA or a DQF, is that there are no available hotels or other facilities at many of the 117 land border crossings into Canada: Barton Affidavit, above, at paragraph 45. I will observe in passing that the bulk of individuals who enter Canada by land are providers of essential services: Barton Transcript, above, at pages 98–99.

[115] The RNN applicants also assert that the Impugned Measures are arbitrary because they are not capable of achieving their objectives. They submit that this is because air travellers with a suitable quarantine plan are permitted to leave their GAA after receiving their Day 1 Test, regardless of whether the test result is negative or positive. As a consequence, they maintain that the GAA requirement can have no discernable positive impact on the spread of COVID-19.

[116] I disagree.

[117] It bears underscoring here that what is relevant is the objective of the Impugned Measures, not their actual effectiveness: *Bedford*, above. A law will only be found to be arbitrary “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”: *Carter*, above, at paragraph 83, citing *Bedford*, above, at paragraph 111. Accordingly, all that is required to demonstrate that the Impugned Measures are not arbitrary is the existence of some link between them and the objective(s) they were intended to achieve.

[118] The stated objective of the impugned OICs, as discussed above, is “reducing the introduction and further spread of COVID-19 and new variants of the virus into Canada by decreasing the risk of importing cases from outside the country”: February Order, Explanatory Notes, above, at page 720; respondent’s record, at R84. This objective is also reflected in the passage of Dr. Poliquin’s Affidavit, quoted at paragraph 110 above.

[119] As noted above, the rationales for the specific requirement to quarantine in a GAA were (i) individuals who know they have tested positive are likely to modify their behaviour in a manner that reduces the risk of transmitting COVID-19 to others in their home and in the broader community, (ii) preventing people from spreading the virus to others when travelling on public transportation to their homes or other suitable place of quarantine, (iii) preventing infected travellers from infecting others in their home or in the community during the period that they are in a GAA; and (iv) facilitating early identification and isolation of asymptomatic air travellers who are infected.

[120] In my view, these rationales provide the requisite rational connection between the objective of the Impugned Measures, including the specific requirement to stay at a GAA, and the limits imposed on the applicants' right to liberty.

[121] I recognize that this objective may well have been better achieved in various ways. Of course, these would include reducing the number of exemptions from the Impugned Measures, requiring persons who have tested positive to isolate at a DQF for 14 days, and requiring asymptomatic travellers to stay at a GAA for a longer period of time. I also fully understand the applicants' perception that it was unfair that the Impugned Measures, particularly the requirement to stay at a GAA at their own cost, were targeted solely at returning air travellers. However, it is not unreasonable to require those who voluntarily assume travel-related risks to pay for costs associated with their port-of-entry quarantine, especially when they incur those risks in the face of repeated government advisories and even exhortations from their Prime Minister to avoid non-essential travel: Barton Affidavit, above, at paragraphs 27–28.

[122] In any event, "[t]he fact that a government practice is in some way unsound or that it fails to further the government objective as effectively as a different course of action would is not sufficient to establish that the government practice is arbitrary": *Ewert v. Canada*, 2018 SCC 30, [2018] 2 S.C.R. 165, at paragraph 73.

(ii) Overbreadth [Back to TABLE OF CONTENTS]

[123] A measure will be deemed overboard when it "takes away rights in a way that generally support the object of the law, [but] goes too far by denying the rights of some individuals in a way that bears no relation to the object": *Carter*, above, at paragraph 85. However, "[t]he question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature": *Carter*, above, at paragraph 85. Where there is a rational connection between the effect on the individual(s) in question and the measure's purpose, it will not be overbroad: *Bedford*, above, at paragraph 113.

[124] The applicants assert that the Impugned Measures, particularly the requirement to stay at a GAA or a DQF, are overbroad for several reasons. Specifically, they maintain that those measures unnecessarily apply to individuals who (i) are asymptomatic, recently tested negative for COVID-19, and have not been in recent contact with an infected individual; (ii) have their own private vehicle (and therefore do not require public transportation), and (iii) live alone, or have travelled with their entire household. In addition, they assert that the requirement to stay at a GAA or a DQF is unnecessary given the stricter requirements that the Impugned Measures impose on suitable quarantine plans.

[125] I disagree. There is a rational connection between the individuals described above, including those who have a suitable quarantine or isolation plan, and the requirement to stay at a GAA or a DQF. In brief, it is reasonable to believe, as Ms. Barton explained, that individuals who know they have tested positive are likely to modify their behaviour in a manner that reduces the risk of transmitting COVID-19 to others in their home and in the broader community. This would apply both after such individuals have arrived home from the airport *and* during their drive from the airport. (One would hope and expect that such persons would be less inclined to stop along the

way where other persons are present.) In addition, the GAA stay requirement prevents asymptomatic infected individuals from transmitting the COVID-19 virus to others in their home or in the community during the period that they are in a GAA or a DQF. The concern about such transmission is based on the evidence that even travellers who have tested positive and were supposed to be isolating at home or at another suitable location have infected others: see paragraph 111 above.

[126] Moreover, the requirement to stay at a GAA or a DQF facilitates early identification and isolation of asymptomatic air travellers who are infected. Among other things, this permits border officials to conduct a more detailed review of the quarantine/isolation plans of travellers who have tested positive. This not only provides an opportunity to reinforce those plans, but also to identify infected individuals whose isolation plans are not suitable. Indeed, this process also provides an opportunity for infected travellers to decide to isolate at a DQF, rather than returning to their home or other suitable place of quarantine, and potentially infecting others.

[127] The Spencer-Duesing applicants further submit that the Impugned Measures are overbroad because they apply to vaccinated travellers. However, they have not adduced evidence to establish that such travellers do not pose a risk of infecting others. Dr. Poliquin's unchallenged evidence is that "at this time, there is insufficient evidence to determine what impact, if any, COVID-19 vaccines will have on SARS-CoV-2 transmission": Poliquin Affidavit, above, at paragraph 13.

[128] Mr. Colvin maintains that the requirement to stay at a GAA facility is overbroad because it exposes individuals to a greater risk of contracting the virus than they would have if they were permitted to proceed directly to their home or other suitable place of quarantine, immediately upon their arrival to Canada. However, he has not provided any evidence to substantiate this position. The evidence on the record is that no air travellers have been infected with the virus at a GAA or a DQF (see paragraph 90 above).

[129] The RNN applicants submit that the Impugned Measures are overbroad because the Government of Canada had already suspended all flights to and from Mexico and Caribbean countries between January 31, 2021, and April 30, 2021. However, this submission fails to address the evidence that COVID-19 had spread to all but a handful of countries of the world by the time the February Order was made. As of February 11, 2021, it had also become apparent that the Variants of Concern were spreading across the globe, with 85 countries reporting confirmed cases of B.1.1.7, 25 countries reporting confirmed cases of the B.1.351 variant, and 16 countries reporting confirmed cases of the P.1 variant: Poliquin Affidavit, above, at paragraph 46.

[130] Finally, the RNN applicants submit that the Impugned Measures are overbroad because they have significant adverse socio-economic impacts that have not been balanced against the rate of imported infection and the number of travellers who require the use of public conveyances. However, the source cited in support of this statement was dated December 8, 2020, before the February Order was made, and the passage in question was commenting upon the broad range of "border restrictions" that had been imposed since March 2020. The RNN applicants have not identified any evidence of significant adverse socio-economic impacts associated with the Impugned Measures. Nor have they supported their bald assertion that any such impacts were not taken into account in the process of developing and passing the Impugned Measures.

[131] In summary, the applicants' various assertions of over breadth regarding the Impugned Measures are without merit. For the reasons set forth above, there is a rational connection between the objective of those measures and the effects on the individuals who the applicants suggest ought to have been exempted from those measures. I will add in passing that I am sympathetic to Ms. Barton's view that "it's very difficult to put in place border measures that include every single conceivable outcome and means and mechanism of travel": Barton Transcript, above, at page 58.

(iii) Gross Disproportionality [Back to TABLE OF CONTENTS]

[132] This aspect of the analysis under section 7 "compares the law's purpose, 'taken at face value', with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law": *Carter*, above, at paragraph 89, quoting *Bedford*, above, at paragraph 125. This assessment contemplates a high bar to establish gross disproportionality: *Carter*, above, at paragraph 89. In brief, the adverse impact on the individual must be "so severe that it violates our fundamental norms": *Bedford*, above, at paragraph 109. As a result, the rule against disproportionality is only applied "in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure": *Bedford*, above, at paragraph 120.

[133] The RNN applicants assert that the Impugned Measures are grossly disproportionate because they apply to all air travellers, despite the fact that approximately 98 percent of them have no symptoms, have not tested positive and will not test positive for COVID-19. They also maintain that they are grossly disproportionate because there are no exceptions for travellers with private transportation who have a suitable quarantine plan and pose no significant risk of further spreading COVID-19 during the isolation period. They add that those measures are grossly disproportionate because they have little effect on the spread of COVID-19, due to the fact that they do not apply to many other travellers, including those entering Canada by land and exempted air travellers. The other applicants share some of these concerns.

[134] I disagree. Given that there is no way to know in advance which asymptomatic air travellers are infected and incubating COVID-19 at the time they arrive in Canada, there is a rational basis to test them all and to require that they stay in a GAA or a DQF while they await their Day 1 Test result. These measures, and their impact on air travellers, are not "completely out of sync" with the objective of "reducing the introduction and further spread of COVID-19 and new variants of the virus into Canada by decreasing the risk of importing cases from outside the country": February Order, Explanatory Notes, above, at page 720.

[135] In particular, the brief (24–72 hour) deprivation of liberty is not completely out of sync with this objective, or with the positive effects identified by the respondent's affiants (see paragraphs 109–112 above). While that deprivation of liberty is not trivial, it is not so significant as to be disproportionate, let alone grossly disproportionate, to the objective and the rationales underlying the Impugned Measures. The evidence also indicates that reasonable efforts are made to accommodate those who are required to stay at GAAs, for example with respect to their dietary preferences, frequency of fresh-air breaks, and desire to have a pet in their room. In addition, families travelling together are placed in adjoining rooms.

[136] Accordingly, the Impugned Measures, do not violate the principles of fundamental justice on grounds of gross disproportionality.

(iv) Section 7 – Conclusion [Back to TABLE OF CONTENTS]

[137] For the reasons set forth above, I have concluded that the applicants' right to security of the person is not engaged by the Impugned Measures. In addition, although their right to liberty is engaged, the deprivation of that right was in accordance with the principles of fundamental justice. Accordingly, the Impugned Measures do not violate section 7 of the Charter.

(3) Section 8 [Back to TABLE OF CONTENTS]

[138] The RNN applicants submit that the requirement that non-exempt travellers pay for their booking at the GAA constitutes an unreasonable seizure within the meaning of section 8 of the Charter. In support of this submission, they maintain that a seizure within the meaning of section 8 need not be accompanied by a search, and occurs where there is "the taking hold, by a public authority of a … thing belonging to a person against that person's will."

[139] This is an incomplete definition. When the scope of section 8 is properly defined, it becomes readily apparent that the RNN applicants' interests under that provision are not engaged.

[140] Section 8 states: "Everyone has the right to be secure against unreasonable search or seizure."

[141] A "seizure" in this context is considered to constitute "the taking of a thing from a person by a public official without that person's consent": *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531 (*Reeves*), at paragraph 13, *citing R. v. Dyment*, [1988] 2 S.C.R. 417, at pages 431, (1988), 73 Nfld. & P.E.I.R. 13.

[142] However, section 8 is not engaged unless "the claimant has a reasonable expectation of privacy in the place or item that is inspected or taken by the state" *Reeves*, above, at paragraph 12, citing *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34 (*Cole*), at paragraphs 34 and 36. Moreover, this expectation of privacy must "[occur] in the context of administrative or criminal investigation": *Quebec (Attorney General) v. Laroche*, 2002 SCC 72, [2002] 3 S.C.R. 708, at paragraph 53, quoting S. C. Hutchison, J. C. Morton and M. P. Bury, *Search and Seizure Law in Canada* (Toronto: Carswell, 1993) (loose-leaf updated 2002, release 2), at page 2-5.

[143] To determine whether a claimant has such an expectation of privacy, courts are required to examine "the totality of the circumstances": *Reeves*, above, at paragraph 12. The objective reasonableness of a person's privacy expectations will vary according to whether the search or seizure occurs in the criminal context rather than in an administrative or regulatory context; intrusions by the state that constitute search or seizure in the criminal context may be neither in an administrative context: *X (Re)*, 2017 FC 1047, [2018] 3 F.C.R. 111, at paragraph 123.

[144] If section 8 is engaged, the court must then determine whether the seizure was reasonable: *Reeves*, above, at paragraph 14, citing *R. v. Edwards*, [1996] 1 S.C.R. 128, (1996), 26 O.R. (3d) 536, at paragraphs 31 and 45(5).

[145] A search or seizure is reasonable "if it is authorized by law, if the law itself is reasonable and if the manner in which the search [or seizure] was carried out is reasonable": *Reeves*, above, at paragraph 14, citing *R. v. Collins*, [1987] 1 S.C.R. 265, at page 278, (1987), 38 D.L.R. (4th) 508.

[146] Having regard to the foregoing, it is evident that the requirement to pay for a booking at a GAA does not engage the RNN applicants' interests under section 8.

[147] I have serious doubts as to whether that requirement constitutes "the taking of a thing from a person by a public official without that person's consent", as understood in the jurisprudence under section 8. However, it is not necessary to dwell on this issue as it is readily apparent from the "totality of the circumstances" that arriving air travellers have no reasonable expectation of privacy in *the money* they are required to pay in order to book a stay at a GAA. They have not suggested otherwise. Rather, they appear to be primarily concerned about the fact of having to pay for the GAA, which adds insult to the requirement to stay at a GAA—something they resolutely oppose. When viewed in this light, their claim appears to be little more than a claim for property rights in their money—something that "was deliberately not included in the *Charter*": *Laroche*, above, at paragraph 52.

[148] Moreover, the circumstances in which air travellers are required to stay at a GAA or a DQF—namely, to await the results of their Day 1 Test—plainly do not constitute "an administrative or criminal investigation". Once again, the RNN applicants have not suggested otherwise.

[149] Given that the RNN applicants have not met their burden of establishing that their rights under section 8 have been engaged, it is not necessary to consider whether the alleged "seizure" of their money was reasonable.

(4) Section 9 [Back to TABLE OF CONTENTS]

(a) *Applicable Legal Principles*

[150] Section 9 of the Charter states: "Everyone has the right not to be arbitrarily detained or imprisoned."

[151] The purpose of section 9 is to "protect individual liberty against unjustified state interference. Its protections limit the state's ability to impose intimidating and coercive pressure on citizens without adequate justification": *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692 (*Le*), at paragraph 25.

[152] The section 9 analysis proceeds in two steps. First, the court must assess whether there was a detention. If it reaches an affirmative conclusion in this regard, it must then proceed to assess whether the detention was arbitrary: *Le*, above, at paragraph 124.

[153] A “detention” pursuant to section 9 requires “significant physical or psychological restraint”: *Le*, above, at paragraph 27, citing *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59, at paragraph 19; *R. v. Hufsky*, [1988] 1 S.C.R. 621, (1988), 27 O.A.C. 103 (*Hufsky*), at pages 631–632; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353 (*Grant*), at paragraphs 28–29. It will also occur where there is “a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee”: *R. v. Therens*, [1985] 1 S.C.R. 613, at page 642, (1985), 18 D.L.R. (4th) 655 (*Therens*). Ultimately, a “contextual analysis” is required: *R. v. Nagle*, 2012 BCCA 373, 97 C.R. (6th) 346 (*Nagle*), at paragraph 32.

[154] Even in the absence of an actual or threatened physical restraint, a detention may occur “if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist”: *Therens*, above, at page 644. In the criminal law context, this may be so even if the detention is “of relatively brief duration”: *Hufsky*, above. However, in the border control context, “[p]eople do not expect to be able to cross international borders free from scrutiny”: *R. v. Simmons*, [1988] 2 S.C.R. 495 (*Simmons*), at page 528. Accordingly, routine questioning by customs officials and routine searches of the person or of luggage do not constitute detention, even where such searches are conducted in a private search room: *Simmons*, above, at pages 521 and 528–529.

[155] Following the S.C.C.’s decision in *Grant*, detention under section 9 is understood as including psychological detention by state agents, notably where an individual is “legally required to comply with a direction or demand” or where a reasonable individual, though not legally required to comply, would “conclude that [they were] not free to go”: *Grant*, above, at paragraphs 30–31.

[156] In assessing whether a detention is arbitrary, a three-part test is applied. Specifically, the detention must be authorized by law, the authorizing law itself must not be arbitrary, and the manner in which the detention is carried out must be reasonable: *Le*, above, at paragraph 124.

(b) *The Parties’ Submissions* [Back to TABLE OF CONTENTS]

[157] The applicants submit that the Impugned Measures, particularly the requirement to stay at a GAA and remain in their room under threat of a substantial fine and/or imprisonment,[6] is a form of detention contemplated by section 9. They variously add that such detention is arbitrary because the measures in question: subject air travellers to a blanket policy that does not take individual circumstances into consideration; do not apply to travellers entering Canada by land (who constitute the vast majority of travellers); do not provide sufficient criteria to guide the exercise of discretion by screening officers and make reasonable determinations as between individuals; and do not fulfill their stated public objectives because the Variants of Concern are already present in Canada and because travellers are permitted to go home after receiving their Day 1 Test, regardless of whether the result is positive or negative. They also object to being subjected to unreasonable policies, including the prohibition on taking photographs or videos upon threat of penalty, and they further reiterate concerns regarding being exposed to increased risks at GAA facilities. Finally, they submit that the Impugned Measures stigmatize air travellers by assuming that they are more likely than land travellers to carry and transmit the virus in Canada.

[158] The respondent submits the Impugned Measures do not give rise to any "detention" within the meaning of section 9. In the alternative, if "detention" occurs under the GAA Measures, such a detention is not arbitrary. Relying on *Canadian Constitution Foundation v. Canada (Attorney General)*, 2021 ONSC 2117, 488 C.R.R. (2d) 106 (*CCF*), at paragraph 39, they dismiss this claim as "frivolous".

[159] In support of its position that no "detention" occurs when returning air travellers are quarantined while awaiting their Day 1 Test results the respondent maintains that in the context of a global pandemic and emerging Variants of Concern, this requirement is an extension of the routine screening process of entering Canada. Stated differently, individuals who find their liberty and freedom of movement restricted during a routine screening cannot be said to be detained, provided that the restrictions do not go beyond the normal screening process. In the respondent's view, the GAA requirement is a part of such a process. Given that this requirement applies uniformly to all non-exempt air travellers, it does not bear the hallmarks of detention at the border.[7] Moreover, there is no stigma attached to being one of the "thousands" of travellers routinely go to a GAA each day, particularly given that the public has been provided with ample notice of the possibility of enhanced quarantine measures throughout the pandemic.

[160] In the alternative, the respondent submits that the GAA requirement does not amount to detention because there is no physical constraint. In this regard, the respondent notes that travellers book their own GAA, may drive there in their own vehicle, check-in as they otherwise would at any hotel, and stay as a family unit.

[161] In any event, the respondent asserts that if there is a "detention" within the meaning of section 9, it is not arbitrary for the same reasons that the engagement of air travellers' liberty interests is not arbitrary under section 7.

(c) *Analysis* [Back to TABLE OF CONTENTS]

[162] In my view, the requirement to stay at a GAA constitutes a "detention" within the meaning of section 9. However, such detention is not "arbitrary." Consequently, there is no infringement of section 9.

[163] The typical border screening process is of relatively short duration, especially compared to the requirement to stay at a GAA or a DQF for 24–72 hours. Even assuming that a screening process of a few hours would not constitute a "detention" within the meaning of section 9 (*Nagle*, above, at paragraph 35), I consider that a screening process lasting 24–72 hours unquestionably constitutes detention.

[164] In contrast to persons who are routinely questioned and even physically searched at the border, air travellers are not permitted to proceed home that same day. Indeed, they may be prevented from doing so for up to three days. During that time, they are required to stay in their hotel room. Although they may request the opportunity to take one or more fresh-air breaks, this does not alter the fact that they are subject to a significant physical restraint of movement. Given the penal nature of the sanctions to which they are subject if they refuse to stay in a GAA, or if they refuse to comply with the physical restrictions at the GAA, a reasonable person in that situation would likely conclude that they were not "free to go."

[165] Accordingly, the requirement to stay in a GAA or a DQF for 24–72 [hours] constitutes “detention” within the meaning of section 9.

[166] However, such detention is not “arbitrary.” As noted above, this stage of the analysis requires three determinations: (i) the detention is authorized by law, (ii) the authorizing law itself is not arbitrary, and (iii) the manner in which the detention is carried out is reasonable: *Le*, above, at paragraph 124.

[167] Given that the requirement to stay at a GAA is mandated by the Impugned Measures, the first part of the test is satisfied.

[168] Turning to the second part of the test, I agree with the respondent that the various reasons for concluding that the restriction of the applicants’ liberty interests is not arbitrary also weigh in favour of concluding that their detention is not arbitrary. This addresses several of the applicants’ submissions, which were in respect of both section 7 and section 9.

[169] With respect to the third part of the test, I consider that the manner in which the detention is carried out is reasonable. Air travellers make their own reservations at the GAA hotel, they may drive their own vehicle there, they check in as they would at any other hotel, they may raise special requests or accessibility needs at that time, they can request fresh air breaks (including to smoke), they retain and are free to use their personal telephones without restriction, they have Wi-Fi access to the Internet, they can choose from a range of food options (including take-out food through contactless delivery), they can avail themselves of a range of television and movie options, and they are generally free to do as they please within the hotel room. Although travellers staying at a DQF may not be able to do all of these things, the manner in which their detention is carried out is not unreasonable. Moreover, those staying at a GAA or a DQF can also lock their rooms if they so choose, and there is no evidence to suggest that anyone is physically forced to go to their room. In addition, they may check out of the GAA or DQF soon after receiving their Day 1 Test results.

[170] Moreover, there is no evidence of any meaningful risk of being infected at a GAA or DQF (see paragraph 90 above). I note that Justice Pentney reached a similar finding in assessing a motion brought earlier in these proceedings: *Spencer v. Canada (Attorney General)*, 2021 FC 361, 490 C.R.R. (2d) 1 (*Spencer*), at paragraphs 110 and 127.

[171] Contrary to the submissions of the applicants, I do not consider the restrictions on taking photographs or videos within a GAA or a DQF to be unreasonable. In my view, this is a reasonable precaution to prevent encroachment on the privacy interests of workers and fellow travellers at the facility.

[172] Ms. Mathis submits that she was not told where her quarantine facility was located and that the police officers who escorted her there refused to provide that information to her spouse. After I expressed concern about this during the hearing, counsel to the respondent replied that this occurred prior to the entry into force of the February Order, and that since the entry into force of that Order travellers now know where they will be staying because they choose and book a room at a GAA themselves. Insofar as DQFs are concerned, Mr. Spowart’s unchallenged evidence is the name of the hotel is not withheld from travellers, who are free to share this information with

family or friends: Spowart Affidavit, above, at paragraph 56, RNN Record at R910. Be that as it may, I consider that the failure to advise an individual of where they are being taken for detention is unreasonable and renders such detention arbitrary.

[173] Finally, I do not agree with the applicants' submissions that the Impugned Measures are arbitrary because they do not take individual circumstances into account and do not provide sufficient criteria to guide the exercise of discretion by screening officers and make reasonable determinations as between individuals. In reaching this conclusion, I have kept in mind the overall context in which the Impugned Measures were issued and in which screening officers operate.

[174] The January Order, the February Order and their successors have extensive provisions that take individual considerations into account and operate to constrain the exercise of discretion by screening officers.

[175] Taking the February Order as an example:

i. The term "isolation" is defined in section 1 to mean "the separation of persons who have reasonable grounds to suspect they have COVID-19, who have signs and symptoms of COVID-19 or who know they have COVID-19, in such a manner as to prevent the spread of the disease";

ii. The term "quarantine" is defined to mean "the separation of persons in such a manner as to prevent the possible spread of disease";

iii. Section 1.3 defines in considerable detail the requirements of a "suitable quarantine plan";

iv. Paragraph 3(1)(a.1) defines the requirements applicable to self-quarantine;

v. Paragraph 4(1) identifies five bases upon which a person who enters Canada by aircraft is considered unable to quarantine themselves;

vi. Section 5 lists six mandatory factors that must be considered in deciding where someone should quarantine;

vii. Subsection 6(1) provides an extensive list of exemptions from the requirement to quarantine;

viii. Section 6.2, subsection 7(1) and subsection 7.2(1) provide additional exemptions;

ix. Subsection 7.1(1) provides a list of compassionate grounds exemptions;

x. Section 9 narrowly defines who is required to isolate and where they can isolate;

xi. Subsection 10(1) narrowly defines who is considered to be unable to isolate;

xii. Section 10(2) defines the requirements applicable to persons who are unable to isolate themselves; and

xiii. Section 11 lists six mandatory factors to be considered in choosing an isolation facility.

[176] In addition to the foregoing, a detailed document entitled *Shift Briefing Bulletin*, which was initially issued to screening officers in November 2020 and was updated on February 23, 2021, contains very specific instructions for those officers. This includes:

i. directions as to what to visually inspect for (namely, signs of illness);

ii. a very specific question to be asked of travellers and directions as to when to provide either the green document or the red document discussed below;

iii. identification of various situations in which a traveller must be referred to a quarantine officer for further assessment;

iv. an instruction that screening officers " are to start from the position that all travellers are required to quarantine unless they can demonstrate at time of processing that they explicitly meet one of the quarantine exemptions outlined in subsection 6(1) of the QIOO Order or have letter of authorization issued by (Patrimoine Heritage Canada) pursuant to subsection 7.2(1) of the QIOO OIC to be exempt from the requirement to quarantine";

v. a statement that exempt asymptomatic travellers "will not be asked to quarantine";

vi. the specific questions to be asked to determine if a traveller has a suitable quarantine plan; and

vii. the basis upon which a person can be provided a limited release from quarantine on compassionate grounds.

[177] The green and red documents referred to above appear to be the documents entitled Green Information Guide and Red Information Guide, which were attached at Exhibit B to Mr. Spowart's affidavit. Those documents identify the specific requirements for a "suitable place of quarantine" and a "suitable place of isolation".

[178] Having regard to the information summarized in the three preceding paragraphs immediately above, I conclude that sufficient criteria to guide the exercise of discretion by screening officers and enable them to make reasonable determinations as between individuals do in fact exist. Those criteria are set forth in the January Order, the February Order and their successors, as well as in the additional documentation described above.

[179] In summary, I find that the Impugned Measures, particularly the requirement to stay at a GAA or a DQF, engage the applicants' section 9 rights because they result in the detention of non-exempt persons arriving in Canada by air. However, with the exception of Ms. Mathis, the Applicants' section 9 rights are not contravened because their detention is not arbitrary. This is because (i) the detention is authorized by law (namely, by the same Order(s) in which the Impugned Measures are contained), (ii) the authorizing law itself is not arbitrary, and (iii) the manner in which the detention is carried out is reasonable. Moreover, the Impugned Measures, together with the other

documents discussed in the immediately preceding paragraphs above, provide sufficient criteria to guide the exercise of discretion by screening officers and to enable them to make reasonable determinations as between individuals.

[180] Regarding Ms. Mathis' section 9 rights, I find that they were infringed because she was not informed of the location to which she was being taken.

(5) Paragraph 10(b) [Back to TABLE OF CONTENTS]

[181] Paragraph 10(b) provides that everyone has the right on arrest or detention to retain and instruct counsel *without delay* and to be *informed* of that right (emphasis added).

[182] The purpose of section 10 of the Charter is to "ensure that in certain situations a person is made aware of the right to counsel and is permitted to retain and instruct counsel without delay": *Therens*, above, at page 641. One of those situations is when the person is detained by the state.

[183] The meaning of "detention" is essentially the same for section 9 and section 10: *Hufsky*, above, at paragraph 12; *Grant*, above, at paragraphs 28–29. Accordingly, given my conclusion in the section immediately above that the requirement to stay in a GAA for 24–72 hours results in a "detention", the applicants' rights under paragraph 10(b) are engaged.

[184] The words "without delay" in section 10 mean "immediately": *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460 (*Suberu*), at paragraphs 41–42.

[185] Beyond maintaining that the requirement to stay at a GAA does not result in a "detention" within the meaning of section 10, the respondent states that arriving air travellers do not require the assistance of counsel. This is said to be because they do not face significant legal consequences associated with their quarantine, including the risk of self-incrimination or seizure of evidence. However, this ignores that the right to legal counsel is also "meant to assist detainees regain their liberty": *Suberu*, above, at paragraph 40.

[186] As with other sections of the *Charter*, the burden to demonstrate a violation of section 10 is on the person(s) claiming a violation: *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, at paragraphs 21–22. "The absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position": *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, (1989), 61 D.L.R. (4th) 385, at page 366.

[187] In these consolidated proceedings, only one of the applicants (Ms. Mathis) provided sufficient evidence that her right to be informed of her right to retain and instruct counsel, *without delay*, was violated. She did so at paragraph 13 of her affidavit. That evidence was not directly disputed by the respondent.

[188] Nevertheless, in his affidavit, Mr. Spowart stated that the "Welcome Packages" provided to arriving air travellers "remind travellers they may contact legal counsel if they wish." The package in question is an undated seven-page brochure entitled *INFORMATION FOR YOUR STAY AT A QUARANTINE/ISOLATION SITE*. On the last

page of that document, it is stated: “We would be pleased to assist you in contacting legal counsel of your choice if you require it.” The same statement is made at page 4 of another document, also attached to Mr. Spowart’s affidavit, entitled *Coronavirus Disease (COVID-19), FEDERAL DESIGNATED QUARANTINE FACILITY INFORMATION FOR YOUR STAY.*

[189] Even assuming that one or both of the above-mentioned documents was provided to Ms. Mathis, I consider that the provision of those documents to her upon her arrival would not satisfy the respondent’s obligations under paragraph 10(1)(b). To discharge those obligations, the person detaining an individual must clearly communicate the right to retain and instruct counsel in a manner that it is readily understood, *at the outset of the detention*. Providing a long brochure that can reasonably be expected to be read at a later point in time is not sufficient. This is because persons who choose to read the document later will not have been meaningfully informed of their right to retain and instruct counsel *without delay*. Among other things, the exercise of that right can be expected to enable air travellers to better understand the potential legal consequences of failing to fully abide by the GAA requirement and associated measures, including the manner in which they should be quarantined.

[190] It follows that Ms. Mathis, who has challenged only the January Order, has satisfied her burden to demonstrate a violation of her rights under paragraph 10(b). I will return to this breach in part VIII.B of these reasons below, where I will briefly address whether it is reasonably justified in a free and democratic society.

[191] None of the other applicants provided any direct evidence that their rights under paragraph 10(b) were breached. Although Mr. Duesing attached to his affidavit a copy of the pamphlet with which he was provided upon his arrival at the DQF where he stayed (before the promulgation of the February Order), he did not specifically address the issue of his right to legal counsel. Accordingly, I consider that neither he nor the other applicants have not met their burden under paragraph 10(b).

(6) Paragraphs 11(d) and (e) [Back to TABLE OF CONTENTS]

[192] Paragraphs 11(d) and (e) state: “Any person charged with an offence has the right … (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; [and] (e) not to be denied reasonable bail without just cause.”

[193] The Spencer-Duesing applicants submit that, by “forcing air travellers into federal facilities,” the government is “breaching their right to be presumed innocent until proven guilty.” With respect to paragraph 11(e), they suggest that air travellers’ rights are breached because they are not “afforded the opportunity to appear before a court and contest their detention.”

[194] These submissions are without merit.

[195] In brief, paragraphs 11(d) and (e) do not apply unless a person has been “charged with an offence”.

[196] Relying on *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at page 559, (1987), 45 D.L.R. (4th) 235 (*Wigglesworth*) and *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737 (*Martineau*), at paragraphs 19 and 21–29, the Spencer-Duesing Applicants maintain that section 11 applies "where a conviction in respect of the offence may lead to a true penal consequence." However, those authorities are of no assistance to the applicants.

[197] In brief, the Supreme Court of Canada in *Wigglesworth* explicitly adopted a narrow interpretation of section 11. In the course of doing so, it held that the rights guaranteed by that section "are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted" *Wigglesworth*, above, at page 554 (emphasis added). Later in its decision, it stated: "It is beyond question that those rights are accorded to those charged with criminal offences, to those who face the prosecutorial power of the State *and* who may well suffer a deprivation of liberty as a result of the exercise of that power": *Wigglesworth*, above, at page 558 (emphasis added). This case is of no assistance to the applicants because they are not being prosecuted by the state in relation to any offence with which they have been charged.

[198] Turning to *Martineau*, above, at paragraph 23, the Court specifically stated that "[o]nly penal proceedings attract the application of s. 11 of the Charter."

[199] Given that the Spencer-Duesing applicants are not currently subject to penal proceedings, their rights under section 11 are not engaged. I agree with the respondent that section 11 has no application in the present context.

[200] Relying on essentially the same argument as is addressed above, the Spencer-Duesing applicants alleged a breach of their rights under section 503 of the *Criminal Code*. That provision imposes certain obligations on "a peace officer who arrests a person with or without a warrant and who has not released the person under any other provision under this Part." I agree with the respondent that this provision also has no application in the present context.

(7) Section 12 [Back to TABLE OF CONTENTS]

[201] Section 12 of the Charter states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

[202] It appears to be common ground between the parties that the Impugned Measures do not constitute "punishment". I agree. In brief, one of the conjunctive requirements of the test for punishment is that it be "a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence": *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599 (*Boudreault*), at paragraph 39. This requirement clearly is not satisfied in the present context.

[203] The Spencer-Duesing applicants submit that "detaining law-abiding citizens en mass, even when they are healthy, non-infectious, or test negative for COVID-19 is a treatment by the government that is grossly disproportionate and has outraged society's sense of decency."

[204] Even assuming, without deciding, that the requirement to stay at a GAA or a DQF upon arrival in Canada is a “treatment” contemplated by section 12, I consider that such “treatment” does not rise to the very high threshold required to be considered “cruel and unusual”. In brief, that threshold has been variously described as being “so excessive as to outrage standards of decency”, “abhorrent or intolerable to society” and “grossly disproportionate”: *Boudreault*, above, at paragraphs 45 and 46. It is manifest that the requirement to stay at a GAA or a DQF for 24–72 hours cannot be described in any of these terms.

[205] Accordingly, the Impugned Measures do not violate the applicants’ rights under section 12.

B. *If so, is any such Violation Demonstrably Justified in a Free and Democratic Society?* [Back to TABLE OF CONTENTS]

[206] For the reasons discussed in part VIII.A. above, Ms. Mathis has established that her rights under sections 9 and 10(b) of the Charter were violated. None of the other alleged violations of the Charter have been established.

[207] The rights and freedoms guaranteed by the Charter are not absolute. This is because “[i]t may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance”: *Oakes*, above, at page 136.

[208] Accordingly, a measure that has been found to infringe the Charter will survive challenge when it is established to be a “reasonable limit prescribed by law” that is “demonstrably justified in a free and democratic society”, as contemplated by section 1 of the Charter.

[209] The onus of proving that a limit on a right enshrined in the Charter meets this test is upon the party seeking to uphold the limitation, in this case the respondent: *Oakes*, above, at pages 136–137.

[210] An assessment of whether this test is met proceeds in two stages. At the first stage, it is necessary to assess whether the objectives which the impugned measures are designed to serve “relate to concerns which are pressing and substantial in a free and democratic society.” Given the conclusion I have reached with respect to section 1 immediately below, I will not dwell on this aspect of the test. In brief, I agree with the respondent that it is satisfied. As conceded by the Spencer-Duesing applicants, the objective of the Impugned Measures, “which is to reduce the spread of COVID-19 and its VOCs is pressing and substantial.”

[211] The second stage of the assessment under section 1 “involves ‘a form of proportionality test’”: *Oakes*, above, at page 139. This proportionality test has three parts. First, the measures must be rationally connected to their objectives. Second, the means adopted should impair the right or freedom in question “as little as possible.” Third, the effects of the measures in question must be proportionate to the objectives that have been identified as “pressing and substantial”: *Oakes*, above, at page 139.

[212] It is unnecessary to address the first and third parts of the second stage of the assessment because I consider that it is readily apparent that the violations of Ms.

Mathis' rights under sections 9 and 10(b) do not satisfy the "minimal impairment" criterion. This is because the Respondent has not demonstrated that it was reasonably necessary to refrain from disclosing to her and her spouse the location of the DQF to which she was being taken: *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paragraph 96. Indeed, I agree with her that, in Canada, we do not take people away to be detained in undisclosed locations.

[213] Fortunately, this serious issue was addressed in the February Order and its successors, through the requirement that air travellers book their own GAA. With respect to DQFs, Mr. Spowart's unchallenged evidence is that the name of the DQF facility to which a traveller may be headed is not withheld, and that once a border officer determines that a traveller will be directed to a DQF, they provide the traveller with the details of the DQF and their stay: Spowart Affidavit, above, at paragraphs 46 and 56.

[214] Turning to the violation of Ms. Mathis' right to retain and instruct counsel without delay and to be informed of that right, once again, the respondent has not demonstrated that it was reasonably necessary to refrain from informing her of those rights in a clear and straightforward manner when she was being taken to the DQF.

[215] In summary, I conclude that the breaches of Ms. Mathis' rights under section 9 and paragraph 10(b) of the Charter are not saved by section 1. Even considering the greater deference due to the government "[w]here a complex regulatory response to a social problem is challenged" (*Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 (*Hutterian Brethren*), at paragraph 37) those breaches cannot be said to be demonstrably justified in a free and democratic society. I will return to those breaches in Part IX below.

C. *Are the Orders Containing the Impugned Measures* Ultra Vires *the Authority Delegated to the Governor in Council under Subsection 58(1) of the Quarantine Act? If not, are the Impugned Measures Nevertheless Unreasonable?* [Back to TABLE OF CONTENTS]

(1) Summary of the Applicants' Submissions [Back to TABLE OF CONTENTS]

[216] The RNN applicants submit that the February Order was an unreasonable exercise of authority and was therefore *ultra vires* the *Quarantine Act*.

[217] The focus of this argument is that the Impugned Measures are not within the scope of the authority delegated under subsection 58(1) of the *Quarantine Act* because they do not satisfy the requirement in paragraph 58(1)(d) that "no reasonable alternatives to prevent the introduction or spread of the disease are available."[8] The RNN applicants assert that various such alternatives were in fact available and that the respondent did not provide any evidence regarding the potential alternatives that were considered. In any event, they state that the respondent also did not establish that the requirement in paragraph 58(1)(d), which is a precondition to the exercise of the delegated authority, was satisfied.

[218] In the absence of such evidence, or any reasons explaining this aspect of the decision to promulgate the Impugned Measures, the RNN applicants maintain that this Court's review should focus on the *outcome*, rather than speculate on the *reasoning process* underlying those measures. In their view, such a focus demonstrates that the

Impugned Measures are unreasonable. Among other things, they state that those measures are overbroad, arbitrary and achieve nothing. This is because everyone who is required to stay in a GAA or a DQF and who has a suitable quarantine or isolation plan is permitted to leave that location after receiving their Day 1 Test results. Such persons can then quarantine or isolate in precisely the same location as they would have stayed had the Impugned Measures not existed. In addition, given that only approximately 2 percent of asymptomatic travellers test positive in their Day 1 Test, the Impugned Measures have the effect of detaining 98 percent of international air travellers, at their own expense, for no reason. Moreover, the Impugned Measures are not applicable to persons crossing into Canada by land, who constitute the vast majority of travellers entering Canada.

[219] The RNN applicants further assert that no explanation has been provided as to why the measures that were in effect before the Impugned Measures came into force were not sufficient. In this regard, those applicants note that information attached to the Barton Affidavit indicates that rates of imported cases per 100,000 peaked the week of January 3, 2021, and then declined in the ensuing weeks. In their view, this undermines the Respondent's assertion that there were no reasonable alternatives to the requirement to stay at a GAA, because the previous measures "had all but eliminated the problem the GAA [requirement] was later implemented to address."

(2) Summary of the Respondent's Submissions [Back to TABLE OF CONTENTS]

[220] The respondent submits that the reasonableness of the AIC's exercise of delegated authority under subsection 58(1) is eminently apparent from the record. The respondent states that, among other things, the evidence supports the AIC's opinion that "no reasonable alternatives to prevent the introduction or spread of the disease are available."

[221] Given that subsection 58(1) simply requires the AIC to be of "the opinion" that the conditions set forth in paragraphs (a) – (d) are met, the respondent asserts that those conditions do not need to be objectively satisfied before an order passed under that provision can be found to be reasonable. Rather, the Order will have been reasonably made "if the grounds are informed by scientific literature and exercised fairly and suitably under the circumstances": *Nesathurai v. Schuyler Farms Ltd.*, 2020 ONSC 4711 (Div. Ct.), at paragraphs 40–42 and 52.

[222] The respondent maintains that there was and remains a sound basis, grounded in the evolving science and information that was available, to support the conclusion that more stringent measures than were in place prior to the implementation of the Impugned Measures were required. Those measures, and in particular the requirement to stay at a GAA or DQF while awaiting the Day 1 Test result, were reasonable. Among other things, they permit early identification and isolation of the category of travellers with the highest positivity rates and reduces the risk of those travellers infecting others.

[223] In any event, where the science is evolving and the threat is moving faster than the state's ability to collect robust evidence, the precautionary principle, "a foundational approach to decision-making under uncertainty … points to the importance of acting on the best available information to protect the health of all Canadians": *Spencer*, above, at paragraph 113.

(3) Applicable Legal Principles

[224] The assessment of whether the promulgation of a particular measure was *ultra vires* (beyond the scope of) delegated authority typically begins by scrutinizing the governing statutory scheme and the decision-maker's reasons: *Vavilov*, above, at paragraphs 108–109.

[225] In situations where the process of making an impugned measure does not lend itself to producing a set of "reasons", the reviewing court must holistically consider all relevant circumstances, including the overall context and the record as a whole, to understand the measure and attempt to ascertain its underlying rationale: *Vavilov*, above, at paragraph 137.

[226] To successfully challenge the *vires* of an impugned measure, the burden is on the challenging party to demonstrate that it is inconsistent with *either* the objective of the enabling statute *or* the scope of the statutory mandate: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 (*Katz*), at paragraph 24. In the absence of such a demonstration, the measure will benefit from a presumption of validity: *Katz*, above, at paragraph 25.

[227] Before a measure will be found to be inconsistent with its statutory purpose, it must be shown to be irrelevant, extraneous or completely unrelated to that purpose: *Katz*, above, at paragraph 28.

[228] In conducting its assessment, the Court will take a broad and purposive approach, without considering whether the measure was "necessary, wise or effective in practice": *Katz*, above, at paragraphs 26–27.

[229] The requirement to holistically consider all relevant circumstances, including the overall context and the record as a whole, also applies to the Court's assessment of the reasonableness of the impugned measure: *Vavilov*, above, at paragraphs 75, 89, 103, 107 and 110.

[230] Even where a delegated decision-making body may have been given considerable discretion, any measure that it passes "must ultimately comply 'with the rationale and purview of the statutory scheme under which it is adopted'": *Vavilov*, above, at paragraph 108, quoting *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at paragraphs 15 and 25–28.

[231] In so doing, the Court must give "respectful attention" to and seek to understand the reasoning process followed by the decision-making body: *Vavilov*, above, at paragraph 84. Its review will be "concerned with both outcome and process": *Vavilov*, above, at paragraph 87. In this regard, the Court will assess whether the measure is appropriately justified, transparent and intelligible. A measure which is appropriately justified, transparent and understandable is one that is based on "an internally coherent and rational chain of analysis" and "is justified in relation to the facts and the law that constrain the decision maker": *Vavilov*, above, at paragraph 85.

[232] In other words, the Court will consider whether it is able to understand the basis upon which the measure was made and then to determine whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and

the law": *Vavilov*, above, at paragraphs 86 and 97. In considering whether the measure falls within that range, the Court will conduct a "robust" review and consider its potential impact on the individuals to whom it applies: *Vavilov*, above, at paragraphs 14, 67, 106 and 138.

4) Assessment [Back to TABLE OF CONTENTS]

(a) *Are the Impugned Measures* Ultra Vires *the* Quarantine Act*?* [Back to TABLE OF CONTENTS]

[233] At its core, the dispute between the parties as to whether the AIC acted beyond its authority in promulgating the Impugned Measures turns on whether the AIC considered the potential existence of reasonable alternatives and then reached the opinion that there were none. The RNN applicants maintain that there is no evidence that it did either of these things, and that there were in fact such reasonable alternatives. I disagree.

[234] As with the process followed in enacting other types of subordinate legislation, the process of issuing OICs such as the Impugned Measures does not lend itself to producing a set of "reasons". Accordingly, in considering the issues raised by the RNN applicants, the Court must holistically consider all relevant circumstances, including the overall context and the record as a whole, to understand the measure and attempt to ascertain its underlying rationale: *Vavilov*, above, at paragraph 137.

[235] In this regard, the most relevant aspects of the record include the recitals to the February Order, Explanatory Notes that accompanied that Order, and the evidence adduced by the respondent's affiants. Those materials reveal that the AIC did in fact reach the opinion that no reasonable alternatives to the Impugned Measures were available to prevent the spread of COVID-19.

[236] The fourth recital to the February Order in which the Impugned Measures are contained specifically states: "And whereas the Administrator in Council is of the opinion that no reasonable alternatives to prevent the introduction or spread of [COVID-19] are available."

[237] Turning to the specific alternatives that the RNN applicants state were available, they are the following:

i. Continuing to rely on the measures that were in place before the Impugned Measures were promulgated—the applicants maintain that those prior measures "had all but eliminated the problem the GAA was later implemented to address";

ii. A requirement for incoming air travellers to quarantine apart from health-care workers and vulnerable persons—the applicants assert that this requirement may have prevented the COVID-19 outbreak at the Roberta Place, discussed at paragraph 106 above;

iii. Enhanced testing;

iv. Prohibiting incoming air travellers from taking any form of "public conveyance";

v. Stricter requirements for quarantine and isolation plans;

vi. Permitting anyone who has private transportation from the airport to proceed directly to their suitable place of quarantine, rather than awaiting the result of their Day 1 Test before being permitted to do so; and

vii. Restricting vacation travel, as was done when travel to Mexico and the Caribbean was restricted under another Order.

[238] Regarding continued reliance on the measures that were in place before the promulgation of the Impugned Measures, the Explanatory Notes to the February Order state the following:

> Based on current review of international experience with new variants, introducing additional measures that leverage the availability of testing technologies to further prevent the introduction and spread of COVID-19 or new variants of concern in Canada is justifiable.
>
> (February Order, Explanatory Notes, above, at page 726.)

[239] In addition, Ms. Barton, who is primarily responsible for the development of OICs pursuant to the provisions of the *Quarantine Act*, stated that the information available at that time "demonstrated that the measures in place since January 7, 2021, were inadequate to prevent or to limit sufficiently the importation of COVID-19 cases into Canada via aircraft especially in light of the emergence of the VOCs": Barton Affidavit, above, at paragraph 17. In that same paragraph, she identified that information as follows:

> i. "Prior to the [promulgation of the Impugned Measures], asymptomatic travellers entering Canada were able to travel onward via public conveyance which could have included domestic flights;
>
> ii. Data from a testing pilot in Alberta in November and December 2020 demonstrated that approximately 1 to 2 percent of asymptomatic travellers entering Canada were infected with COVID-19. In other words, for every flight of 100 people arriving in Canada, on average one or two were infected with COVID-19 …; (Ms. Barton subsequently produced other data showing that in January 2021, the number of passengers arriving into Canada by air reached 325,765. In that same month "data on imported cases of COVID-19 demonstrated more than a three-fold increase in the number of affected flights (international flights with confirmed COVID-19 cases on them) from September (131 flights carrying 157 cases) to January (407 flights carrying 698 cases from Jan 1–27): Barton Affidavit, at paragraphs 19 and 20.)
>
> iii. After the implementation of pre-departure testing on January 7, 2021, information from an Ontario pilot program showed that 2.2 percent of asymptomatic travellers entering Canada were infected with COVID-19 notwithstanding their having had a negative pre-departure test …;
>
> iv. Data from testing of the travellers on flights from January 10 to 18, 2021, arriving from a country lacking the resources to administer pre-departure tests showed a COVID-19 positivity rate of 6.8% in asymptomatic travellers …; and
>
> v. Evidence on the increased transmissibility of VOCs suggested that Canada needed to take more precautions at ports of entry to reduce as much as possible the risk of starting new chains of transmission with these variants."

[240] Ms. Barton further stated that she received information from a broad range of sources, and that this information was used “to support the Minister of Health in her role in making recommendations for the drafting of OICs”: Barton Affidavit, above, at paragraph 10.

[241] Considering the foregoing, I am satisfied that continued reliance on the measures in place prior to the promulgation of the Impugned Measures was in fact considered and rejected by the AIC on reasonable grounds.

[242] Regarding the six other alternatives identified by the RNN applicants, three of them were included in the February Order. It can be inferred from the justifications that were provided for the Impugned Measures, including the requirement to stay in a GAA or a DQF, that the alternatives listed immediately below were not considered to be sufficient, in and of themselves or even in aggregate, to address the risks to which that requirement was addressed. As further discussed at paragraphs 109–112 above, those justifications were: (i) the likelihood that persons who tested positive on their Day 1 Test would modify their behaviour upon their arrival at their suitable place of quarantine, (ii) preventing arriving air travellers from immediately taking a domestic air flight or other form of public transportation; (iii) preventing persons who are awaiting their Day 1 Test results from infecting anyone at their home or other suitable place of quarantine, or in the community, while they are staying at a GAA or a DQF, and (iv) facilitating early identification and isolation of asymptomatic air travellers who are infected.

[243] The three specific alternatives identified by the RNN applicants and included in the February Order are as follows:

i. Avoiding contact with health care workers and vulnerable persons: Paragraph 1.3(f) provides that a suitable quarantine plan must indicate that the place of quarantine will allow the traveller “to avoid all contact with vulnerable persons and persons who provide care to those persons, unless the vulnerable person is a consenting adult or is the parent or dependent child in a parent-child relationship.” Paragraph 1.3(g) contains a similar provision with respect to avoiding all contact with a health care provider. Subparagraphs 3(1)(a.1)(ii) and (b)(ii) also requires an asymptomatic person to quarantine at a location where they will not be in contact with a vulnerable person (subject to the same proviso mentioned above). Clause 9(b)(ii) contains a similar provision for symptomatic persons.

ii. Additional testing: Section 1.4 of the Order included provisions for enhanced testing (i.e., the Day 1 Test and a second test).

iii. Avoiding public transportation: Paragraph 10(1)(c) provides that a symptomatic person is considered to be unable to isolate themselves if it is necessary to use a public means of transportation to travel from their place of entry into Canada to the place where they would isolate themselves. Although it may well have been desirable to include a similar provision for asymptomatic persons, it can be inferred from the justifications that were provided for the GAA requirement that such an addition to the February Order was not considered to be sufficient to address the risks to which this requirement was addressed: see paragraphs 109–112 above.

[244] Regarding the remaining three alternatives identified by the RNN applicants, once again, It can be inferred from the justifications that were provided for the Impugned Measures (see paragraph 242 above), including the requirement to stay in a GAA or a DQF, that those alternatives were not considered to be sufficient to address the risks to which that requirement were targeted.

[245] In considering the Impugned Measures, Ms. Barton and her team received information regarding steps being taken in other countries, including Australia and New Zealand. However, the more strict approach pursued by Australia, New Zealand and certain other island countries was not considered to be feasible here, given the length of the land border shared with the United States.

[246] In summary, contrary to the RNN applicants' submission, the AIC did in fact reach the opinion that no reasonable alternatives to prevent the introduction or spread of COVID-19 were available. This is clear from the fourth recital to the February Order, reproduced at paragraph 236 above. In this regard, the AIC specifically considered that the measures in force prior to the promulgation of the Impugned Measures were not sufficient to address the risk posed by COVID-19. This is plainly apparent from the excerpt of the Explanatory Notes to the February Order, reproduced at paragraph 238 above.

[247] In addition, the AIC specifically addressed three of the remaining six alternatives identified by the RNN applicants, in the February Order. It is implicit from the fact that the AIC also included the GAA/DQF stay requirement in that Order that the AIC considered that the three alternatives in question, by themselves would not be sufficient to address the risks posed by COVID-19.

[248] It can be inferred from the justifications that were provided for the Impugned Measures that the remaining three alternatives identified by the RNN applicants were not considered to be sufficient to address the risks to which the Impugned Measures targeted. Those justifications also reflect that the Impugned Measures were consistent with the purpose underlying section 58 of the *Quarantine Act*.

[249] Finally, approaches adopted by other countries were considered.

[250] Given all of the foregoing, I conclude that the Orders containing the Impugned Measures are not *ultra vires* the AIC. The record as a whole reveals that the AIC did in fact reach the opinion that no reasonable alternatives to prevent the introduction or spread of COVID-19 in Canada were available. That opinion is entitled to some deference, particularly given that paragraph 58(1)(d) enables the AIC to exercise the emergency powers provided for in subsection 58(1) when it is of the opinion that the conditions described in paragraphs (a) – (d) are met. So long as there is a reasonable basis in the record to support that opinion, it does not matter that others, such as the RNN applicants, may believe or even demonstrate that there was in fact a reasonable alternative available. As it turns out, the alternatives identified by the RNN applicants were also considered, either explicitly or implicitly. They were not considered to be adequate to prevent the introduction or spread of COVID-19 in Canada.

[251] The RNN applicants also submit that the Orders containing the Impugned Measures are *ultra vires* the *Quarantine Act* because they are arbitrary. For the reasons I have already given at paragraphs 77, 103–122 and 166–179 above, I disagree.

(b) *Are the Impugned Measures Reasonable?* [Back to TABLE OF CONTENTS]

[252] Mr. Colvin maintains that the February Order is unreasonable because the respondent has not provided the record of the AIC's decision to implement that Order. I have already addressed that issue at paragraphs 47–49 above. In brief, as with the process of making other types of subordinate legislation, the process of making the February Order, which contains the Impugned Measures, does not lend itself to producing a set of "reasons." In such circumstances, it is permissible to assess the overall context and the record as a whole to understand the Impugned Measures and attempt to ascertain their underlying rationale. My assessment of that context is set forth above and does not need to be repeated here to deal with the narrow point raised by Mr. Colvin.

[253] Mr. Colvin further maintains that the respondent has not met its evidentiary burden to justify the infringement of the rights of Canadian citizens. I presume that the rights in question are those under sections 6 and 9 of the Charter, as those are the only specific infringements that he alleges. Once again, I have already dealt with those allegations and concluded that the Impugned Measures do not infringe sections 6 or 9 of the Charter. It is unnecessary to repeat that analysis here.

[254] Mr. Colvin also appears to maintain that the Impugned Measures are unreasonable because they are arbitrary and because they are not sufficiently justified or substantiated as a general matter. He adds that they are also based on flawed analysis.

[255] The allegation that the Impugned Measures are arbitrary is already addressed at paragraphs 77, 103–122 and 166–79 above in connection with various other allegations made by Mr. Colvin or other applicants. My analysis there applies equally here and provides a sufficient basis to conclude that the Impugned Measures are not unreasonable on the basis of arbitrariness.

[256] Regarding Mr. Colvin's remaining arguments, I do not agree that the Impugned Measures are unreasonable because they are not sufficiently justified or substantiated as a general matter, or because they are based on flawed analysis.

[257] The basic justifications for the Impugned Measures were set forth in the recitals to the February Order, which closely track each of the provision in paragraph 58(1)(a)–(d) of the *Quarantine Act*. Those justifications were further addressed in the Explanatory Notes to the February Order. In addition to the passage quoted at paragraph 238 above, the following passages of the Explanatory Notes, at pages 723 to 728 of the February Order justified the need for stronger border measures than had previously been in place:

> …. As case numbers continue to rise throughout Canada, there is concern for the domestic capacity to respond to the pandemic. An increase in the number of reported cases in hospitals and intensive care units may overwhelm the health system, further exacerbating the negative health impacts of the virus. The introduction of the new variants of the virus that causes COVID-19 with suspected higher transmissibility may further worsen the negative health impacts of COVID-19. [Page 723.]

…

> As new variants continue to spread in the UK, South Africa, Brazil, and other countries, there is a strong rationale to require that travellers to Canada should test for COVID-19 before and upon arrival in Canada and should, with few exceptions, quarantine immediately upon arrival until they receive a negative test result to increase overall protection for Canadians and prevent further introduction and transmission of all variants of the virus that causes COVID-19 into Canada. [Page 724.]
>
> …
>
> At this time, travel continues to present a risk of importing cases, including cases of new variants of the virus that causes COVID-19 and increases the potential for onward community transmission of COVID-19. [Page 725.]
>
> …
>
> If travellers are to continue to enter Canada, it is important to reduce the risk of travellers introducing cases of COVID-19 into Canada as much as possible. Evidence demonstrates that pre-departure testing combined with testing all travellers upon entry and again later in the quarantine period will enable detection of the majority of persons with COVID-19 arriving in Canada. Identification of these cases will further permit genetic sequencing and the identification of novel variants of concern to support public health efforts to contain COVID-19 spread. Requiring travellers entering Canada by aircraft to reside in government-authorized accommodations until they receive their first test result will help identify and isolate those who may introduce or spread COVID-19 variants. [Pages 726–727.]
>
> …
>
> …. The Government of Canada recognizes that entry prohibitions, mandatory quarantine requirements, and testing protocols place significant burden on the Canadian economy, Canadians, and their immediate and extended families. Together, these measures remain the most effective means of limiting the introduction of new cases of COVID-19 into Canada. With the potential advent of new, more transmissible variants of the virus, the Government of Canada continues to take a precautionary approach by increasing border restrictions, and entry conditions, and restricting incoming travel from any country in an effort to preserve domestic health capacity in Canada and reduce the further introduction and transmission of COVID-19 in the country. [Page 728.]

[258] I consider that the foregoing passages of the Explanatory Notes, together with the recitals to the February Order, provided a reasonable basic justification for that Order. In brief, they disclose “an inherently coherent and rational chain of analysis”, that is appropriately transparent and intelligible. Those passages and recitals also permit the Court to confirm that the measures contemplated by the Order are consistent with the rationale and purview of subsection 58(1) of the *Quarantine Act*.

[259] Regarding the specific Impugned Measures within that Order, as previously discussed, the justifications were as follows: (i) the likelihood that persons who tested positive on their Day 1 Test would modify their behaviour upon their arrival at their suitable place of quarantine, (ii) preventing people from spreading the virus to others when travelling on public transportation to their homes or other suitable place of quarantine, (iii) preventing air travellers from infecting anyone in their home or other suitable place of quarantine, or in the community, while there are staying at a GAA or a DQF, and (iv) facilitating early identification and isolation of asymptomatic air travellers who are infected. Once again, I consider that, collectively, these justifications provided a reasonable basis for the Impugned Measures. Those justifications are also

appropriately transparent, intelligible, and based on an internally coherent and rational chain of analysis.

[260] My conclusion in this regard is reinforced by the evidence that some returning travellers continued to infect others with COVID-19 even when they were instructed to quarantine: Rodin Affidavit, above, at paragraph 16(c). Having regard to that fact, the following justification offered by Ms. Barton for the GAA stay requirement is not unreasonable, even considering that travellers are permitted to leave the GAA to quarantine at home or another suitable place of quarantine, upon receiving their Day 1 Test results:

> The requirement for travellers entering Canada by air at the four airports open to international flights to remain in GAAs while awaiting the results of their arrival tests is to prevent those travellers from inadvertently introducing and further spreading COVID-19, especially VOCs, in Canada. It ensures that travellers can be monitored closely while waiting for the results of their arrival test. In the event of a positive result, rapid public health action can be taken, including moving the traveller to a designated quarantine facility, or ensuring private transportation to their identified place of quarantine.
>
> (Barton Affidavit, above, at paragraph 38.)

[261] This justification applies equally to the requirement for symptomatic travellers to stay at a DQF.

[262] Mr. Colvin also maintains that the evidence adduced by the respondent's affiants to support the Impugned Measures "is unequivocally flawed for numerous reasons including: hearsay, argumentative, political spin, unbalanced, one-sided and non-probative statements at almost every paragraph." I disagree. As discussed at paragraph 55 above, I consider that those affiants were straightforward, frank, succinct and generally credible. For greater certainty, I do not consider that they were argumentative, one-sided or otherwise impartial. I also do not consider that their evidence was inadmissible hearsay: see paragraphs 53–54 above.

[263] Mr. Colvin took particular issue with the requirement for travellers to await the results of a PCR test, which he considers to be flawed for various reasons. However, even assuming that it may have some limitations or deficiencies, there was a reasonable basis for requiring travellers to take the test, both prior to departing for Canada and upon their arrival. That basis was addressed in the following passage of the Explanatory Notes to the February Order:

> COVID-19 molecular testing such as polymerase chain reaction (PCR) test and reverse transcription loop-mediated isothermal amplification (LAMP) tests have a higher sensitivity for detecting COVID-19 over the duration of infection. They are also able to detect most symptomatic and asymptomatic infections, making them more accurate for pre-departure screening. An antigen test is more likely to miss a COVID-19 infection compared to a molecular test, such as a PCR test. Therefore, molecular tests are more accurate for use in pre-departure screening.
>
> (February Order, Explanatory Notes, above, at page 727.)

[264] Dr. Poliquin provided a similar explanation, albeit in greater detail, in his affidavit: Poliquin Affidavit, above, at paragraphs 54–57.

[265] In summary, for the various reasons set forth above, I have concluded that the Impugned Measures are not unreasonable.

D. *Are the Orders Containing the Impugned Measures* Ultra Vires *the Authority of the Federal Government under Subsection 91(11) of the* Constitution Act, 1867*?* [Back to TABLE OF CONTENTS]

(1) The RNN Applicants' Submissions [Back to TABLE OF CONTENTS]

[266] The RNN applicants submit that the February Order, which contains the Impugned Measures, is *ultra vires* the authority of the federal government and an improper infringement on the exclusive jurisdiction of the provinces over public health. They assert that such jurisdiction was conferred pursuant to subsection 92(7) of the *Constitution Act*, *1867*, which extends to "The Establishment, Maintenance, and management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals", and subsection 92(13), which extends to "Property and Civil Rights in the Province." In addition, subsection 92(16) confers jurisdiction over "Generally all Matters of a merely local or private Nature in the Province."

[267] In support of their submission, the RNN applicants maintain that the "pith and substance" of the February Order is the regulation of public health. They add that the February Order does not attempt to do anything that the provinces could not achieve independently. They further assert that once a traveler is permitted into Canada, it is inappropriate and unconstitutional for the federal government to impose terms and conditions which are of a localized nature. Such action prevents the provinces from making their own determinations as to what are or are not reasonable limitations on the liberty rights of citizens. It also has other socio-economic impacts on the provinces.

[268] The RNN applicants further submit that the federal government's jurisdiction over "Quarantine and the Establishment and Maintenance of Marine Hospitals", as set forth in subsection 91(11) of the *Constitution Act*, *1867* is confined to ship quarantine. In any event, they state that this power should be read down to the extent that it infringes on clear provincial jurisdiction or matters of a local nature. Moreover, in the absence of any clear head of power, the federal government cannot rely on its residual power to make laws for the peace, order, and good governance of Canada on matters of national concern or in national emergencies.

[269] In the alternative, the RNN applicants state that the February Order overreaches in its efforts to control local populations, specifically with respect to those returning travellers who do not have connecting flights for interprovincial travel.

(2) The Respondent's Submissions [Back to TABLE OF CONTENTS]

[270] The respondent submits that an ordinary and grammatical reading of subsection 91(11) demonstrates that it is not confined to ship quarantine and that there has been a longstanding acceptance of Parliament's jurisdiction over quarantine upon entry into Canada.

[271] The respondent maintains that the "pith and substance" of the February Order and its successors falls within the purview of subsection 91(11) because their stated

aim is “reducing the introduction and further spread of COVID-19 and new variants of the virus into Canada by reducing the risk of importing cases from outside the country”: February Order, Explanatory Notes, above, at p 720. Moreover, the February Order was enacted pursuant to the *Quarantine Act*, the long title of which is *An Act to prevent the introduction and spread of communicable diseases*; and the purpose of which is “to protect public health by taking comprehensive measures to prevent the introduction and spread of communicable diseases”: *Quarantine Act*, above, section 4.

[272] The respondent adds that although the provinces have jurisdiction in relation to public health and local epidemics, including quarantine powers, the federal government also has jurisdiction pursuant to the double aspect doctrine.

(3) Applicable Legal Principles [Back to TABLE OF CONTENTS]

[273] The first step in determining whether a law falls within a federal or a provincial head of power under the *Constitution Act, 1867* is to assess the “pith and substance” or “essential character” of the law: *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783 (*Firearms Reference*), at paragraph 15. This involves examining “the purpose of the enacting body, and the legal effect of the law”: *Firearms Reference*, above, at paragraph 16.

[274] In this assessment, the actual efficaciousness of the law is not relevant to the Court’s analysis. Instead, “the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its ‘total meaning’”: *Firearms Reference*, above, at paragraph 18, quoting W. R. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada*, (Toronto: Butterworths, 1981), at pages 239–240.

[275] In seeking to understand the purpose of a law, it can often be helpful to consider the “mischief” to which it is directed: *Firearms Reference*, above, at paragraph 17.

[276] Implicit in the “pith and substance” analysis is a recognition that it may be impossible for one level of government to exercise its legitimate jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (*Western Bank*), at paragraph 29.

[277] In conducting this analysis, it is important to describe the “pith and substance” “as precisely as possible” to avoid superficially assigning a law to both federal and provincial heads of power or exaggerating the extent to which the law extends into the other level of government’s sphere of jurisdiction: *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, 455 D.L.R. (4th) 1 (*GGPPA*), at paragraph 52.

[278] The second step in a division of powers analysis is to classify the essential character of the law by reference to the heads of power under the *Constitution Act, 1867*: *Firearms Reference*, above, at paragraph 25.

[279] Some subject matters may fall within the jurisdiction of both the federal government and the provinces: *Western Bank*, above, at paragraph 30. Although the provinces have long been considered to have jurisdiction over health matters within the province (see e.g. *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pages 490–491, (1993),

125 N.S.R. (2d) 81), the federal government is now considered to have concurrent jurisdiction in this area: *Carter*, above, at paragraph 53. This is particularly so where Parliament legislates with respect to a federal matter that touches on health: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at paragraph 66.

(4) Analysis [Back to TABLE OF CONTENTS]

[280] In my view, the two steps in the division of powers analysis are sufficient to resolve the dispute between the parties on this issue. Accordingly, it is unnecessary to address the RNN applicants' argument pertaining to the federal government's residual powers.

[281] I agree with the respondent that an ordinary and grammatical reading of subsection 91(11) belies the RNN applicants' position that the word "Quarantine" in that provision should be restricted to marine quarantines.

[282] In my view, there is nothing whatsoever in the text of subsection 91(11) to suggest that the meaning of the word "Quarantine" should be limited in the manner suggested by the RNN applicants. For convenience, it bears reproducing that provision here: "**11.** Quarantine and the Establishment and Maintenance of Marine Hospitals."

[283] The plain and ordinary meaning of the words "Quarantine and" is that Parliament has been given jurisdiction over quarantine *as well as* the other matter mentioned, namely, the establishment and maintenance of marine hospitals. The word "ship" does not appear in this head of power, and it is readily apparent that the word "maritime" qualifies only "hospitals", and not also "quarantine."

[284] The RNN applicants note that in *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at page 136, (1982), 139 D.L.R. (3d) 417, the Supreme Court of Canada quoted a passage from the 1938 Royal Commission on Dominion-Provincial Relations, in which it was observed that "the British North American Act does not expressly allocate jurisdiction in public health, except that marine hospitals and quarantine (presumably ship quarantine) were assigned to the Dominion". They rely on this to support their narrow interpretation of the jurisdiction conferred on the federal government pursuant to subsection 91(11).

[285] However, in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 [cited above], at paragraph 16, the Supreme Court of Canada adopted a broader interpretation when it observed in passing that "the federal government has express jurisdiction over certain matters relating to health, such as quarantine, and the establishment and maintenance of marine hospitals."

[286] That same interpretation was adopted in *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 (CanLII) (*Taylor*), at paragraphs 272–273:

> Section 91(11) gives the federal government exclusive authority in relation to "Quarantine and the Establishment and Maintenance of Marine Hospitals."
>
> The establishment and maintenance of marine hospitals clearly does not encompass s. 28(1)(h) of the PHPPA. However, s. 91(11) also gives the federal government exclusive jurisdiction over quarantine. To this end the federal government has passed the *Quarantine*

Act, S.C. 2004, c. 20.

[287] Later in *Taylor*, the Court observed that "in the case of *Rinfret v. Pope* (1886), 10 L.N. 74, 12 Q.L.R. 303 (Que. C.A.) [the Quebec Court of Appeal] held that with the exception of federal jurisdiction over quarantine and marine hospitals, all matters of public health fall within the control of the provinces" (emphasis added): *Taylor*, above, at paragraph 279. I pause to add that the portion of the *Rinfret* decision which recognized exclusive provincial jurisdiction over matters of public health is in conflict with more recent jurisprudence of the Supreme Court of Canada: *Carter*, above, at paragraph 53.

[288] Turning to the "pith and substance" stage of the division of powers analysis, I agree with the respondent that the RNN applicants' characterization of the February Order as being a law that regulates public heath is inconsistent with the principle that a challenged law must be characterized as precisely as possible: *GGPPA*, above.

[289] I also agree that the AIC's purpose in enacting the February Order supports the view that the "pith and substance", or the "essential character", of that Order is not the regulation of health *per se*. Rather it is "reducing the introduction and further spread of COVID-19 and new variants of the virus into Canada by decreasing the risk of importing cases from outside the country": February Order, Explanatory Notes, above, at page 720. That purpose is consistent with the purpose of the *Quarantine Act*, which is "to protect public health by taking comprehensive measures to prevent the introduction and spread of communicable diseases": *Quarantine Act*, above, section 4.

[290] The context in which the February Order was promulgated provides further support for the view that the "pith and substance" of the Order is to prevent the introduction and spread of COVID-19. Indeed, this is also plainly reflected in the various provisions of the February Order, including the Impugned Measures. That is to say, the manner in which the February Order sets out to achieve its purpose is by implementing various measures designed to identify infected international travellers and then prevent them from infecting others within Canada. The fact that the February Order may not be as efficacious in this regard as some would prefer is not relevant to this analysis: *Firearms Reference*, above, at paragraph 18.

[291] I will turn now to the classification stage of the analysis. I agree with the respondent that preventing or reducing the introduction and spread of COVID-19 is an objective that falls squarely within the purview of subsection 91(11) of the *Constitution Act, 1867*. I consider it axiomatic that the power to quarantine was conferred specifically for the purpose of preventing or reducing the introduction and spread of communicable diseases from outside the country.

[292] This classification is supported by the particular provisions of the February Order that are the focus of the dispute in these consolidated proceedings. Those provisions pertain to the requirement to *quarantine* at a GAA or in a DQF. The applicants all forcefully submitted that returning travellers ought to be able to *quarantine* at home, provided they have a *suitable quarantine plan*.

[293] I agree with the respondent that nothing turns on the fact that the provinces have long been recognized to have jurisdiction over health and have even been recognized to have authority to prevent the spread of an epidemic at the local level. Pursuant to the

double aspect doctrine, Parliament also has jurisdiction to enact measures to prevent or reduce the introduction and spread of diseases from outside Canada into the country.

[294] I do not accept the RNN applicants' position that the February Order is overbroad because it applies to air travellers who live near one of the four airports where international flights currently are permitted to land. To the extent that the overriding objective of subsection 91(11) may be said to be the prevention or reduction of the introduction and spread of diseases from abroad into Canada, it is entirely within the power of Parliament to legislate measures that apply to anyone entering Canada, even if they are only travelling a short distance after crossing the border. If it were otherwise, this important objective could be seriously undermined by even a single province or territory failing to act appropriately.

[295] In summary, for the reasons set forth above, I conclude that the February Order, and its successors, are *intra vires* the authority of the AIC, which has received delegated authority from Parliament pursuant to subsection 58(1) of the *Quarantine Act*.

E. *Do the Impugned Measures Violate Paragraph 1(a) of the* Canadian Bill of Rights*?* [Back to TABLE OF CONTENTS]

[296] The RNN applicants submit that the Impugned Measures violate paragraph 1(a) of the Bill of Rights because they deprive air travellers entering the country of their financial property, namely, the money required to pay for their stay at a GAA, without due process of law.

[297] Paragraph 1(a) states: "[i]t is hereby recognized and declared that in Canada there have existed and shall continue to exist ... (a) the right of the individual to … enjoyment of property, and the right not to be deprived thereof except by due process of law."

[298] During the hearing of these consolidated applications, the RNN applicants stated that its argument on this issue would "fall away" if I concluded that: the February Order does not breach the Charter*;* is *intra vires* of subsection 58(1) of the *Quarantine Act;* and is *intra vires* of Parliament's authority. Given my conclusions on these issues and given that the only breaches of the Charter I have found pertain to the January Order, which was not challenged by the RNN applicants, I will not further address this issue. I will simply note in passing that one of those breaches, the failure to advise Ms. Mathis of the location of the DQF to which she was being brought, is no longer an issue. (See paragraph 213 above.) The other breach pertained to a matter that is not addressed in the February Order or any of its successors—that is the right to retain and instruct counsel and to be informed of that right. This is something that border officials will have to do going forward, if the requirement to stay in a GAA or a DQF upon arrival in Canada is maintained.

F. *Conclusion* [Back to TABLE OF CONTENTS]

[299] For the reasons set forth in part VIII.A. of this decision, the Impugned Measures, in and of themselves, do not violate any of subsection 6(1), sections 7, 8, 9, paragraphs 10(b), 11(d), 11(e) or section 12 of the Charter. However, *the manner in which the Impugned Measures were implemented* with respect to the applicant Nicole Mathis violated her rights under section 9 and paragraph 10(b) of the Charter.

[300] In particular, (i) the refusal of border control officials to disclose to Ms. Mathis and her spouse the location of the facility to which she was being taken infringed her right under section 9, and (ii) the fact that she was not properly informed of her right to retain and instruct counsel without delay, infringed her rights under paragraph 10(b).

[301] For the reasons set forth in part VIII.B. of this decision, those violations of Ms. Mathis' rights cannot be demonstrably justified in a free and democratic society.

[302] Given that those violations pertained to government action or administrative practice, the appropriate remedy lies under subsection 24(1) of the Charter, rather than section 52 of the *Constitution Act, 1982*: *Hutterian Brethren*, above, at paragraph 67. However, the notice of constitutional question that Ms. Mathis and the other Spencer-Duesing applicants served on the respondent pursuant to subsection 57(1) of the *Federal Courts Act* did not give notice of an intention to seek a remedy under subsection 24(1). Instead, it only referred to the alleged violations and to section 52. The same is true of the written submissions that were made on behalf of those applicants. Therefore, I do not consider it appropriate to issue any remedy under subsection 24(1), even though the notice of application filed on behalf of Ms. Mathis and Mr. Duesing in Court File T-366-21 referred to relief under that section.

[303] As a practical matter, nothing turns on this, because the evidence establishes that the first of the two violations of Ms. Mathis' rights has been remedied since she was detained at under the January Order. Under the February Order and its successors, travellers who are required to stay in a GAA must book their own reservation there (so they will know its location), while travellers who are required to stay in a DQF are provided with the relevant details pertaining to that facility. As to the second violation, border control officials will now be aware that they must clearly communicate the right to retain and instruct counsel in a manner that is readily understood, *at the outset of the detention*.

[304] For the reasons set forth in Part VIII.C. of this decision, I have also concluded that the orders containing the Impugned Measures are within the authority of the AIC and are not unreasonable.

[305] For the reasons provided in Part VIII.D. of this decision, I have concluded that the orders containing the Impugned Measures are within the jurisdiction of the federal government.

[306] Finally, for the reasons explained in Part VIII.E. of this decision, the Impugned Measures do not contravene paragraph 1(a) of the Bill of Rights.

[307] Accordingly, these applications will be dismissed.

[308] Given that the COVID-19 pandemic may continue to evolve and new Variants of Concern may continue to emerge, I consider it appropriate to make some concluding observations. This is particularly so because, when pressed as to why stronger border control measures were not imposed, one of the reasons identified by the respondent was the Charter. In addition, the federal government may need to act swiftly to address threats that new or existing Variants of Concern may present.

[309] In brief, I consider that the principles of fundamental justice would permit the imposition of stronger border control measures, should the AIC become of the opinion that the preconditions set forth in paragraphs 58(1)(a)–(d) of the *Quarantine Act* are met. This includes a longer period of quarantine at the border. In my view, it would not be necessary to resort to section 1 of the Charter to impose such a measure.

[310] In addition to saving more lives and considerable suffering, especially for those who would otherwise be hospitalized or experience serious symptoms over an extended period of time, such a measure might well serve other important purposes. These include reducing the perception of some, such as the applicants in this case, that weaker and less uniformly applied measures are unfair and do not contribute meaningfully to preventing the entry and spread of COVID-19 and Variants of Concern.

[311] I recognize that those who have second residences abroad or other good reasons to travel may not welcome such measures, particularly if they are required to pay for some of them. However, like times of war and other crises, pandemics call for sacrifices to save lives and avoid broad based suffering. If some are unwilling to make such sacrifices, and engage in behaviour that poses a demonstrated risk to the health and safety of others, the principles of fundamental justice will not prevent the state from performing its essential function of protecting its citizens from that risk: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at paragraph 1; *R. v. Jones* (2006), 81 O.R. (3d) 481, 2006 CanLII 28086 (Ont. C.A.), at paragraph 31. Of course, like other principles, the principles of fundamental justice have their limits. But I consider that there is currently additional leeway within those principles, before resort must be had to section 1 of the *Charter*.

JUDGMENT in T-340-21, T-341-21, T-366-21, T-480-21

THIS COURT'S JUDGMENT is that:

1. These applications are dismissed.

2. The parties are encouraged to reach an agreement regarding costs. If they are unable to do so, they shall provide submissions that reflect the conclusions I have reached in respect of the issues in dispute. Such submissions shall be provided no later than the close of business on June 25, 2021 and shall not exceed five pages for the applicants as a group and for the respondent.

Appendix 1 – Relevant Legislation [Back to TABLE OF CONTENTS]

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]

Rights and freedoms in Canada

1 The *Canadian Charter of Rights* and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

…

Mobility of Citizens

6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

…

Life, liberty and security of person

7 Everyone has 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.

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9 Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10 Everyone has the right on arrest or detention

…

(b) to retain and instruct counsel without delay and to be informed of that right; and

…

Proceedings in criminal and penal matters

11 Any person charged with an offence has the right

…

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

…

Treatment or punishment

12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

…

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

…

Primacy of Constitution of Canada

52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is

inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Quarantine Act, S.C. 2005, c. 20

Order prohibiting entry into Canada

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

(a) there is an outbreak of a communicable disease in the foreign country;

(b) the introduction or spread of the disease would pose an imminent and severe risk to public health in Canada;

(c) the entry of members of that class of persons into Canada may introduce or contribute to the spread of the communicable disease in Canada; and

(d) no reasonable alternatives to prevent the introduction or spread of the disease are available

Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), P.C. 2021-11, (2021) *C. Gaz. I*, 362 (*Quarantine Act*) [January Order]

Definitions

1 The following definitions apply in this Order.

…

isolation means the separation of persons who have reasonable grounds to suspect that they have COVID-19, who have signs and symptoms of COVID-19 or who know that they have COVID-19, in such a manner as to prevent the spread of the disease. (*isolement*)

…

quarantine means the separation of persons in such a manner as to prevent the possible spread of disease. (*quarantaine*)

…

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

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

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

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

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

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

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

(D) the test result,

Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations), P.C. 2021-75, (2021) *C. Gaz. I*, 673 (*Quarantine Act*) [February Order, as amended]

1.2 (1) …

(ii) subject to subsection (3), provide to the Minister of Health, screening officer or quarantine officer

(A) a suitable quarantine plan, and

(B) evidence of prepaid accommodation that enables the person to remain in quarantine at a government-authorized accommodation for a three-day period that begins on the day on which they enter Canada, and

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

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

…

Suitable quarantine plan

1.3 The suitable quarantine plan referred to in clause 1.2(1)(a)(ii)(A) must

(a) include

(i) in the case of a person entering Canada by land, the civic address of the place where they plan to quarantine themselves during the 14-day period that begins on the day on which they enter Canada,

(ii) in the case of a person entering Canada by aircraft,

(A) the name and address of the government-authorized accommodation where they plan to quarantine themselves during the period that begins on the day on which they enter Canada and remain in quarantine and ends on the day on which they receive the result for the molecular test referred to in subparagraph 1.4(1)(a)(i), and

(B) the civic address of the place where they plan to quarantine themselves during the period that begins on the day on which they receive evidence of a negative result for the molecular test referred to in subparagraph 1.4(1)(a)(i) and remain in quarantine for the remainder of the 14-day period that begins on the day on which they enter Canada, and

(iii) their contact information for the 14-day period that begins on the day on which they enter Canada;

(b) indicate that the place referred to in subparagraph (a)(i) or clause (a)(ii)(B), as the case may be, allows them to avoid all contact with other people with whom they did not travel unless they are a minor and a parent or guardian or tutor who is providing care and support to the minor;

(c) indicate that no person will be present at the place referred to in subparagraph (a)(i) or clause (a)(ii)(B), as the case may be, unless that person resides there habitually;

(d) indicate that the person has access to a bedroom at the place referred to in subparagraph (a)(i) or clause (a)(ii)(B), as the case may be, that are separate from the one used by persons who did not travel with them and enter Canada together;

(e) indicate that the place referred to in subparagraph (a)(i) or clause (a)(ii)(B), as the case may be, allows the person to access the necessities of life without leaving that place;

(f) indicate that the place referred to in subparagraph (a)(i) or clause (a)(ii)(B), as the case may be, allows the person to avoid all contact with vulnerable persons and persons who provide care to those persons, unless the vulnerable person is a consenting adult or is the parent or dependent child in a parent-child relationship; and

(g) indicate that the place referred to in subparagraph (a)(i) or clause (a)(ii)(B), as the case may be, allows the person to avoid all contact with a health care provider and the person works or assists in a facility, home or workplace where vulnerable persons are present.

…

Requirements

3(1) Every person who enters Canada and who does not have signs and symptoms of COVID-19 must

(a) in the case of a person entering Canada by aircraft, quarantine themselves without delay at a government-authorized accommodation in accordance with the instructions provided by a screening officer or quarantine officer and remain in quarantine until they receive the result for the COVID-19 molecular test referred to in subparagraph 1.4(1)(a)(i);

(a.1) in the case of a person entering Canada by a mode of transportation other than an aircraft, quarantine themselves without delay in accordance with the instructions provided by a screening officer or quarantine officer and remain in quarantine until the expiry of the 14-day period that begins on the day on which the person enters Canada in a place

(i) that is considered suitable by the Chief Public Health Officer, having regard to the risk to public health posed by COVID-19, the likelihood or degree of exposure

of the person to COVID-19 prior to entry into Canada and any other factor that the Chief Public Health Officer considers relevant,

(ii) where they will not be in contact with a vulnerable person, unless the vulnerable person is a consenting adult or is the parent or dependent child in a parent-child relationship, and

(iii) where they will have access to the necessities of life without leaving that place;

…

Accommodation — expense

(1.3) For greater certainty, a person referred to in paragraph (1)(a) must comply with the conditions established under that paragraph at their own expense unless the government-authorized accommodation is provided or paid for by Her Majesty in right of Canada or an agent of Her Majesty.

…

Unable to quarantine themselves

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

(a) the person has not provided the evidence referred to in paragraph 1.1(1)(a) or subparagraph 1.2(1)(a)(i), unless the person is excepted from that requirement under subsection 1.1(2) or 1.2(2);

(b) the person refuses to undergo a COVID-19 molecular test in accordance with paragraph 1.4(1)(a);

(c) the person has not provided a suitable quarantine plan in accordance with this Order;

(d) the person cannot quarantine themselves in accordance with paragraphs 3(1)(a) or (a.1), as applicable, or paragraph (b); or

(e) while they remain in quarantine at the government-authorized accommodation referred to in paragraph 3(1)(a), the person develops signs and symptoms of COVID-19, receives evidence of a positive result under any type of COVID-19 test or is exposed to another person who exhibits signs and symptoms of COVID-19.

Requirements — quarantine at quarantine facility

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

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

(b) enter into quarantine without delay

(i) at the quarantine facility in accordance with instructions provided by a screening officer or quarantine officer and remain in quarantine at the facility or at any other quarantine facility to which they are subsequently transferred until the expiry of that 14-day period, or

(ii) at any other place that the quarantine officer considers suitable in accordance with instructions provided by the quarantine officer and remain in quarantine at the place or at any other place to which they are subsequently transferred until the expiry of that 14-day period;

(c) in the case of a person who is considered unable to quarantine themselves within 48 hours after entering Canada, report their arrival at the quarantine facility to a screening officer or quarantine officer at that facility within 48 hours after entering Canada, unless the person has already reported their arrival at their place of quarantine under paragraph 3(1)(b);

(d) subject to subsection (3), until the end of that 14-day period,

(i) monitor for signs and symptoms of COVID-19,

(ii) report daily to a screening officer or quarantine officer at the quarantine facility on their health status relating to signs and symptoms of COVID-19, and

(iii) in the event that they develop signs and symptoms of COVID-19 or test positive for COVID-19 under any type of COVID-19 test, follow instructions provided by the public health authority specified by a screening officer or quarantine officer**;** and

(e) while they remain at a quarantine facility, undergo any health assessments that a quarantine officer requires.

…

Choice of quarantine facility

5 In choosing a quarantine facility for the purposes of subsection 4(2), the Chief Public Health Officer must consider the following factors:

(a) the risk to public health posed by COVID-19;

(b) the feasibility of controlling access to the quarantine facility;

(c) the capacity of the quarantine facility;

(d) the feasibility of quarantining persons at the facility;

(e) the likelihood or degree of exposure of the person to COVID-19 prior to entry into Canada; and

(f) any other factor that the Chief Public Health Officer considers relevant.

Non-application — requirement to quarantine

6 (1) Subject to subsection (2), paragraphs 3(1)(a) or (a.1), as applicable, and paragraph (b), subparagraph 3(1)(c)(ii) and section 4 do not apply to the following persons:

(a) a *crew member* as defined in subsection 101.01(1) of the *Canadian Aviation Regulations* or a person who enters Canada only to become such a crew member;

(b) a *member of a crew* as defined in subsection 3(1) of the *Immigration and Refugee Protection Regulations* or a person who enters Canada only to become such a member of a crew;

(c) a person who enters Canada at the invitation of the Minister of Health for the purpose of assisting in the COVID-19 response;

(d) a member of the *Canadian Forces* or a *visiting force*, as defined in section 2 of the *Visiting Forces Act*, who enters Canada for the purpose of performing their duties as a member of that force;

(e) a person or any member of a class of persons who, as determined by the Chief Public Health Officer, will provide an essential service, if the person complies with any conditions imposed on them by the Chief Public Health Officer to minimize the risk of introduction or spread of COVID-19;

(f) a person or any member of a class of persons whose presence in Canada, as determined by the Minister of Foreign Affairs, the Minister of Citizenship and Immigration or the Minister of Public Safety and Emergency Preparedness, is in the national interest, if the person complies with any conditions imposed on them by the relevant Minister to minimize the risk of introduction or spread of COVID-19;

(g) a person who is permitted to work in Canada as a provider of emergency services under paragraph 186(t) of the *Immigration and Refugee Protection Regulations* and who enters Canada for the purpose of providing those services;

(h) a person who enters Canada for the purpose of providing medical care, transporting or collecting essential medical equipment, supplies or means of treatment, or delivering, maintaining or repairing medically necessary equipment or devices, if they do not directly care for persons 65 years of age or older within the 14-day period that begins on the day on which the person enters Canada;

(i) a person who enters Canada for the purpose of receiving essential medical services or treatments within 36 hours of entering Canada, other than services or treatments related to COVID-19, as long as they remain under medical supervision for the 14-day period that begins on the day on which they enter Canada;

(i.1) a Canadian citizen, permanent resident, temporary resident, protected person or person registered as an Indian under the *Indian Act* who resides in Canada and who received essential medical services or treatments in a foreign country, if the person has the following:

> **(i)** written evidence from a licensed health care practitioner in Canada who indicated that the medical services or treatments outside Canada are essential, and
>
> **(ii)** written evidence from a licensed health care practitioner in the foreign country who indicated that the services or treatments were provided in that country;

(j) a person who is permitted to work in Canada as a student in a health field under paragraph 186(p) of the *Immigration and Refugee Protection Regulations* and who enters Canada for the purpose of performing their duties as a student in the health field, if they do not directly care for persons 65 years of age or older within the 14-day period that begins on the day on which the person enters Canada;

(k) a licensed health care practitioner with proof of employment in Canada who enters Canada for the purpose of performing their duties as a practitioner, if they do not directly care for persons 65 years of age or older within the 14-day period that begins on the day on which the person enters Canada;

(l) a person, including a captain, deckhand, observer, inspector, scientist and any

other person supporting commercial or research fishing-related activities, who enters Canada aboard a *Canadian fishing vessel* or a *foreign fishing vessel*, as defined in subsection 2(1) of the *Coastal Fisheries Protection Act*, for the purpose of carrying out fishing or fishing-related activities, including offloading of fish, repairs, provisioning the vessel and exchange of crew;

(m) a habitual resident of an integrated transborder community that exists on both sides of the Canada-United States border who enters Canada within the boundaries of that community, if entering Canada is necessary for carrying out an everyday function within that community;

(n) a person who enters Canada to return to their habitual place of residence in Canada after carrying out an everyday function that, due to geographical constraints, necessarily involves entering the United States;

(o) a person who seeks to enter Canada on board a *vessel*, as defined in section 2 of the *Canada Shipping Act, 2001*, that is engaged in research and that is operated by or under the authority of the Government of Canada or at its request or operated by the government of a province, a local authority or a government, council or other entity authorized to act on behalf of an Indigenous group, if the person remains on board the vessel;

(p) a student who is enrolled at a listed institution within the meaning of any order made under section 58 of the *Quarantine Act*, who attends that institution regularly and who enters Canada to go to that institution, if the government of the province and the local health authority of the place where that institution is located have indicated to the Public Health Agency of Canada that the institution is authorized to accommodate students who are excepted from paragraph 3(1)(a) and section 4;

(q) a driver of a conveyance who enters Canada to drop off a student enrolled in an institution referred to in paragraph (p) or to pick the student up from that institution, if the driver leaves the conveyance while in Canada, if at all, only to escort the student to or from that institution and they wear a mask while outside the conveyance;

(r) a student who is enrolled at an educational institution in the United States, who attends that institution regularly and who enters Canada to return to their habitual place of residence after attending that institution, if they will not directly care for persons 65 years of age or older;

(s) a driver of a conveyance who enters Canada after dropping off a student enrolled in an institution referred to in paragraph (r) or picking the student up from that institution and who enters Canada to return to their habitual place of residence after dropping off or picking up that student, if the driver left the conveyance while outside Canada, if at all, only to escort the student to or from that institution and they wore a mask while outside the conveyance;

(t) a dependent child who enters Canada under the terms of a written agreement or court order regarding custody, access or parenting;

(u) a driver of a conveyance who enters Canada to drop off or pick up a dependent child under the terms of a written agreement or court order regarding custody, access or parenting, if the driver leaves the conveyance while in Canada, if at all, only to escort the dependent child to or from the conveyance and they wear a mask while outside the conveyance;

(v) a driver of a conveyance who enters Canada after dropping off or picking up a dependent child under the terms of a written agreement or court order regarding

custody, access or parenting, if the driver left the conveyance while outside Canada, if at all, only to escort the dependent child to or from the conveyance and they wore a mask while outside the conveyance;

(w) a habitual resident of the remote communities of Northwest Angle, Minnesota or Hyder, Alaska who enters Canada only to access necessities of life from the closest Canadian community where such necessities of life are available;

(x) a habitual resident of the remote communities of Campobello Island, New Brunswick or Stewart, British Columbia who enters Canada after having entered the United States only to access necessities of life from the closest American community where such necessities of life are available; or

(y) a person who enters Canada in a conveyance at a land border crossing in the following circumstances, if neither the person nor any other person in the conveyance left the conveyance while outside Canada:

(i) the person was denied entry into the United States at the land border crossing, or

(ii) the person entered the territory of the United States but did not seek legal entry into the United States at the land border crossing.

…

Non-application — persons participating in projects

6.2 (1) Subject to subsection (2), paragraphs 3(1)(a) or (a.1), as applicable, and paragraph (b), subparagraph 3(1)(c)(ii) and section 4 do not apply to a person who, under an arrangement entered into between the Minister of Health and the minister responsible for health care in the province where the person enters Canada, is participating in a project to gather information to inform the development of quarantine requirements other than those set out in this Order, if the person complies with any conditions imposed on them by the Minister of Health to minimize the risk of introduction or spread of COVID-19.

Non-application — persons required to provide evidence

(2) Subsection (1) does not apply to a person who is required to provide the evidence referred to in paragraph 1.1(1)(a) or subparagraph 1.2(1)(a)(i) but who does not do so, unless they subsequently receive evidence of a negative COVID-19 test result or the authorization of a quarantine officer to leave a quarantine facility or any other place that the quarantine officer considered suitable.

Non-application — medical reason

7 (1) Paragraphs 3(1)(a) or (a.1), as applicable, and section 4 do not apply to a person

(a) during any medical emergency or essential medical services or treatments that require the person to visit or be taken to a health care facility that, in the case where the person is in a quarantine facility, is outside that quarantine facility; or

(b) during the time necessary to enable the person to undergo a COVID-19 molecular test.

Non-application — compassionate grounds

7.1 (1) Subject to subsection (3), paragraphs 3(1)(a) (a.1), as applicable, and section 4 do not apply to a person if the Minister of Health

(a) determines that the person does not intend to quarantine themselves or to remain in quarantine, as the case may be, in order to engage in one of the following activities:

(i) to attend to the death of or provide support to a Canadian citizen, permanent resident, temporary resident, protected person or person registered as an Indian under the *Indian Act*, who is residing in Canada and who is deemed to be critically ill by a licensed health care practitioner,

(ii) to provide care to a Canadian citizen, permanent resident, temporary resident or protected person or person registered as an Indian under the *Indian Act*, who is residing in Canada and who is deemed by a licensed health care practitioner to require support for a medical reason, or

(iii) to attend a funeral or end-of-life ceremony;

b) has not received written notice from the government of the province where the activity referred to in paragraph (a) will take place indicating that that government opposes the non-application of paragraph 3(1)(a) and section 4 to persons who engage in the activity referred to in paragraph (a) in that province; and

(c) in the case of a person referred to in paragraph (a) who intends to engage in the activity in a location other than a public outdoor location, determines that the person in charge of the location does not object to the presence of the person referred to in paragraph (a) at that location in order to engage in that activity.

[…]

Non-application — international single sport event

7.2 (1) Subject to subsection (5), paragraphs 3(1)(a) or (a.1), as applicable, and paragraph (b), subparagraph 3(1)(c)(ii) and section 4 do not apply to a person in respect of whom a letter of authorization has been issued under subsection (2) and who enters Canada to take part in an international single sport event as a high-performance athlete or to engage in an essential role in relation to that event, if they are affiliated with a national organization responsible for that sport.

…

Requirements

9 Every person who enters Canada and who has reasonable grounds to suspect they have COVID-19, has signs and symptoms of COVID-19 or knows that they have COVID-19 and every person who travelled with that person must

(a) isolate themselves without delay at a quarantine facility in accordance with the instructions provided by a screening officer or quarantine officer and remain in isolation at the facility until they receive the result for the molecular test referred to in subparagraph 1.4(1)(a)(i);

(b) if the person receives evidence of a positive result for a test referred to in paragraph 1.4(1)(a) or a test performed under an alternative testing protocol referred to in subsection 1.5(1), isolate themselves without delay in accordance with the instructions provided by a screening officer or quarantine officer and remain in isolation for the remainder of the 14-day period that begins on the day on which the person enters Canada in a place

(i) that is considered suitable by the Chief Public Health Officer, having regard to the risk to public health posed by COVID-19, the likelihood or degree of exposure

of the person to COVID-19 prior to entry into Canada and any other factor that the Chief Public Health Officer considers relevant,

(ii) where they will not be in contact with a vulnerable person, unless the vulnerable person is a consenting adult or is the parent or dependent child in a parent-child relationship, and

(iii) where they will have access to the necessities of life without leaving that place;

(c) within 48 hours after entering Canada, report their arrival at, and the civic address of, their place of isolation by electronic means specified by the Minister of Health or by telephone using a number specified by the Minister of Health; and

(d) during that 14-day period, undergo any health assessments that a quarantine officer requires, monitor their signs and symptoms of COVID-19 and report to the public health authority specified by a screening officer or quarantine officer if they require additional medical care.

Unable to isolate

10 (1) A person referred to in section 9 is considered unable to isolate themselves if

(a) the person has not provided the evidence referred to in paragraph 1.1(1)(a) or subparagraph 1.2(1)(a)(i), unless the person is excepted from that requirement under subsections 1.1(2) or 1.2(2), as the case may be;

(b) the person refuses to undergo a COVID-19 molecular test in accordance with paragraph 1.4(1)(a);

(c) it is necessary for the person to use a public means of transportation, including an aircraft, bus, train, subway, taxi or ride-sharing service, to travel from the place where they enter Canada to the place where they will isolate themselves;

(d) the person cannot isolate themselves in accordance with paragraph 9(a);

(e) while they remain in isolation at the quarantine facility in accordance with paragraph 9(a), the person receives evidence of a positive result for the test referred to in subparagraph 1.4(1)(a)(i); or

(f) the person travelled with a person who has reasonable grounds to suspect they have COVID-19, has signs and symptoms of COVID-19 or knows that they have COVID-19.

Requirements — isolation at quarantine facility

(2) A person who, at the time of entry into Canada or at any other time during the 14-day period referred to in section 9 is considered unable to isolate themselves must

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

(b) enter into isolation without delay

(i) at the quarantine facility in accordance with the instructions provided by a screening officer or quarantine officer and remain in isolation at the facility or at any other quarantine facility to which they are subsequently transferred until the

expiry of that 14-day period, or

(ii) at any other place that the quarantine officer considers suitable, in accordance with the instructions provided by the quarantine officer, and remain in isolation at the place or at any other place to which they are subsequently transferred until the expiry of that 14-day period;

(c) in the case of a person who is considered unable to isolate themselves within 48 hours after entering Canada, report their arrival at the quarantine facility to a screening officer or quarantine officer at that facility within 48 hours after entering Canada, unless the person has already reported their arrival at their place of isolation under paragraph 9(b); and

(d) until the expiry of that 14-day period, undergo any health assessments that a quarantine officer requires, monitor their signs and symptoms of COVID-19 and, if they require additional medical care, report to the public health authority specified by a screening officer or quarantine officer.

…

Choice of quarantine facility

11 In choosing a quarantine facility for the purposes of subsection 10(2), the Chief Public Health Officer must consider the following factors:

(a) the risk to public health posed by COVID-19;

(b) the feasibility of controlling access to the quarantine facility;

(c) the capacity of the quarantine facility;

(d) the feasibility of isolating persons at the quarantine facility;

(e) the likelihood or degree of exposure of the person to COVID-19 prior to entry into Canada; and

(f) any other factor that the Chief Public Health Officer considers relevant.

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[1] *Minimizing the Risk of Exposure to COVID-19 in Canada (Quarantine, Isolation and Other Obligations)*, P.C. 2021-11, (2021) *C. Gaz. I*, 362 (*Quarantine Act*) (the January Order).
[2] *Minimizing the Risk of Exposure to COVID-19 in Canada (Quarantine, Isolation and Other Obligations*), P.C. 2021-75, (2021) *C. Gaz. I*, 673 (*Quarantine Act*) (the February Order).
[3] The amendment to the February Order was effected by adding sections 15–30, which have the effect of modifying various portions of sections 1–14. For the purpose of this decision, I will refer to the sections of the February Order as they appear subsequent to having been amended.
[4] Some of the applicants were not entirely clear about which specific provisions they are challenging, beyond those related to the requirement to quarantine or isolate in a GAA or a DQF pending receipt of the results of the Day 1 Test.
[5] I note that, at paragraph 18 of his affidavit, Mr. Bexte stated that during his travels from February 25 to 28, 2021, he "followed recommended physical distancing, hand washing, and mask wearing where necessary."
[6] 6 As previously noted, persons who refuse to comply with the impugned measures may be fined up to $5 000 pursuant to the Contraventions Act. Persons who contravene the Quarantine Act may be subject to a fine of up to $1 000 000 and/or imprisonment of up to three years.
[7] AGC MFL, AGCR Tab 12, at paragraph 113.
[8] The full text of paragraph 58(1)(d) of the Quarantine Act is reproduced at paragraph 39 above and in Appendix 1 below.