In The Supreme Court of Bermuda

CIVIL JURISDICTION
2021: No. 162

IN THE MATTER OF BERMUDA CONSTITUTION ORDER 1968
AND IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE QUARANTINE (COVID-19) AMENDMENT ORDER 2021
AND IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE PUBLIC HEALTH (COVID-19 EMERGENCY POWERS) (PHASED-REOPENING) REGULATIONS

BETWEEN:

(1) ALBERT BREWSTER
(2) VINCENT LIGHTBOURNE
(3) WENDY WARREN

Applicants

-and-

(1) THE PREMIER OF BERMUDA
(2) THE MINISTER OF HEALTH

Respondents

Before: **Hon. Chief Justice Hargun**

Representation: **Mr. Mark Pettingill of Chancery Legal Ltd. for the Applicants**
Mr. Delroy Duncan QC and Mr. Ryan Hawthorne of Trott & Duncan Limited for the Respondents

Dates of Hearing: **4 June 2021**

Date of Ruling: **9 June 2021**

JUDGMENT

Application for an interim injunction restraining the implementation of mandatory quarantine of unvaccinated residents on the ground that it infringes the Applicants' fundamental rights under the Constitution; test to be applied in relation to the grant of interim injunction involving constitutional rights; role and obligations of an expert witness in court proceedings

HARGUN CJ

Introduction

1. At the conclusion of the hearing on 4 June 2021 the Court dismissed the ex parte on notice application by Mr. Albert Brewster, Mr. Vincent Lightbourne and Ms. Wendie Warren (the **"Applicants"**) for "*an immediate interim injunction and/or stay… that prohibits and/or restrains the Respondents from implementing the Mandatory Quarantine on 6 June 2021 until such further order of the Court and in any event not before this Honourable Court's substantive determination of the Applicants' constitutional challenge*." This Judgment sets out the Court's reasons for dismissing that application.

2. In these proceedings the Applicants seek a declaration that the implementation of the proposed amendments to the Quarantine (Covid- 19) (No. 3) Amendment Order 2021 are and/or will violate, *inter-alia*, the Applicants' constitutionally enshrined fundamental rights to freedom of movement pursuant to section 11 of the Bermuda Constitution Order

1968 (the "**Constitution**"). The proceedings are brought against the Premier of Bermuda as the First Respondent and the Minister of Health as the Second Respondent (the "**Respondents**" or the "**Government**").

3. The Applicants rely upon the remarks made by the Minister of National Security on 7 May 2021 during a Government press conference which indicated that the Government intended to amend the existing regulations to require, inter alia:

   (a) all non-immunised persons travelling to Bermuda are subject to mandatory supervised quarantine for a period of 14 days and will be required to bear all costs for the hotel/guest house.

   (b) Persons could be fined if they did not provide evidence of prepaid accommodation at a Government designated hotel prior to arriving in Bermuda.

   (c) The three approved quarantine locations are the Coco Reef Resort ($204 single and $230 for double occupancy); Grotto Bay Beach Resort ($291.88 pp/ and $12.50 for additional person); Hamilton Princess & Beach Club ($289.30 for a deluxe garden view room; $356.30 for a deluxe harbour view room).

4. In the ex-parte Summons seeking emergency interim injunctive relief (the "Summons") the Applicants have referred to the remarks of the Minister of National security as the "***Proposed Amendments***" and as "***Mandatory Quarantine***".

5. At the commencement of the hearing the Court advised the parties that the substantive application would be heard by the Court on 7-8 July 2021 and it is expected that a judgment will be delivered by the Court shortly thereafter. It is likely that a judgment in relation to the substantive challenge would be delivered by the Court within the next 8 weeks.

6. The issue for determination of the Court was whether in the circumstances it was just and equitable that the Court should restrain the implementation of Mandatory Quarantine pending the determination of the substantive issue in this action.

The factual basis of the Application

7. All three applicants have filed affidavits in support of the application for an interim injunction restraining the Respondents from the implementation of Mandatory Quarantine. Their evidence is summarized by Mr. Pettingill in his written submissions provided to the Court.

8. All three Applicants maintain that they will unreasonably and unjustifiably face significant pressure and coercion and may make an irreversible decision under duress, to get the vaccine simply so that they are not subject to the Mandatory Quarantine and can enjoy the rights guaranteed by section 11 of the Constitution.

9. In addition, Mr. Brewster states in his affidavit that if the Mandatory Quarantine becomes effective and his fundamental right of freedom of movement is contravened and/or restricted:

   (a) He will indefinitely be prevented from enjoying an ordinary parental relationship with his three Bermudian children (currently residing abroad) who he financially supports simply because he and his children have chosen not to get the vaccine. They will be required to incur significant financial burden of having to pay approximately $3,500 (not including the provision of food) at the designated hotels if either of them is to enjoy their ordinary familial relationship.

   (b) It is likely to exacerbate his pre-existing colon disease and digestive disorder and he will not receive the proper medical attention and/or dietary requirements will not be addressed.

(c) His mental health risks serious deterioration. He has already suffered serious anxiety and depressive feelings and has been referred to a clinical psychologist in respect of those feelings which arise from, *inter-alia,* the feeling of rejection, isolation, and depression which arise from feeling dejected.

10. Mr. Lightbourne adds that if the Mandatory Quarantine becomes effective and his fundamental right of freedom of movement is contravened and/or restricted:

(a) He will indefinitely be prevented from enjoying an ordinary parental relationship with his eldest Bermudian daughter (aged 19 and currently residing abroad with her mother) who he financially supports. He regularly arranges to visit and/or bring his eldest daughter to Bermuda. He will be required to incur the significant financial burden of having to pay approximately $3,500 (not including the provision of food) at the designated hotels, in order for his eldest daughter to arrive in Bermuda and/or he will be subject to taking two weeks off from work to quarantine at the luxury resort and to do so would be financially catastrophic such that his other children, including his two-month infant son, would suffer irreparable harm if he is unable to financially care for them.

(b) His mental health risks serious deterioration as a result of, *inter-alia*, the strain of his family relationship and/or the feelings of having to choose between which children he enjoys a relationship with and/or the feelings that he is being unfairly discriminated against and subject to humiliation and/or differential treatment at work and/or the community simply because he has chosen not to receive the vaccine.

11. Ms. Warren confirms that if the Mandatory Quarantine becomes effective and her freedom of movement is contravened and/or restricted:

(a) She will indefinitely be prevented from enjoying an ordinary parental relationship with her daughters (who are currently abroad pursuing professional development opportunities), both of whom she financially supports. She regularly arranges to bring her daughters to Bermuda and/or visit them in order to enjoy an ordinary parental relationship with them. She also makes the point that she cannot absorb the extraordinary expense of approximately $3,500 for Mandatory Quarantine.

(b) She will be subject to taking two weeks off from work to quarantine at the luxury resort properties and this is impracticable given that she is employed as a teacher.

(c) She risks losing her family homestead on the basis that in the event of a medical emergency, she had to travel overseas to visit one or both of her daughters or they were required to travel back home, she would be left with the unattractive decision of having to choose between paying a mortgage or the Mandatory Quarantine for herself and/or her daughters.

12. It is to be noted that none of the Applicants in their affidavits assert that they or their children have any fixed plans to travel to or from Bermuda within the next 8 weeks or so.

The appropriate test for the grant of an interim injunction involving constitutional issues

13. In his written submissions Mr. Pettingill submitted that the applicants rely upon the principles governing the granting of interim injunctive relief as set out in the House of Lords decision in *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1. He submitted that in considering whether to grant the interim injunction the Court has to ask itself the following three questions in respect of the present application:

(a) Have the Applicants established that there is a serious issue to be tried?
(b) Are damages an adequate remedy to resolve the Applicant's grievance?

(c) Will the granting of an interim injunction cause less harm to the Respondents compared to the likely harm to the Applicants will suffer if the injunction is not granted?

14. Mr. Pettingill invites the Court to preserve the status quo pending the substantive hearing of this matter, at which time the Respondents, as a matter of law, he submits, will be required to provide evidence substantiating the contention that Mandatory Quarantine is, *inter-alia*, reasonably required.

15. The Court accepts Mr. Duncan QC's submission, on behalf of the Government, that the test articulated by Mr. Pettingill is not the applicable test in relation to an application for an interim injunction involving a constitutional issue and his reliance upon cases such as *London Borough of Islington v Elliott and another* [2012] EWCA Civ 56; *The Siskina* [1979] AC 210; *CBM SA v FFP Ltd* [2016] SC (Bda) 76 Com; *The Niedersachsen* [1983] 1 WLR 1412; *National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice note)* [2009] UKPC 16; *Pacific Rainbow International Inc. v Shenzhen Wolverine Tech Ltd* [2017] HKEC 869; *Leo Pharma AS and another v Sandoz Ltd* EWCA Civ 850 and *Bath and Northeast Somerset DC v Mowlem plc* [2004] EWCA Civ 115, does not assist the Court in determining this application for interim injunction restraining the Government from implementing the Mandatory Quarantine.

16. The relevant test is established by the Privy Council decision in *Seepersad (a minor) v Ayers-Caesar* [2019] UKPC 7. At paragraph 15 Lady Hale, delivering the advice of the Board, stated that "*The Board agrees that the tri-partite test in RJR-MacDonald is appropriate when considering interim relief in constitutional cases.*"

17. The *RJR-MacDonald* is a reference to the decision of the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)* [1994] 1 S. C. R. 311. The case concerned the constitutional challenge to the Tobacco Products Control Act which regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants in that case challenged the Act's constitutional validity on

the grounds that it was ultra vires Parliament and that it violated the right to freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms (the "**Charter**").

18. The Supreme Court of Canada held that the three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd* [1987] 1 S. C. R. 110) should be applied to applications for interlocutory injunctions and as well for stays imposed in private law and Charter cases.

19. At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by the court on the basis of common sense and an extremely limited review of the case on the merits. The court should only go beyond a preliminary investigation into the merits when the result of the interlocutory application will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort would be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, the court must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

20. At the second stage, the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. "*Irreparable*" refers to the nature of the harm rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the Court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (paragraph 59).

21. The third part of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving Charter cases. A consideration of the public interest must be taken into account in assessing the

inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases then in suspension cases. When the nature and declared purpose of the legislation is to promote the public interest, a court, in interlocutory applications, should not be concerned whether the legislation in fact has this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

22. On the facts of the *RJR-MacDonald* case, the Supreme Court of Canada held that the Government passed these regulations with the intention of protecting public health and furthering the public good. When the Government declares that it is passing legislation in order to protect and promote public health and it is shown that the constraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory application to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of widespread and serious medical problems directly attributable to smoking.

23. The Supreme Court in *RJR-MacDonald* also considered the relevance of preserving the status quo when considering whether to grant an interim injunction involving constitutional issues. At paragraph 75 the Court referred to the speech of Lord Diplock in *American Cyanamid* that when everything else is equal, "*it is a counsel of prudence to…preserve the status quo*." The Supreme Court considered this approach to be of limited value in private cases, and, although there may be exceptions," *as a general rule it has no merit as such in the face of the alleged violations of fundamental rights*."

Discussion

24. The first issue to consider is whether there is a serious issue to be tried in these proceedings. At this stage of the proceedings the Court is not deciding the constitutional issue raised in the Originating Summons but as stated by Myres J in *Canadian Constitution Foundation v Attorney General of Canada* [2021] ONSC 2117, Ontario Superior Court of Justice, 22 March 2021, a case relied upon by Mr. Duncan QC, at [36] the Court is "*just taking a peek at the evidence and arguments alleged to see if there are any claims made that are not frivolous. It is not a high hurdle for the applicants to surmount at this stage of the proceedings.*"

25. In his written submissions on behalf of the Applicants, Mr. Pettingill contends:

(a) the Mandatory Quarantine, which will require the Applicants and other unvaccinated Bermudians to quarantine at the designated hotels and guest houses for 14 days, undeniably engages their section 11 Constitutional right of freedom of movement.

(b) The Applicants' core grievance is that the engagement of their section 11 right by the imposition of the Mandatory Quarantine is and/or will be unreasonable insofar as, *inter-alia*:

(i) There is no rational connection between the Mandatory Quarantine and the public health interest in view;

(ii) There are several less restrictive alternatives to the Mandatory Quarantine that can achieve the public health interest aim in view; and

(iii) The Mandatory Quarantine does not fairly balance between the rights of the individual and the general interest of the community, including the rights of others.

26. Given the very low threshold required in constitutional challenges to satisfy the requirement that there is a serious issue to be tried, the Court is prepared to assume that this requirement has been established. The Court understood that Mr. Duncan QC for the Respondents did not take issue with this requirement.

27. The second issue requires the Court to consider whether the Applicants have established that the Mandatory Quarantine will cause them irreparable harm. In *Spencer v The Attorney General of Canada* [2021] FC 361, Ottawa, Ontario, 23 April 2021, another Canadian case relied upon by Mr. Duncan QC, Pentney J emphasised that this high bar must be established through evidence at a convincing level of particularity and demonstrate a high likelihood that harm will occur, not that it is merely possible. At [81] Pentney J held:

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

28. In approaching this issue the Court acknowledges that the supporting affidavits disclose evidence of financial hardship suffered by the Applicants which may be exacerbated by the Mandatory Quarantine in the event that the Applicants were to travel abroad and return to Bermuda. The affidavits also attest to the potential isolation and distress caused by the 14 days of Mandatory Quarantine. The issue for determination by the Court is whether the Applicants have discharged the burden of establishing that unless the Court restrains the

Respondents from implementing the Proposed Regulations during the next 8 weeks the Applicants will suffer irreparable harm. On the basis of the affidavit evidence filed by the Applicants, in support of the application for an interim injunction, the Court is of the view that the Applicants have not demonstrated that unless the Court grants the injunction sought they will suffer irreparable damage during the next 8 weeks. In short, there is no evidence that the Applicants have any fixed plans which will subject them or their overseas family members to the Mandatory Quarantine within the next 8 weeks.

29. Secondly, all three Applicants rely upon, as evidence of irreparable harm, the additional cost of approximately $3,500 required to stay at the designated hotels during the Mandatory Quarantine. As the Supreme Court of Canada made it clear in *RJR-MacDonald*, the requirement of "*irreparable*" refers to the nature of the harm rather than its magnitude. Monetary loss, by its very nature, is unlikely to be irreparable. Similar argument based upon additional cost constituting irreparable harm was rejected by Myres J in the *Canadian Constitution case* at [61]-[62]:

> *"[61] None of the applicants have shown through non-speculative evidence that they are likely to suffer harm before the hearing of the constitutional issues that cannot be compensated in money damages. As noted above, two of the applicants have already traveled. The two who will travel anyway, but object to the expense, can be compensated in money damages. Mr. Radonjic's evidence that it is the cost of the quarantine hotel that makes further travel prohibitive for him is bald, unsupported, speculative, and unpersuasive on this issue.*
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> *[62] Moreover, the applicants have claimed damages against the government under s. 24 of the Charter. While this is not a simple or immediately available remedy, the fact is that if the applicants are entitled to compensation for a breach of their Charter rights, they will get it."*

30. Accordingly, the Court concludes that the monetary loss of approximately $3,500 does not constitute "*irreparable*" harm, as that term has been defined in the context of applications for interlocutory injunctions in Constitutional challenges. In any event, this additional cost is potentially recoverable from the Government, under section 15 of the Constitution, in the event the Applicants were to succeed in their Constitutional challenge.

31. Thirdly, Mr. Pettingill in his oral presentation to the Court relied upon the potential deleterious effects on the Applicants physical and psychological health associated with the 14 days Mandatory Quarantine at the designated hotels. However, there is no "*evidence*", as opposed to speculation, in this regard which the Court can properly accept. Speculative arguments in this regard are incapable of establishing "*irreparable*" harm. As held by Pentney J in the *Spencer case* at [94]-[95]:

> *"[94] ...I do agree with the Respondent's argument that the Applicants have failed to lead evidence to support their claim that being required to stay at a GAA or DQF while they wait for the results of their COVID-19 test will cause them "devastating emotional, relational, and spiritual harm". The jurisprudence is clear: the harm alleged must be "real, definite, unavoidable harm—not hypothetical and speculative harm— that cannot be repaired later" (Canada (Attorney General) v Oshkosh Defense Canada Inc, 2018 FCA 102 at para 25). The Applicants' evidence does not address this aspect of the harm in any detail, and it is not self-evident why a short stay in a hotel prior to spending a further period in quarantine at home will inevitably cause such harms.*
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> *[95] In Glooscap, the Court of Appeal found that the applicant's inability to establish an unavoidable harm was fatal to its application. Unavoidable was defined as "irreparable harm that will be caused by the failure to get a stay, not harm caused by its own conduct in running a clearly-known risk that it actually knew about, could have avoided, but deliberately chose to accept" (Glooscap at para 39)."*

32. In the circumstances the Court concludes that the Applicants have failed to establish that in the absence of an injunction restraining the Respondents from implementing the Mandatory Quarantine during the next 8 weeks, the Applicants will suffer irreparable harm.

33. In light of the ruling that the Applicants have failed to establish irreparable harm this application for an interim injunction cannot succeed and stands to be dismissed. Nevertheless, the Court considers briefly the third issue, namely, the balance of inconvenience.

34. In *RJR-MacDonald* the Supreme Court of Canada held at [85] that among the factors which must be considered in order to determine whether the granting or withholding of the interlocutory relief would occasion greater inconvenience are the nature of the relief sought and the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

35. The inconvenience suffered by the Applicants has been discussed above in consideration of the requirement of irreparable harm and does not need to be repeated.

36. In considering the inconvenience suffered by the Respondents and in particular where the public interest lies the Court assumes, in the context of an interlocutory application, that legislation is directed to the public good and serves a valid purpose. The Court can of course declare a law to be inoperable but would only do so after a complete constitutional review following consideration of all the evidence submitted by the parties at the hearing. As Pentney J noted in the *Spencer case* at [100]:

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

enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter" (Harper at para 9).

37. Similar sentiments have been expressed in English cases particularly in relation to decisions made by the Government in relation to the public health issues requiring the evaluation of complex scientific evidence. In *The Queen (on the application of Simon Dolan and others) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, the English Court of Appeal was dealing with a challenge to the regulations made in response to the Covid-19 pandemic and which introduced what was commonly known as a "lockdown" in England. It was submitted that the regulations imposed sweeping restrictions on civil liberties which were unprecedented and were unlawful. In that context the Court of Appeal held at [89]-[90]:

> *89. We also bear in mind that this is an area in which the Secretary of State had to make difficult judgements about medical and scientific issues and did so after taking advice from relevant experts. Although this case does not arise under European Union law, we consider that an analogy can be drawn with what was said by Lord Bingham of Cornhill CJ in R v Secretary of State for Health, ex parte Eastside Cheese Co [1999] 3 CMLR 123, at para. 47: "on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers".*
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> *90. We find it impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality. There were powerfully expressed conflicting views about many of the measures taken by the Government and how various balances should be struck. This was quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suited to determination by the courts."*

38. The approach of the Canadian and English courts is consistent with the approach recently taken by the European Court of Human Rights ("**ECHR**") in *Vavricka and others v the Czech Republic* [2021] ECHR 116 (8 April 2021), a case dealing with the issue whether a legal duty to vaccinate children against nine diseases that are well known to medical sciences amounted to a violation of article 8 of the European Convention on Human Rights (right to respect of private life). Under the relevant law parents who failed to comply, without good reason, can be fined and unvaccinated children are not accepted in nursery schools (exception being if a child cannot be vaccinated for health reasons).

39. The ECHR held that the mandatory vaccination of children in the Czech Republic did not violate article 8 of the Convention. In coming to this conclusion the Court recognised that the Czech policy pursued the legitimate aims of protecting health as well as the rights of others, noting that vaccination protects both those who receive it and also those who cannot be vaccinated for medical reasons and are therefore reliant on herd immunity for protection against serious contagious diseases. The Court referred to its previous decisions holding that matters of health-care policy are in principle within the margin of appreciation of the domestic authorities, who are best placed to assess priorities, use of resources and social needs. Having regard to these considerations "*the Court takes the view that in the present case, which specifically concerns the compulsory nature of child vaccination, that margin should be a wide one.*"

40. The challenged regulations are designed to eliminate or curtail the importation of the Covid-19 virus from outside Bermuda. As at the date of hearing of the application for the interim injunction Covid-19 pandemic has resulted in over 3.7 million deaths worldwide and 33 deaths in Bermuda. In the present circumstances, which can appropriately be described as a global health emergency, the Government, in common with national governments worldwide, has the responsibility of taking all reasonable measures to safeguard the health and well-being of Bermuda residents.

41. As the Court understands the position, the Applicants do not challenge the imposition of the mandatory quarantine but object principally to two aspects of the proposed quarantine regime. First, they object that the Mandatory Quarantine is confined to the designated

hotels by the Government which necessarily results in additional cost of approximately $3,500. As I understood Mr. Pettingill's argument the Applicants would be prepared to remain in quarantine for 14 days at their homes. Secondly, the Applicants object to the differential treatment afforded to Bermuda residents who are fully vaccinated for Covid-19 and others who have elected not to be vaccinated. The Mandatory Quarantine for 14 days only applies to those Bermuda residents who have not been vaccinated.

42. As noted at the outset this was an ex parte application on notice. In the circumstances the Respondents have not had the opportunity to file any evidence in relation to this application. However, the Canadian decisions in the *Canadian Constitution case* and the *Spencer case*, both dealing with mandatory quarantine at the Government designated hotels at their own expense, indicate, for the purposes of this ex parte application, why supervised quarantine is necessary. In the *Canadian Constitution case* Myres J referred to the following evidence in relation to the use of hotel for quarantine in that case:

> *"[50] Plus, despite peoples' best wishes and belief in their own honest adherence to quarantine and social distancing protocols, the current best evidence from Alberta and McMaster University studies is that home quarantines still spreads the virus. Deaths of 71 people in a long-term care facility have been traced to a single person who was quarantining at home with someone who worked at the long-term care facility in the same household.*
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> *…*
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> *[52] The use of a hotel for quarantine thereby provides a buffer before arriving passengers are released into the general population. This allows health officials to exercise control and provide a rapid response to COVID-19 positive cases.*
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> *…*
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> *[55] The evidence before the court is that the first study results suggest that the use of the hotel quarantine does have some effect on reducing the incidence of spread of COVID-19 and, especially, new variants. The government's experts support the*

> *emergency regulation as a necessary but measured process to delay the spread further and to nip in the bud the sudden increase of imported cases on flights that arrived in January.*
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> *[56] All of the foregoing is the untested evidence of the government's witnesses. It will be for the judge at the main hearing to make findings if he or she can do so. At this stage, I simply note that despite being the first off the mark and having as much time as they needed to bring this proceeding, the applicants have no real evidence to the contrary.*

43. In the *Spencer case* Pentney J also dealt with the same argument that quarantine at a hotel was unnecessary and its benefits had not been proven. Pentney J outlined the evidence in relation to this issue in that case in the following paragraphs:

> *"[102] The Applicants contend that the mandatory hotel quarantine rules are not data-driven and therefore are not justified in a free and democratic society. They say that the evidence does not show that quarantining at a hotel is more effective than quarantining at one's own private residence. The Applicants also suggest that placing otherwise-healthy asymptomatic Canadians in a hotel setting where they may be in proximity to other travellers who are carrying COVID-19 may pose a greater risk than if these people were allowed to proceed directly to their own residences.*
>
> *…*
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> *[112] Turning to the wider public interest, the evidence demonstrates why the challenged measures were adopted. I find that the evidence amply supports the Respondent's position that the challenged measures provide an additional layer of protection against the importation and spread of COVID-19 and its variants into Canada.*

> *[113] Specifically, I reject the Applicants' arguments regarding the precautionary principle. The precautionary principle is a foundational approach to decision-making under uncertainty that points to the importance of acting on the best available information to protect the health of Canadians. The Order is a public health measure that was adopted based on available scientific evidence from Canada and abroad, and it gives effect to the precautionary principle in a manner that reflects the Government of Canada's overall assessment of the risks posed by the previously circulating virus and variants, and the lack of alternatives to mitigate it given the current state of knowledge of the virus.*
>
> *[114] Viewed in light of the precautionary principle, the fact that the Order may not provide perfect protection is not particularly significant. The evidence shows that the challenged measures are a rational response to a real and imminent threat to public health, and any temporary suspension of them would inevitably reduce the effectiveness of this additional layer of protection. This, in turn, would have a significant – perhaps deadly – effect on the wider Canadian public, based on the experience thus far."*

44. As set out earlier, this issue can only finally be determined after the Respondents have had an opportunity to file relevant evidence and have had the proper opportunity to make submissions in respect of that evidence. However, the Canadian cases do indicate that the Government's decision to implement Mandatory Quarantine has been accepted as a rational response by the Canadian courts to the current Covid-19 pandemic on the basis of the evidence presented in those cases.

45. The Applicants also complain that the Mandatory Quarantine discriminates between vaccinated residents and unvaccinated residents and that there is no rational basis in medical science for making that distinction. In support of this contention the Applicants rely upon the fact that the First Respondent tested positive for Covid-19 despite the fact

that he had been fully vaccinated few weeks earlier. On the basis of this fact they argue that even vaccinated persons can become infected with the virus.

46. The Applicants also rely upon the expert opinion evidence of Dr. Amani Flood and Dr. Henry Dowling, who both express their opinion in identical conclusory language : "*In my professional opinion, the Mandatory Quarantine will discriminate against unvaccinated Bermudians by penalizing them for exercising their human right to choose not to participate in what is, in my professional opinion, still an experimental medical treatment which persons are entitled to choose not to partake in, at this time, or at all*." Dr. Flood and Dr. Dowling rely upon the statement by the World Health Organization, on its website, stating that: "*Being vaccinated does not mean that we can throw caution to the wind and put ourselves and others at risk, particularly because of the research is still ongoing into how much vaccines protect not only against disease but also against infection and transmission*."

47. Again, the Court can only finally decide these issues after all parties have had an opportunity to file evidence which is relevant to the determination of this issue. The issues raised here are (i) to what extent vaccinated persons can be infected with Covid-19 compared with unvaccinated persons; and (ii) to what extent vaccinated persons, if infected, can transmit the virus to others as compared with unvaccinated persons. The Expert evidence of a Dr. Flood and Dr. Dowling is silent on these issues. It is common knowledge and well-publicised in the media that there have been a number of studies dealing precisely with these issues and appear to indicate that the vaccination not only reduces the severity of symptoms if infected but also reduces the chance of transmitting the virus to others. The extent to which the chance of transmission is reduced and whether that justifies treating vaccinated and unvaccinated persons differently can only be determined after the parties have had an opportunity to file appropriate evidence.

48. The Court would like to take this opportunity to restate the role of an expert witness in court proceedings and the obligations owed by expert witnesses to the Court. All expert witnesses giving evidence to this Court should keep the following guidance as to their

obligations to the Court, as stated by Toulmin J in *Anglo Group plc v Winther Brown & Co* [2000] Lexis Citation 2848, at [109], firmly in mind:

> *"1. An expert witness should at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in relation to matters within his expertise. This applies as much to the initial meetings of experts as to evidence at trial. An expert witness should never assume the role of an advocate.*
>
> *2. The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.*
>
> *3. He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely arrears of disagreement to be set out in the joint statement of experts ordered by the court.*
>
> *4. The expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.*
>
> *5. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*
>
> *6. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
>
> *7.Where an expert is of the opinion that his conclusions are based on inadequate factual information he should say so explicitly.*

> *8. An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity."*

49. In applying the balance of inconvenience test the Court accepts the Applicants' evidence that there is the potential financial hardship of the additional cost associated with the Mandatory Quarantine. The Court also accepts the real inconvenience of having to stay in a designated hotel for a period of 14 days.

50. Against that the Court has to bear in mind that these emergency measures are proposed by the Government in the middle of a pandemic which has already cost 33 lives in Bermuda. For the purposes of this interlocutory hearing the Court has to assume that these measures are designed to prevent or minimise the importation of the virus, or one of the newly emerging, more transmissible and perhaps more dangerous variants. At this stage of the proceedings, and in the absence of an opportunity for the Government to file evidence, the Court is bound to conclude that the public interest lies against the grant of an interim injunction restraining the Government from implementing the Mandatory Quarantine.

51. It was for these reasons that the Court dismissed the Applicants' application for an interim injunction at the conclusion of the hearing on 4 June 2021.

Dated this 9th day of June 2021

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NARINDER K HARGUN
CHIEF JUSTICE