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Re: Recent Supreme Court of Canada Decision; Charkaoui v. Minister of Citizenship and Immigration (2007) SCC 9

In keeping with our practice on such matters, we take this opportunity to comment on the February 23, 2007 Supreme Court of Canada decision in Charkaoui v. Minister of Citizenship and Immigration (2007) SCC 9. Although we do not generally comment on constitutional law cases, we have decided to offer our thoughts on this one nonetheless, given that national security and related issues are of virtually universal interest.

As you are undoubtedly aware from the media coverage the decision has attracted, the Court unanimously declared unconstitutional those procedures established by the Immigration and Refugee Protection Act (the “**IRPA**”) regarding verification of the reasonableness of Certificates of Inadmissibility issued pursuant to that statute, and regarding detention pursuant to those Certificates. Being fully alive to the possibly far-reaching consequences of its decision, the Court stayed operation of part of its Judgment (but significantly not all of it) for a period of one year to allow time for an appropriate Parliamentary response. In the result, while Parliament will have the luxury of time to devise legislative corrections, one would expect the Federal Court (which is charged with reviewing the reasonableness of Certificates and detentions effected under them) to be beset almost immediately with applications for judicial relief.

While the outcome of the case has caused some angst among those of a “law and order” bent, we do not believe there is any need to fear some Pamplona-like “running of the terrorists” through Canadian streets. The Court expressly contemplates long-term detention without charge of non-citizens who are considered to be a threat to Canada, whether for terrorism, human rights, or organized crime reasons. It merely requires the adoption of a system somewhat different from what is currently provided, and it almost positively invites the adoption of a system which is already used in other security-related settings in Canada. Indeed, as detailed below, the processes and procedures which the Court apparently finds acceptable would be regarded as impermissibly draconian in Britain.

I. INTRODUCTION.

We apologise in advance for the length of this comment letter. There are three reasons for that. First, the Judgment is a lengthy one, running some 81 pages, plus an appendix. Any detailed consideration of such a lengthy Judgment almost necessarily tends to be lengthy as well. Second, we have included numerous excerpts from the case, to allow you to obtain a better sense of the Court's approach and reasoning than could be had from news reports. Finally, we confess to having some fun with how parts of the Judgment are written. There is a tendency for Charter cases in particular, especially at the Supreme Court of Canada level, to be distinguished by prose which some might describe as florid at least. We simply found it impossible to resist sharing some examples.

The overall tone of the decision, written by Chief Justice McLachlin, is exemplified by the following excerpts from Paragraphs 1, 2, and 69 of her Ladyship's Reasons for Judgment:

One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees. These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance.

In this case, we are confronted with a statute ... that attempts to resolve this tension in the immigration context by allowing the Minister of Citizenship and Immigration (the "Minister"), and the Minister of Public Safety and Emergency Preparedness (collectively "the ministers") to issue a certificate of inadmissibility leading to the detention of a permanent resident or foreign national deemed to be a threat to national security. ... The question is whether the solution that Parliament has enacted conforms to the Constitution, and in particular the guarantees in the *Canadian Charter of Rights and Freedoms* that protect against unjustifiable intrusions on liberty, equality and the freedom from arbitrary detention and from cruel and unusual treatment. ...

The realities that confront modern governments faced with the challenge of terrorism are stark. ... But these tensions are not new. ... Canada has already devised processes that go further in preserving s. 7 [Charter] rights while protecting sensitive information; until recently, one of these solutions was applicable in the security certificate context. Nor are these tensions unique to Canada ...

The contrast in approach to that underlying the creation and on-going operation of a certain "destination resort" in Guantanamo Bay is striking.

II. MATERIAL BACKGROUND.

In order for Charkaoui to be understood, some background information and explanation is necessary. First, the IRPA is successor legislation to the former Immigration Act and therefore is not anti-terrorism legislation per se. Second, because it is immigration-focussed legislation, the IRPA has no application to Canadian citizens, as opposed to those holding permanent residency status or those who are foreign nationals otherwise properly in the country. Third, references to “removal Orders” should be interpreted as “deportation Orders,” since that is what they truly are. Enforcement of a removal Order entails placing the person involved on an aircraft bound for some location outside Canada. While the aircraft might return, the “passenger of honour” will not.

A quick review of the material provisions of the Charter is also of assistance. They are as follows:

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.

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

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.

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

10. Everyone has the right on arrest or detention

a) to be informed promptly of the reasons therefor;

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

c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

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

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A two-stage analysis is required when the claimed violation of a Charter right is in issue. The first question is whether a specific Charter right has been infringed at all. If, and only if, the answer to that question is in the affirmative does a consideration of s. 1 then come into play. Put another way, s. 1 plays no role in determining the scope of the specific Charter rights which follow it, but rather presents a means of possible "salvation" of otherwise offensive legislation. In order for a breach of a Charter right to be subject to salvage under s. 1, it must satisfy the "Oakes test," so-called after the decision in R. v. Oakes [1986] 1 SCR 103, i.e., the subject matter of the legislation under review must be "pressing and substantial;" and the violation of the Charter right in issue must be "proportional," in the sense that it must be rationally connected to the legislative objective, it must minimally impair the Charter right in issue, and there must be proportionality between the infringement of the Charter right and the importance of the legislative objective.

The material workings of the IRPA were described by McLachlin, C.J.C., at Paragraphs 4 – 7 of her Reasons:

[The purpose of t]he provisions of the *IRPA* ... is to permit the removal of non-citizens living in Canada — permanent residents and foreign nationals — on various grounds, including connection with terrorist activities. The scheme permits deportation on the basis of confidential information that is not to be disclosed to the person named in the certificate or anyone acting on the person's behalf or in his or her interest. The scheme was meant to "facilitat[e] the early removal of persons who are inadmissible on serious grounds, including persons posing a threat to the security of Canada" (*Clause by Clause Analysis* (2001), at p. 72). In reality, however, it may also lead to long periods of incarceration.

The *IRPA* requires the ministers to sign a certificate declaring that a foreign national or permanent resident is inadmissible to enter or remain in Canada on grounds of security, among others: s. 77. A judge of the Federal Court then reviews the certificate to determine whether it is reasonable: s. 80. If the state so requests, the review is conducted *in camera* and *ex parte*. The person named in the certificate has no right to see the material on the basis of which the certificate was issued. Non-sensitive material may be disclosed; sensitive or confidential material must not be disclosed if the government objects. The named person and his or her lawyer cannot see undisclosed material, although the ministers and the reviewing judge may rely on it. At the end of the day, the judge must provide the person with a summary of the case against him or her — a summary that does not disclose material that might compromise national security. If the judge determines that the certificate is reasonable, there is no appeal and no way to have the decision judicially reviewed: s. 80(3).

The consequences of the issuance and confirmation of a certificate of inadmissibility vary, depending on whether the person is a permanent resident of Canada or a foreign national whose right to remain in Canada has not yet been confirmed. Permanent residents who the ministers have reasonable grounds to

believe are a danger to national security *may* be held in detention. ... Foreign nationals, meanwhile, *must* be detained once a certificate is issued: under s. 82(2), the detention is automatic. While the detention of a permanent resident must be reviewed within 48 hours, a foreign national, on the other hand, must apply for review, but may not do so until 120 days after a judge of the Federal Court determines the certificate to be reasonable. In both cases, if the judge finds the certificate to be reasonable, it becomes a removal order. Such an order deprives permanent residents of their status; their detention is then subject to review on the same basis as that of other foreign nationals.

The removal order cannot be appealed and may be immediately enforced, thus eliminating the requirement of holding or continuing an examination or an admissibility hearing: s.81(b). The detainee, whether a permanent resident or a foreign national, may no longer apply for protection: s. 81(c). Additionally, a refugee or a protected person determined to be inadmissible on any of the grounds for a certificate loses the protection of the principle of non-refoulement under s. 115(1) if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada: s. 115(2). This means that he or she may, at least in theory, be deported to torture.

In keeping with our earlier comment regarding the lofty language which the Court has trouble resisting in cases of this kind, we pause here only to note that the reference to “non-refoulement” had us completely flummoxed. Our first response was to review the terms of s. 115 of the IRPA. The section makes no use of the term. We then had resort to several dictionaries, including the two-volume “compact edition” of the Oxford English Dictionary (the print in which is so small that the publication comes with a complimentary magnifying glass), all to no avail. We eventually located a Wikipedia definition as “a principle in international law that concerns the protection of refugees from being returned to places where their lives or freedoms could be threatened. ... [It] is a jus cogens of international law that forbids the expulsion of a refugee into an area where s/he might be again subjected to persecution [and is c]odified within the 1951 Geneva Convention and 1967 Protocol ...” At least that much is clear.

Returning to the topic at hand, an additional feature of the IRPA is that it allows the detention of people who have not been charged by the Canadian legal system with anything. That circumstance is very different from the familiar process of holding a person charged with an offence pending trial unless bail or some other form of judicial interim release is granted. Under the IRPA, it is entirely possible for no charges to ever be filed, and thus for the Crown to keep a person in custody without ever having to prove its case on the merits.

III. THE ISSUES AND THE DECISION.

A. “Reasonableness Hearings.”

The Court found that the conduct of “reasonableness hearings” offended the s. 7 Charter right to life, liberty, and security by requiring an adjudication process in which neither the person affected by the Certificate nor anyone acting on his or her behalf was permitted to fully know what was placed before the Court. It also found that defect to be incapable of being saved by s. 1 of the Charter, since there were less intrusive measures available to ensure people affected by Certificates could be properly represented while potentially critical confidential information remained protected (at Paragraph 66):

The rights protected by s. 7 — life, liberty, and security of the person — are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests. It follows that violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1: *G. (J.)*. Nevertheless, the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenges complex.

For a possibly acceptable alternative, the Court pointed to the practice followed by the Security Intelligence Review Committee under the Canadian Security Intelligence Service Act, pursuant to which security-cleared “special counsel” were allowed access to all the material in issue, even if they were prohibited from disclosing all of it to their “clients,” and were expected to cross-examine Crown witnesses “with as much vigour as one would expect from the complainant’s counsel”. The Court noted that similar practices had been adopted in other security-related matters, both in Canada and in the United Kingdom, including the “Air India Trial” held in Vancouver two years ago. It all but recommended the adoption of that practice for IRPA matters (see: Paragraphs 70 - 87).

The Court’s invocation of the British model as an example is interesting. While the Court acknowledged that the British procedures had their critics, it could well be argued that it understated the problems associated with them. The initial British procedures ultimately had to be abandoned. Many of the “special advocates” with the security clearance necessary to represent detained persons resigned from the program, on the ground that being unable to even meet their “clients” at all effectively eliminated any prospect of dealing with such people in a just way: see, e.g., “Has Justice Become a Casualty in War Against Terrorism?” Times Online, March 29, 2005. The enabling legislation was later declared “unconstitutional” by the House of Lords (we put the term in quotation marks only because Britain does not have a written constitution, as opposed to a collection of guiding principles and traditions). The procedure implemented to replace it, under which the Court has the ability to avoid indeterminate detention without charge by issuing a “control Order,” has experienced difficulties of its own. Unlike the law in Canada, wiretap evidence is generally inadmissible in British criminal proceedings, thus making it difficult for the Crown to present a sufficiently compelling case to keep people in detention following their arrest. Further, the state of British law on such things is such that control Orders can not include terms authorizing continued surveillance, the interception of communications, and the like. In the result, out of eighteen people regarding whom control

Orders have been issued to date, three have absconded and can no longer be found: “Third Control Order Terror Suspect Absconds,” The Telegraph, January 18, 2007; “Judge Rejects Control Order on Suspect,” The Guardian, February 17, 2007; “Control Order Powers Win Renewal,” BBC News, February 22, 2007.

In contrast to all that, as reflected in an excerpt appearing later in this letter, the Supreme Court of Canada had no apparent difficulty with terms of judicial release which included things such as continual surveillance and the on-going interception of communications. Put another way, it was apparently content to permit remedies which would be impermissible in Britain, perhaps thereby struck a middle ground between the British approach and that taken toward all “aliens” in the United States.

Any concern that the Court did not fully appreciate the implications of permitting “special counsel” access to very sensitive information which they could not share with their “clients” ought to be allayed by the following comments (from Paragraphs 76, 85, and 86):

Certain elements of SIRC process may be inappropriate to the context of terrorism. Where there is a risk of catastrophic acts of violence, it would be foolhardy to require a lengthy review process *before* a certificate could be issued. But it was not suggested before this Court that SIRC’s special counsel system had not functioned well in connection with the review of certificates under the *Immigration Act*, nor was any explanation given for why, under the new system for vetting certificates and reviewing detentions, a special counsel process had not been retained.

Parliament is not required to use the *perfect*, or least restrictive, alternative to achieve its objective: *R. v. Chaulk*, [1990] 3 S.C.R. 1303. However, bearing in mind the deference that is owed to Parliament in its legislative choices, the alternatives discussed demonstrate that the *IRPA* does not minimally impair the named person’s rights.

... The special counsel system may not be perfect from the named person’s perspective, given that special counsel cannot reveal confidential material. But, without compromising security, it better protects the named person’s s. 7 interests.

The Court did not move from a decision that the material portions of the *IRPA* were unconstitutional to a direction that all those currently in detention under Certificates were to be released, to commit whatever mischief they might have initially intended. Rather, it stayed operation of its finding for a year to allow Parliament the opportunity to reformulate the legislation. That stay however was coupled with the direction that, if the matter had not been duly addressed by the end of that 12 month period, the Crown’s entitlement to detain under current Certificates would be at an end and it would be required to “start again” (see: Paragraphs 139, 140).

B. Detention Review Hearings.

The Court had equal difficulty with the disparity in the treatment of permanent residents on one hand and foreign nationals on the other. It found those provisions displacing a foreign national's judicial review entitlements for 120 days following conduct of an initial reasonableness hearing breached the s. 9 Charter protection against arbitrary detention and that, particularly given how the system was able to deal with permanent residents, it was incapable of being saved by s. 1 (see: Paragraphs 88 – 94). Unlike the decision regarding the conduct of reasonableness hearings generally, the Court did not stay this facet of its decision, thereby exposing the Federal Court to a deluge of applications for judicial release (Paragraphs 141, 142).

Lest anyone conclude that its approach to this matter was entirely too “soft,” it should be noted the Court had no difficulty with the notion of automatic detention, since it was premised on some rational mechanism, i.e., the issuance of a Certificate (Paragraph 89). The conceptual balance struck by the Court on this issue is summarized in its comments at Paragraph 93:

It is clear that there may be a need for some flexibility regarding the period for which a suspected terrorist may be detained. Confronted with a terrorist threat, state officials may need to act immediately, in the absence of a fully documented case. It may take some time to verify and document the threat. Where state officials act expeditiously, the failure to meet an arbitrary target of a fixed number of hours should not mean the automatic release of the person, who may well be dangerous. However, this cannot justify the complete denial of a timely detention review. Permanent residents who pose a danger to national security are also meant to be removed expeditiously. If this objective can be pursued while providing permanent residents with a mandatory detention review within 48 hours, then how can a denial of review for foreign nationals for 120 days after the certificate is confirmed be considered a minimal impairment?

C. Extended Detention.

The Supreme Court of Canada's approach on this issue was again different from that seen in Britain and the United States. Although the ultimate objective of a Certificate is the expulsion of a dangerous person from Canada, the fact is that deportation can take a substantial time to occur after an initial arrest, regardless of whether there is a “non-refoulement issue”. Indeed one of the Appellants in Charkaoui has been in custody since 2001. A remaining issue was therefore whether the ability to keep people in detention for such a long time without even charging them violated the s. 12 Charter protection against cruel and unusual treatment. The arguably pernicious argument advanced by the Crown was that the issue did not truly arise, since a detained person could “solve the problem” simply by volunteering to be placed on the next flight out of Canada to whatever country would accept him or her. The consequent argument was that any continued detention was in fact as much at the detained person's election as it was the Crown's.

Departing from the evolving British approach, the Court found there was no Charter-related difficulty with indeterminate detention, provided there remained an on-going ability to seek judicial review of whether that remained necessary in view of those forms of judicial release which were available. Accordingly, those provisions of the IRPA which had the effect of limiting the ability to seek such judicial review were also declared unconstitutional, again with no stay on the operation of that aspect of the Court's decision.

The Court's approach to the issue is exemplified by the following excerpts from Paragraphs 95, 96, 98, 99, 101, and 103 of the Reasons:

The question at this point is whether the extended detention that may occur under the *IRPA* violates the guarantee against cruel and unusual treatment under s. 12 of the *Charter*. The threshold for breach of s. 12 is high. As stated by Lamer J. (as he then was) in *Smith*, treatment or punishment is cruel and unusual if it is "so excessive as to outrage [our] standards of decency": *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1072; also *R. v. Wiles*, [2005] 3 S.C.R. 895, 2005 SCC 84, at para. 4.

... Detention itself is never pleasant, but it is only cruel and unusual in the legal sense if it violates accepted norms of treatment. Denying the means required by the principles of fundamental justice to challenge a detention may render the detention arbitrarily indefinite and support the argument that it is cruel or unusual. (The same may be true of onerous conditions of release that seriously restrict a person's liberty without affording an opportunity to challenge the restrictions.) Conversely, a system that permits the detainee to challenge the detention and obtain a release if one is justified may lead to the conclusion that the detention is not cruel and unusual: see *Sahin v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 214 (T.D.), *per* Rothstein J. (as he then was).

More narrowly, however, it has been recognized that indefinite detention in circumstances where the detainee has no hope of release or recourse to a legal process to procure his or her release may cause psychological stress and therefore constitute cruel and unusual treatment: *Soering v. United Kingdom* (1989), 11 E.H.R.R. 439 (ct.), at para. 111; compare *Lyons*, at pp. 339-41. However, for the reasons that follow, I conclude that the *IRPA* does not impose cruel and unusual treatment within the meaning of s. 12 of the *Charter* because, although detentions may be lengthy, the *IRPA*, properly interpreted, provides a process for reviewing detention and obtaining release and for reviewing and amending conditions of release, where appropriate.

On its face, the *IRPA* permits detention pending deportation on security grounds. In reality, however, a release from detention may be difficult to obtain. The Federal Court suggested that Mr. Almrei "holds the key to his release": *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2004] 4 F.C.R. 327, 2004 FC 420, at para. 138. But voluntary departure may be impossible. A person named in a certificate of inadmissibility may have nowhere to go. Other countries may assume such a person to be a terrorist and are likely to refuse entry, or the person may fear torture on his or her return. Deportation may fail for the same reasons,

despite the observation that “[i]n our jurisdiction, at this moment, deportation to torture remains a possibility” in exceptional circumstances: *Almrei*, 2005 FCA 54, at para. 127. The only realistic option may be judicial release.

Courts thus far have understood these provisions to set a high standard for release. In interpreting the predecessor to s. 84(2) under the *Immigration Act*, the Federal Court of Appeal held that judicial release “cannot be an automatic or easy thing to achieve”, and that it “is not to be routinely obtained”: *Ahani*, at para. 13. At the same time, courts have read the provision as allowing the judge to inquire whether terms and conditions could make the release safe. This is an invitation that Federal Court judges have rightly accepted: *Harkat v. Canada (Minister of Citizenship and Immigration)* (2006), 270 D.L.R. (4th) 50, 2006 FC 628, at para. 82, *Almrei v. Canada (Minister of Citizenship and Immigration)* (2005), 270 F.T.R. 1, 2005 FC 1645, at paras. 419-26. Likewise, when reviewing the detention of a permanent resident under s. 83(3), judges have examined the context that would surround release in order to determine whether the person would pose a security risk: *Charkaoui (Re)*, 2005 FC 248, at paras. 71-73.

Mr. Harkat has been released from detention, but remains under house arrest and continuous surveillance by the Canada Border Services Agency (“CBSA”) and the RCMP by virtue of an order by Dawson J. He must at all times wear an electronic monitoring device and obtain the CBSA’s permission before leaving his house. He must at all times be under the supervision of either his wife or his mother-in-law. Access to his residence is restricted to individuals who have posted sureties and to Mr. Harkat’s legal counsel, as well as to emergency, fire, police and health care professionals. The CBSA is permitted to intercept all telephone and oral communications between Mr. Harkat and any third party. Mr. Harkat is forbidden to use any cellular phone or any computer with Internet connectivity. Breach of any of the numerous conditions in Dawson J.’s order would lead to automatic rearrest; however, these conditions are subject to ongoing review and amendment.

As already noted, while conditions of release of the kind imposed on Mr. Harkat would be impossible in Britain, they are apparently perfectly acceptable to the Supreme Court of Canada, provided he remains able to seek judicial review of them.

D. Equality Under the Law.

Recalling the Orwellian dictum that while all animals are equal, some animals are more equal than others, a facet of Charkaoui which might well go unnoticed given the nature of the other issues addressed is that the Court expressly found the Charter itself permits discrimination between Canadian citizens and permanent residents on one hand and foreign nationals on the other. Contrary to conventional wisdom, simply "making it in" does not automatically make the

person involved fully "one of us," at least for the purposes of the IRPA and similar statutory regimes. That said, however, the Court also found that once such people are here, all Charter rights aside from those under s. 6(1) apply to them as much as they do to anyone else.

At the end, the "permissible discrimination" under the Charter may not in fact go any further than to recognize the basic right of citizenship to never be refused access to one's own country. (The American approach is now different, as exemplified by the recent proposed rules barring re-entry to the United States by air, even by American citizens, unless they are able to produce a current passport.)

IV. QUOTABLE QUOTES.

For reasons known only to the Chief Justice, the consideration of contemporary immigration/national security legislation required revisiting the days of Magna Carta, cases decided in Shakespearian times, and even references to a legal form of Eden-like world. If nothing else, such references at least served to keep one entertained (emphasis added):

1. From Paragraph 28: "The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair judicial process: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46. "It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process": *Ferras*, at para. 19. **This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of *habeas corpus*. It remains as fundamental to our modern conception of liberty as it was in the days of King John.**"
2. From Paragraph 48: "To comply with s. 7 of the *Charter*, the magistrate must make a decision based on the facts and the law. In the extradition context, the principles of fundamental justice have been held to require, "at a minimum, a meaningful judicial assessment of the case on the basis of the evidence and the law. ... **Since *Bonham's Case* [(1610), 8 Co. Rep. 113b, 77 E.R. 646]**, the essence of a judicial hearing has been the treatment of facts revealed by the evidence in consideration of the substantive rights of the parties as set down by law" (*Ferras*, at para. 25).
3. From Paragraph 50: "As Hugessen J. has noted, the adversarial system provides "the real warranty that the outcome of what we do is going to be fair and just" (p. 384); **without it, the judge may feel "a little bit like a fig leaf"** (Proceedings of the March 2002 Conference, at p. 385)."

V. CONCLUSIONS.

In our view Charkaoui represents a reasoned, and reasonable, approach to very challenging issues. Although it will undoubtedly generate a considerable volume of work almost instantly for the Federal Court, we suspect that the safety of Canadian society will remain intact. That is so for three reasons.

First, rather than simply declaring the legislation unconstitutional and therefore inoperative as it generally does in Charter cases, the Court stayed operation of critical parts of its decision for a year. Provided Parliament moves with appropriate speed, and presumably accepts the Court's very strong suggestions, there is no reason to believe that those already in custody will not continue to stay there, albeit subject to an ability to seek judicial review.

Second, apparently acceptable terms of judicial release are a far cry from "turning them loose". As noted, the Court is perfectly content with terms which require electronic monitoring, continual surveillance, restrictions on who can enter a residence to which a released person is confined, the monitoring of all communications, and prohibitions against such persons having such common forms of communication as wireless telephone or internet access. Thus, while a person regarding whom a Certificate has been issued may be able to "get out" pending his or her potential removal, the practical effect of "success" might well be to simply trade one form of cell for another.

Finally, depending on the number of applications received for detention reviews, it may well be that, at least initially, the administrative load posed by so many applications might well result in a large proportion of applicants remaining in detention for some considerable further amount of time, albeit as a consequence of the speed of the Court's operations rather than pursuant to the IRPA itself.

We trust the foregoing has been of some interest to you. Should you have any questions or comments related to the foregoing discussion, you ought not to hesitate to contact us at your convenience.

For further information contact Kimberly S. Campbell.