Date: 20080619

Docket: DES-4-08

Citation: 2008 FC 765

IN THE MATTER OF a certificate pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act (IRPA)*;

IN THE MATTER OF the referral of this certificate to the Federal Court of Canada pursuant to subsection 77(1) of the IRPA;

AND IN THE MATTER OF Adil Charkaoui

REASONS FOR ORDER

Lemieux J.

Introduction and background

[1] These reasons follow the order that I signed on June 12, 2008, dismissing the motion by Adil Charkaoui (the applicant) for a temporary stay of the review of the reasonableness of the security certificate issued against him on February 22, 2008 (the certificate), by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration (the Ministers).

[2] The certificate was signed by the Ministers and referred to the Federal Court under subsection 77(1) of the *Immigration and Refugee Protection Act*, as amended by chapter 3 of the Statutes of Canada 2008, assented to on February 14, 2008 (the Act).

[3] Chapter 3 of the Statutes of Canada 2008 entitled *An Act to Amend the Immigration and Refugee Protection Act (Certificate and Special Advocate) and to Make a Consequential Amendment to Another Act* was adopted by the Parliament of Canada following the decision of the Supreme Court of Canada dated February 23, 2007, in *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, which determined that the provisions of the Act regarding the procedure for reviewing a security certificate were invalid. At paragraphs 139 and 140, the Chief Justice, on behalf of the Court, made the following findings on the invalidity and the suspension of the judgment:

> **139** The first is that s. 78(*g*) allows for the use of evidence that is never disclosed to the named person without providing adequate measures to compensate for this non-disclosure and the constitutional problems it causes. It is clear from approaches adopted in other democracies, and in Canada itself in other security situations, that solutions can be devised that protect confidential security information and at the same time are less intrusive on the person's rights. It follows that the *IRPA*'s procedure for the judicial confirmation of certificates and review of detention violates s. 7 of the *Charter* and has not been shown to be justified under s. 1 of the *Charter*. I would declare the procedure to be inconsistent with the *Charter*, and hence of no force or effect.
>
> **140** However, in order to give Parliament time to amend the law, I would suspend this declaration for one year from the date of this judgment. If the government chooses to go forward with the proceedings to have the reasonableness of Mr. Charkaoui's certificate determined during the one-year suspension period, the existing process under the *IRPA* will apply. After one year, the certificates of Mr. Harkat and Mr. Almrei (and of any other individuals whose certificates have been deemed reasonable) will lose the "reasonable" status that has been conferred on them, and it will be open to them to apply to have the certificates quashed. If the government intends to employ a certificate after the one-year delay, it will need to seek a fresh determination of reasonableness under the new process devised by Parliament. Likewise, any detention review occurring after the delay will be subject to the new process.
> [My emphasis.]

[4] The certificate signed by the Ministers reads as follows:

> [TRANSLATION]
>
> We hereby certify that we believe, based on the security intelligence that we have, that Adil CHARKAOUI, a permanent resident, is inadmissible on security grounds under paragraphs 34(1)(c), 34(1)(d) and 34(1)(f) of the *Immigration and Refugee Protection Act.*

[5] Paragraph 1 of the public summary of the security intelligence report concerning Adil Charkaoui (the report) dated February 22, 2008, prepared by the Canadian Security Intelligence Service (the Service) for the Ministers, under the heading "Summary of Recommendation" reads:

> [TRANSLATION]
>
> 1. The Canadian Security Intelligence Service (the Service) believes that Adil CHARKAOUI (CHARKAOUI), a permanent resident of Canada born July 3, 1973, in Mohammedia, Morocco, is inadmissible on security grounds under subsections 34(1)(c), 34(1)(d) and 34(1)(f) of the *Immigration and Refugee Protection Act* (the IRPA).

[6] Subsections 34(1)(c), 34(1)(d) and 34(1)(f) of the Act provide:

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for	34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants:
. . .	…
(c) engaging in terrorism;	(c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
. . .	…
(f) being a member of an organization that there are reasonable grounds to believe	f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle

engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).	est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

[7] Paragraphs 3 and 4 of the report, under the heading "The Danger" read as follows:

[TRANSLATION]

3. Based on the Service's investigation and analysis, there are reasonable grounds to believe that CHARKAOUI

(a) was, is or will be a member of an organization that the Service has reasonable grounds to believe engages, engaged or will engage in acts of terrorism;

(b) is engaging, has engaged or will engage in terrorism;

(c) constitutes, has constituted or will constitute a danger to the security of Canada.

4. Specifically, the Service believes that CHARKAOUI

(a) is or was a member of the Al Qaida network;

(b) participated in training camps in Afghanistan and/or Pakistan;

(c) had Islamic extremists among his circle of contacts;

(d) discussed plans for terrorist attacks;

(e) engaged in criminal activities to provide financial support to the jihad;

(f) was a sleeper agent for the Al Qaida network.

The requested stay

[8] It is important to understand that the stay of proceedings requested by Mr. Charkaoui is limited in scope. He is not requesting a permanent stay of the proceedings prescribed by the Act following the issuance of the security certificate against him. He is not asking for a freeze of any other motion that he would be free to file such as a motion for a declaration that the new Act is unconstitutional, a motion to set aside his detention conditions or preliminary motions before the process to review the certificate. He only wants this Court to order a stay of the procedure for reviewing the reasonableness of this certificate until the Supreme Court of Canada renders a final judgment in docket 31597, *Adil Charkaoui v. Minister of Citizenship and Immigration et al*. The Court heard this case on January 31, 2008, and reserved judgment.

[9] Docket 31597 progressed towards the Supreme Court of Canada in the following way:

1. On May 16, 2003, the first security certificate was issued against Mr. Charkaoui. This certificate certified that he was inadmissible on security grounds because he was a person

referred to in subsections 34(1)(c), 34(1)(d) and 34(1)(f) of the Act. Concurrently, the Ministers authorized a warrant for his arrest and detention.

2. The designated judge had not determined the reasonableness of the first certificate before the Supreme Court of Canada ruled on February 23, 2007, that Part 9 of the Act was invalid. No decision on the reasonableness had been made for these reasons: four detention reviews; two protection applications; his motion for a declaration of unconstitutionality and other motions or appeals on his part.

3. As part of the fourth detention review hearing, Mr. Charkaoui brought a two-pronged motion: the first asking that the certificate be quashed and that he be released (a permanent stay of proceedings) and the other, in the alternative, asking for an order excluding the summary of the additional information about the new sensitive evidence filed on January 6, 2005.

4. The motion for a stay of the procedure for determining the reasonableness of the certificate was based on the fact that the Service no longer had in its possession the notes of the interviews that the Service had had with Mr. Charkaoui. The Service had destroyed those notes in accordance with its internal policy of erasing notes and recordings once the information they contain is incorporated into a report or a summary. Counsel for Mr. Charkaoui argued before the designated judge, Mr. Justice Simon Noël, that this policy breached the principle of procedural fairness in that neither the Ministers nor Mr. Charkaoui could benefit from all the information collected during the interviews,

> including information favourable to Mr. Charkaoui, and that this infringed section 7 of the *Canadian Charter of Rights and Freedoms.* The alternative request was based on the argument that the late disclosure of new facts (or allegations) prejudiced Mr. Charkaoui.

[10] In a decision dated February 1, 2005 (Reference 2005 FC 149), Justice Noël dismissed both prongs of the motion. His conclusion on the first prong reads as follows:

> [14] The Court has analyzed Mr. Charkaoui's submissions from every angle but the conclusion sought is not the one adopted. There is no infringement of procedural fairness that cannot be remedied (if such is the case). Mr. Charkaoui may testify about these interviews and communicate his version. This would be the version that would most adequately reflect the interviews. So there can be no harm in such circumstances and if there was an infringement of procedural fairness it would be neutralized.
>
> [15] As mentioned at the hearing, it is inconceivable to the Court that it would vacate the certificate on the basis of a one-page document, taking into account both the very voluminous overall evidence that has been disclosed and the evidence that is protected for national security purposes. It would not be in the interest of justice to make such a decision. Furthermore, a careful reading of the evidence (both public and protected) indicates that the facts and allegations at the basis of the certificate and the detention do not originate in any way in the summaries of interviews but are instead elsewhere in the evidence. Of course, these summaries are part of the evidence but they are not necessary in order to demonstrate directly or indirectly the foundation of the facts and the allegations on which the proceeding is based. [My emphasis.]

[11] As for the exclusion of the new evidence, Justice Noël found that the evidence was authorized by the Act and that the appropriate remedy for its late disclosure was an adjournment. He also decided that the determination on the unreliability and lack of credibility of these new facts would not be made until all the evidence had been heard. Given his findings, Justice Noël was of the view that it was unnecessary to address Mr. Charkaoui's other arguments.

[12] Mr. Charkaoui appealed. The Federal Court of Appeal dismissed the appeal on June 6, 2006 (see *Adil Charkaoui v. Minister of Citizenship and Immigration*, 2006 FCA 206). Mr. Justice Pelletier, on behalf of the Court of Appeal, was of the view that Mr. Charkaoui ". . . has failed to convince me that his right to procedural fairness was breached or, if there was such a breach, that it would entitle him to a stay of the inadmissibility proceedings. The request that the new allegations not be admitted by the designated judge must also be dismissed, in view of the fact that the Act expressly provides this possibility."

[13] At paragraph 27 of his reasons, Justice Pelletier dealt with an argument that had not been made before Justice Noël—the impact of section 12 of the *Canadian Security Intelligence Service Act* as a factor justifying its internal policy of destroying interview notes once the summary is prepared. He wrote: "I must say in passing that I find the justification proffered by the Ministers for this CSIS policy rather unconvincing." However, he determined that the Service's application of this policy did not warrant granting a stay of the proceedings instituted against Mr. Charkaoui because he was unable to establish harm resulting from a possible breach. Justice Pelletier wrote the following in paragraphs 32, 33, 34 and 35 of these reasons:

> [32] In the case at bar, Mr. Charkaoui alleges that the timely disclosure of the interview summary could have influenced the decision of the Ministers and the decisions of the designated judge. He sees therein a prejudice that entitles him to the relief he claims. The very description of this argument reveals its speculative nature.
>
> [33] Mr. Charkaoui submits that he was prejudiced by the destruction of the interview notes because the designated judge was unable to verify the concordance between what he said in his testimony and what allegedly appeared in the notes of the interviews. Even conceding that Mr. Charkaoui could have been prejudiced by the absence of these notes, it must also be acknowledged that he may have derived some advantage from the fact that their absence shielded him from

> cross-examination relating to discrepancies between his testimony and his prior statements.
>
> [34] It cannot be assumed that the summaries are not consistent with the notes that were destroyed, or vice versa. Insofar as the designated judge is satisfied with the reliability of the evidence that he has, whether as a result of its origin from independent sources or because of its apparent corroboration, the absence of interview notes, even notes that might be relevant, does not affect the reliability of this evidence on the record, particularly the evidence that is extrinsic to the interviews with Mr. Charkaoui.
>
> [35] Wherever the interview notes are liable to throw some light on dubious evidence, their absence is a factor that the designated judge must consider in his assessment of this evidence. It cannot be assumed that the designated judge will not discharge his duties pertaining to the assessment of the probative value of the evidence, as he must.

[14] On September 5, 2006, Mr. Charkaoui applied to the Supreme Court of Canada for leave to appeal, which was granted on March 15, 2007.

Scope of the requested stay

[15] At the beginning of the hearing of the motion on June 11, 2008, I asked counsel for Mr. Charkaoui at what stage in the process for determining the reasonableness of the certificate would the stay apply to.

[16] This question was important because there are a number of steps in the review process, and the 2008 amendment to the Act mandated a special advocate "to protect the interests of the permanent resident or foreign national in a proceeding under any of sections 78 [determination of the reasonableness of the certificate] and 82 to 82.2 [review of the reasons for the person's continued detention]." Moreover, the special advocate system was identified by the Supreme Court of Canada in its judgment of February 23, 2007, in *Charkaoui*, above, as a less intrusive alternative to protect

sensitive information while giving fair treatment to individuals who are subject to the procedures prescribed by the Act for determining whether a certificate is reasonable.

[17] Mr. Charkaoui was not the only person against whom a new security certificate was issued on February 22, 2008. This was also the case with Messrs. Almrei, Harkat, Jaballah and Mahjoub. It was clear that Court resources had to be coordinated, but at the same time, the Court had to comply with the mandatory language of subsection 83(1)(a) of the 2008 amendment to the Act: "[T]he judge shall proceed as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit." For these reasons, the Chief Justice of the Federal Court decided that all the new proceedings for reviewing the new security certificates would be specially managed. The Chief Justice and Justice Simon Noël have been assigned as the case management judges for each of those cases. Discussions will be conducted via consolidated conferences between the representatives of the five individuals and the Court.

[18] One of the key elements in managing proceedings for determining the reasonableness of security certificates is the preparation of a litigation plan for each proceeding that sets out the following parameters:

- the appointment of a special advocate;

- a period of consultation between the special advocate and the person who is the subject of the security certificate;

- use of the same information for the decision on the reasonableness of the certificate and the questions concerning the detention or the release conditions;

- a period of time for the special advocate to review the confidential information;

- provision for the establishment of a schedule for the beginning (end of summer or beginning of fall) and the end of the public hearings and the closed hearings (November/December 2008);

- a list of all the applications and motions pertaining to the reasonableness of the certificate, the detention or the release conditions, including the questions about the constitutionality of any provision under section 9 or any other matter.

Test for granting a stay of proceedings

[19] Mr. Charkaoui invokes subsection 50(1)(b) of the *Federal Courts Act*, which permits this Court to grant an order temporarily staying the review of the reasonableness of the certificate. This subsection reads as follows:

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	50. (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire:
. . .	…
(b) where for any other reason it is in the interest of justice that the proceedings be stayed.	b) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[My emphasis.] [Je souligne.]

[20] The parties agree that, in order to obtain a stay of proceedings under subsection 50(1)(b) of the *Federal Courts Act*, Mr. Charkaoui must satisfy each branch of the test laid down by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 and *R.J.R. – Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, specifically:

- There must be a serious question to be tried;

- It must be determined whether the applicant would suffer irreparable harm if the application were refused;

- An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[21] *R.J.R. – Macdonald Inc.*, above, describes the three branches in detail.

1. Serious issue

[22] Justices Sopinka and Cory wrote at page 337:

> **49** What then are the indicators of a "serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are

raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

2. Irreparable harm

[23] Justices Sopinka and Cory wrote the following at page 341 of their reasons:

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered 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 (*R.L. Crain Inc. v. Hendry*, (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, 1985 CanLII 154 (B.C.C.A.), [1985] W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

3. Balance of convenience and the public interest

[24] At page 346, Justices Sopinka and Cory concluded as follows regarding the third branch of the test:

71 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating

> irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> **72** A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights. [My emphasis.]

[25] Applying the principles in *R.J.R. – Macdonald Inc.*, above, Justices Cory and Sopinka wrote the following at page 350:

> **85** Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

Mr. Charkaoui's submissions

[26] In response to the Court's question regarding what stage of the review process the stay would apply to, his counsel clearly indicated that the process of appointing a special advocate could continue as well as the motions that Mr. Charkaoui has already filed or anticipates filing in the near future: (1) application for a declaration that the 2008 amendments to the Act are unconstitutional; (2) his interlocutory motions for disclosure, particulars and arguments in support; and (3) his motion to set aside or review the conditions of his release.

[27] His counsel gave an ambiguous answer as to whether the special advocate could begin to consult with Mr. Charkaoui before reviewing the sensitive evidence. At first, she replied that the consultation could proceed, but she later informed the Court that the consultation would of necessity be imperfect because it was impossible to develop a specific approach on the evidence submitted to the designated judge without knowing the parameters of the Supreme Court of Canada judgment that has been reserved. On the other hand, she was of the view that the special advocate for the review of the detention conditions should be someone other than the advocate who will be appointed for the review of the reasonableness of the certificate.

[28] In short, I believe that the stay sought by Mr. Charkaoui encompasses an almost total freeze of all the steps that must be taken to determine whether the certificate is reasonable.

[29] With respect to the first branch, Mr. Charkaoui emphasizes that it requires a preliminary interim assessment of the merits of the case; his counsel submits that the substance of the case for the second certificate is the same as for the first—the allegations against Mr. Charkaoui are the same. This link between the two certificates means that the Supreme Court decision will necessarily have an impact on the conduct of this proceeding and that, under these circumstances, it would be prudent to await this judgment before continuing.

[30] As for the second branch, Mr. Charkaoui argues that he will suffer irreparable harm if the steps following the appointment of the special advocate are not stayed until the Supreme Court of

Canada renders its judgment on the application for a permanent stay of the proceedings in the previous docket.

[31] Mr. Charkaoui's submissions on the irreparable harm branch are based on the following propositions: (1) Neither Justice Noël nor the Federal Court of Appeal addressed the real issues in dispute that are before the Supreme Court of Canada because they were not aware of the extent of the Service's policy on the destruction of interview notes and tape or video recordings; (2) The Service's practices and policies pertaining to investigations and the management of information and evidence have irremediably tainted the investigation on which the certificate issued against Mr. Charkaoui was based to the point where they are inconsistent with the Ministers' duty to retain and disclose evidence; (3) these practices and policies of the Service irremediably violated Mr. Charkaoui's right to procedural fairness; (4) the Service's behaviour in this regard constitutes an abuse of process that contaminates the new certificate; (5) continuing the review of the reasonableness of the certificate would needlessly perpetuate the constitutional violations alleged by Mr. Charkaoui and may constitute a further infringement of his rights.

[32] I summarize the irreparable harm that counsel for Mr. Charkaoui has identified:

- He needs the teachings that the Supreme Court of Canada will give in its judgment that is currently reserved, in order to guide and prepare his defence with respect to the evidence, which was the basis of the investigation;

- A final decision on the reasonableness of the certificate may make the Supreme Court of Canada's decision moot, with the result that he may lose the fruits of a favourable judgment;

- He will be compelled to make certain choices: to testify or not and other repercussions on his defence;

- His reputation will be irreparably damaged because he will not be able to be fully compensated in damages;

- Financial loss and stress of a trial.

[33] With respect to the third branch, counsel for Mr. Charkaoui submits that Mr. Charkaoui will suffer greater harm depending on whether a stay is granted or refused pending the decision of the Supreme Court of Canada. She reiterates the harm that Mr. Charkaoui will suffer and argues that the Ministers will not be prejudiced if the stay is granted. On the contrary, she maintains that if the Ministers continue the proceeding, they risk making their own errors worse, and it is in their real interests that the law be clarified regarding the legality and constitutionality of their actions and those of the Service before allowing them to continue the proceeding. This is also in the best interests of justice. Referring to *R.J.R. – Macdonald Inc.*, above, she submits that the requested stay is similar to an exemption case that does not affect anyone other than Mr. Charkaoui and, consequently, the public interest is not infringed.

Analysis and conclusions

[34] On June 12, 2008, I made an order dismissing Mr. Charkaoui's motion on the grounds that he had not persuaded me that he would suffer irreparable harm if the stay order were not granted and that, under the circumstances, if the stay were granted, the balance of convenience favoured the Minister. I will explain.

(1) Serious question

[35] At the hearing of the motion, I advised the parties that I was satisfied that there was a serious question, given that the Supreme Court of Canada granted leave to appeal in docket 31597, that the appeal was heard and that judgment has been reserved since the end of January 2008. In *R.J.R. – Macdonald Inc.*, above, the Supreme Court of Canada held that "a decision by an appellate court to grant leave on the merits indicates that serious questions are raised . . . ". Mr. Charkaoui demonstrated one of the serious questions by establishing a link (same allegations) between the first certificate and this one, notwithstanding the fact that no decision was made on the reasonableness of the first certificate and that, among the transitional provisions of the 2008 amendment to the Act, section 7(1) states "A proceeding related to the reasonableness of a certificate . . . is terminated on the coming into force of this Act." (In French "Dès l'entrée en vigueur de la présente loi, il est mis fin à toute instance relative au caractère raisonnable du certificate déposé à la Cour fédérale au titre du paragraphe 77(1) de la Loi.").

(2) Irreparable harm

[36] The onus is on Mr. Charkaoui to demonstrate that he will suffer irreparable harm if the stay of proceedings is not granted. The jurisprudence establishes that "the evidence as to irreparable harm

must be clear and not speculative" [and that] it is necessary for the evidence to support a finding that the applicant would suffer irreparable harm, see *Centre Ice Ltd. v. National Hockey League*, [1994] 166 N.R. 44 (F.C.A.). The evidence of irreparable harm must be "clear and not speculative", see *Nature Co. v. Sci-tech Educational Inc*., [1992] 141 N.R. 363 (F.C.A.)).

[37] In *Canadian National Railways v. Leger*, [2000] F.C.J. No. 243, my colleague, Madam Justice Hansen, adopted the test of "the evidence as to irreparable harm must be clear and not speculative"; this was a public law case in which Canadian National (CN) sought a stay to prevent the Canadian Human Rights Tribunal from examining the discrimination complaint filed by Mr. Leger until the Court disposed of CN's application for judicial review of the decision by the Human Rights Commission to refer the complaint to the Tribunal.

[38] Justice Hansen determined two points that are relevant to this dispute: the demands of litigation and the possibility of success on the judicial review application.

[39] On the first point, she wrote at paragraph 15 of her reasons:

> **15** In a number of cases, this Court has held that the demands of litigation, including inconvenience to parties and witnesses, stress and the inability to recover costs are not sufficient to meet the irreparable harm branch of the test where they are incurred in the ordinary course of litigation. I have no indication that CN will incur costs or hardship outside the ordinary course of litigation, and therefore, it has not established irreparable harm for the purposes of this stay application. Of particular relevance in this regard is Reed J.'s holding in *ICN Pharmaceuticals Inc. v. Canada* (*Patented Medicine Prices Review Board*):
>
> > I have not been persuaded that the circumstances are such that I should stay the proceedings. While unnecessary time and costs will have been expended if the proceeding goes ahead and it is ultimately decided that the Board is

> without jurisdiction, this is more a matter of inconvenience than irreparable harm . . .

[40] Regarding the possibility of success on the application for judicial review, my colleague's view was as follows:

> **16** Reed J.'s holding in *ICN Pharmaceuticals Inc*., supra is equally applicable to CN's final submission on irreparable harm. CN claims it will be the victim of abuse of process and procedural unfairness should the tribunal hearing proceed as scheduled prior to the hearing of the judicial review application. In its submission, once the inquiry has been allowed to proceed, the judgment ultimately rendered on the judicial review application will be ineffective, untimely, and will therefore result in irreparable harm. I agree with counsel for the Respondent that this is a circular argument. It assumes that which still remains to be decided on the judicial review application. In any event, as Reed J. has noted in *ICN Pharmaceutical Inc.*, supra, even in the event of a successful judicial review application, the applicant's participation in the inquiry will have constituted an inconvenience, not irreparable harm. At issue is the actual concrete harm to be suffered by the applicant, and CN has not established that it would suffer irreparable harm warranting a stay of proceedings.

[41] The case law relied on by my colleague Justice Hansen is long-standing and consistent. I cite the following paragraph from Mr. Justice McNair's judgment in *Varnam v. Canada (Minister of National Health and Welfare)*, [1987] F.C.J. No. 511:

> A stay of proceedings is never granted as a matter of course. The matter is one calling for the exercise of a judicial discretion in determining whether a stay should be ordered in the particular circumstances of the case. The power to stay should be exercised sparingly and a stay will only be ordered in the clearest cases. In an order to justify a stay of proceedings two conditions must be met, one positive and the other negative: (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. Expense and inconvenience to a party or the prospect of the proceedings being abortive in the event of a successful appeal are not sufficient special circumstances in themselves for the granting of a stay: *Communications Workers of Canada v. Bell Canada*, [1976] 1 F.C. 282 (T.D.); *Weight Watchers Int'l Inc. v. Weight Watchers of Ontario Ltd.* (1972), 25 D.L.R. (3d) 4I9 (F.C.T.D.); *Baxter*

> *Travenol Laboratories Ltd. v. Cutter (Canada), Ltd.* (1981), 54 C.P.R. (2d) 218 (F.C.T.D.).

[42] *Canadian Pacific Railway Co. v. Canadian Transportation Agency*, 2004 FCA 347 is to the same effect, as is the decision of my colleague, Mr. Justice Kelen, in *Canadian Imperial Bank of Commerce v. Eve Kollar and another*, 2003 FC 985, who wrote at paragraph 8:

> **8** The jurisprudence makes clear that the applicant has failed to meet the second stage of the test. The applicant argues it "ought not to be put to major expense and effort to prepare for and defend itself before the Tribunal panel, with its attendant negative publicity and stigmization" [*sic*]. Similar arguments have been rejected in the past by this Court as insufficient to constitute irreparable harm: *Bell Canada v. Communications, Energy and Paperworks Union* (1997), 127 F.T.R. 44, per Richard J. (as he then was) at paragraphs 37 to 41. Special circumstances must be present for the Court to treat costs as irreparable harm and there is no evidence that such circumstances are present in this case. It is well settled that the inability of the applicant to recover costs from the Canadian Human Rights Tribunal Inquiry does not constitute irreparable harm.

[43] Last, I cite Mr. Justice Létourneau's decision in *Adil Charkaoui v. Minister of Citizenship and Immigration and Solicitor General of Canada*, 2004 FCA 319, dated September 24, 2004, in which the Federal Court of Appeal dismissed Mr. Charkaoui's motion for an order temporarily suspending the hearings on the reasonableness of the May 2003 certificate pending the hearing and disposition by the Court of Appeal of the appeal of Mr. Justice Noël's decision on the constitutionality of the sections of the Act that deal with the review of certificates. In support of his motion, Mr. Charkaoui argued that his appeal could become ineffective or unnecessary if the temporary stay was not ordered. At the time, Mr. Charkaoui was in detention.

[44] Justice Létourneau was not persuaded that Mr. Charkaoui had demonstrated irreparable harm. His view was that the damage to Mr. Charkaoui's reputation "can be compensated monetarily" and

that his appeal would not be ineffective or unnecessary because "[i]f the process followed by the Federal Court which led to the decision on the reasonableness of the certificate were to be quashed by our Court on the grounds that it was unconstitutional, I find it difficult to see how that decision could stand if its foundation were to crumble."

[45] In view of the case law analyzed above, I must find that Mr. Charkaoui has not demonstrated that he will suffer irreparable harm if the stay of proceedings is not granted.

[46] First, the consequences of the judgment that will be rendered by the Supreme Court of Canada and its impact on the review of the reasonableness of the new certificate lies in the realm of pure speculation, in my view. Who will succeed, which questions will be answered, what findings of fact and law will be made, how the judgment will apply to the new certificate and what relief, if any, will be ordered, are all unknown.

[47] Second, the alleged risk of losing the benefits of a favourable decision by the High Court is also speculative and unrealistic.

[48] Third, the case law teaches that the other harm alleged by Mr. Charkaoui is not irreparable.

[49] Fourth, it would be imprudent for this Court to now tie the hands of the judge designated to conduct the review proceeding, which will respond fairly and completely to the problems, if any, created by the Supreme Court of Canada reserving or delivering its judgment in docket 31597.

3. Balance of convenience and interests of justice

[50] After reviewing the relevant factors, including the nature of the Act and the public interest, I have no doubt that the balance of convenience, which includes an assessment of the interests of justice, clearly favours the Ministers. I will list these statutory and jurisprudential factors:

1. "The objectives as expressed in the *IRPA* indicate an intent to prioritize security." (*Medovarski v. Canada (Minister of Citizenship and Immigration*), [2005] 2 S.C.R. 539)

2. Subsection 83(1)(a), above, is similar to "the mandatory provision in subsection 9(2) of the *Competition Tribunal Act* that the hearing of the application should be held informally and expeditiously as circumstances and conditions of fairness would allow." Chief Justice Isaac of the Federal Court of Appeal in *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.*, [1994] F.C.J. No. 1504 dismissed a motion for a stay of the proceedings before the Competition Tribunal pending the hearing and disposition in the Court of Appeal of D & B's appeal. The Chief Justice concluded that the balance of convenience favoured the Director of Investigation and Research on the ground that he "was influenced to a great extent by the mandatory provision . . . ".

3. Justice Létourneau was of the same view in his decision of September 24, 2004, above, where he wrote at paragraph 19 that "the interest of justice - including the interest to [*sic*] having a review of the lawfulness of his departure order - demands

that the administration of procedures be somewhat expeditious, if not assuredly expeditious. I cannot, by staying proceedings in Federal Court, thwart an efficient and effective coordination of two series of proceedings before two different courts made in the best interest of the administration of justice." In the same vein, see the decision of Justice Richard, now Chief Justice of the Federal Court of Appeal, in *Bell Canada v. Communications, Energy and Paperworks Union*, [1997] F.C.J. No. 207 where he dismissed a motion for a stay of proceedings before the Canadian Human Rights Tribunal pending the final disposition of Bell Canada's judicial review applications. In his view, the balance of convenience favoured having complaints of discrimination prohibited in a public statute dealt with expeditiously.

4. Last, I cite the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391. Mr. Tobiass had been granted a permanent stay of the Federal Court proceedings to revoke his citizenship. The Federal Court of Appeal and the Supreme Court determined that a permanent stay of proceedings was not an appropriate remedy in the circumstances. The Supreme Court held at paragraph 109:

> **109** On the other side of the balance, society's interest in having a final decision on the merits is obvious. It is imperative that the truth should come to light. If it is not proven that the appellants did the things they are said to have done, then they will retain their citizenship. But if some or all of the alleged acts are proven then

> the appropriate action must be taken. What is at stake here, in however small a measure, is Canada's reputation as a responsible member of the community of nations. In our view, this concern is of the highest importance.
>
> .

[51] For all these reasons, the motion for a stay of proceedings is dismissed.

"François Lemieux"

_____

Judge

Ottawa, Ontario
June 19, 2008

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	DES-4-08
STYLE OF CAUSE:	**IN THE MATTER OF** a certificate pursuant to subsection 77(1) of the *Immigration and Refugee Protection Act (IRPA)*; **IN THE MATTER OF** the referral of this certificate to the Federal Court of Canada pursuant to subsection 77(1) of the IRPA; **AND IN THE MATTER OF** Adil Charkaoui
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	June 11, 2008
REASONS FOR ORDER BY:	The Honourable Mr. Justice Lemieux
DATED:	June 19, 2008

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