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Sidestepping the Charter, Again: Muting the Right to Habeas Corpus in Canada (Public Safety and Emergency Preparedness) v. Chhina

Jared Will

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I. INTRODUCTION

In 2019, the Supreme Court of Canada released its judgment in *Canada (Public Safety and Emergency Preparedness) v. Chhina*.[1] The case raised a rather simple

* Jared Will is a member of the bar in Ontario, Quebec and New York State and has been practising Canadian immigration and refugee law since 2006. He specializes in complex immigration and refugee matters, particularly those involving constitutional law, international criminal law, exclusion, inadmissibility and national security issues. He has recently been counsel on a number of long-term detention cases and is counsel in *Brown et al. v. Canada*, the ongoing challenge to the constitutionality of Canada's immigration detention legislation. He was counsel for the Canadian Association of Refugee Lawyers before the Supreme Court of Canada in *Chhina.* He would like to thank Caitlin Leach not only for her impeccable editing, but also for her unfailing intellectual rigour and honesty in providing substantive feedback on an early draft of this article.

[1] [2019] S.C.J. No. 29, 2019 SCC 29 (S.C.C.) [hereinafter "*Chhina*"].

question: Can a non-citizen detained by the Canadian state under the *Immigration and Refugee Protection Act*[2] challenge the legality of his or her detention before a superior court by way of *habeas corpus*? While some thought that the answer had to be "yes", and the government unsurprisingly argued that it is always "no", the Court's somewhat less than emphatic response was a resounding "perhaps occasionally".

I frame the *Chhina* Court's sidestepping of both the common law and the Charter[3] questions before it as a perpetuation of two discernable trends. It reflects the ambiguities created around the rights of non-citizens in Canadian Charter jurisprudence and in liberal rights discourse more generally. The appeal in *Chhina* provided an opportunity for the Court to grapple with the fundamental question of whether the state can *justify* differential protection of the liberty interests of non-citizens. It squarely raised the question of what rights a non-citizen could have to challenge the border being imposed around them in the form of a prison cell. It also expressly raised the question of what it would take to justify any limitation on those rights. Instead of addressing those questions, however, the judgment in *Chhina* thus further cements a thread whereby those hard questions remain unanswered.

At its core, the judgment in *Chhina* is an affirmation of a common law discretion for superior courts to decline jurisdiction to hear *habeas corpus* applications from immigration detainees without considering the fact that declining jurisdiction amounts to an absolute denial of the Charter-protected right for detainees to seek release by way of *habeas corpus*.[4] As a result, the Canadian state, as the appellant in *Chhina*, succeeded in empowering courts to deny the section 10(c) Charter right to *habeas corpus* without providing any specific justification for the denial of that right. In other words, the judgment maintains an uneasy *status quo* in which immigration detainees and those affected by their detention are partially excluded from a critical forum for the protection of liberty interests. This is achieved without any engagement of the basic requirements for justifying *prima facie* Charter violations.

Further, the Court's equivocation on the central questions posed on the appeal falls squarely within a recognizable trend in Canadian jurisprudence on the fundamental rights of non-citizens, wherein critical questions repeatedly go unanswered. The judgment in *Chhina* represents another instance of the courts painting the rights of non-citizens in broad, grey strokes. The result of such deliberate indecision is that the rights and interests of those most vulnerable to abuses of state power remain effectively unprotected.

Where those affected are marginalized, disenfranchised and regarded as inher-

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[2] S.C. 2001, c. 27 [hereinafter "IRPA"].

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[4] Charter, s. 10(c).

ently threatening,[5] any grey areas left around what are supposed to be their rights are readily displaced by decision-makers who are inclined to defer to the state's sovereignty over migrants and protect the power to control migration. Moreover, ambiguities in the law serve as practical obstacles to access to justice. It is no small thing to embark on costly and time-consuming litigation when the applicable rules are largely unknown and where it remains unclear whether the court will even hear the case.

After briefly referencing the scholarship on immigration exceptionalism in Canadian Charter jurisprudence, I turn to the significance of *habeas corpus* for immigration detainees and a review of how that issue had been treated in earlier case law. I then briefly describe the facts of Mr. Chhina's case before moving on to the judgment and outlining the majority and the dissent. I then briefly and critically describe the practical implications of the majority decision. In the final section, I seek to describe a core contradiction within liberal theory to illustrate its replication in *Chhina*, producing yet another example of immigration exceptionalism in Canadian law that appears without any articulated justification.

II. IMMIGRATION EXCEPTIONALISM IN CANADIAN CHARTER JURISPRUDENCE

The existing scholarship describes, in some detail, Canadian courts' dilution of Charter protections for non-citizens in the immigration and refugee law domains. I do not propose to revisit those discussions here, but suffice to say that the rights to equality, liberty, security of the person and the "principles of fundamental justice" have come to mean less for non-citizens subjected to the expansive powers of the state under immigration legislation than they do in other legal contexts.[6] The statutory powers provided by the IRPA to arrest, interrogate, detain and deport are equally or more expansive and intrusive than those created by any other piece of

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[5] See Stephanie J. Silverman & Petra Molnar, "Everyday Injustices: Barriers to Access to Justice for Immigration Detainees in Canada" (2016) 35:1 Refugee Survey Q. 109, at 115. See also Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: University of British Columbia Press, 2005); Mary Bosworth & Sarah Turnbull, "Immigration Detention, Punishment, and the Criminalization of Migration" in Sharon Pickering & Julie Ham, eds., *The Routledge Handbook on Crime and International Migration* (Oxford: Routledge, 2015) 91, at 97.

[6] See Gerald Heckman, "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 U.N.B.L.J. 312; Catherine Dauvergne, "How the Charter has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill L.J. 663; Joshua Blum, "The Chiarelli Doctrine: Immigration Exceptionalism and the Canadian Charter of Rights and Freedoms" (June 20, 2020), U.B.C. L. Rev. [forthcoming], online: SSRN <https://ssrn.com/abstract=3636989>. See also Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2019), at 92; and Rayner Thwaites, "Discriminating Against Non-Citizens Under the *Charter*: *Charkaoui* and Section 15" (2009) 34:2 Queen's L.J. 670.

Canadian legislation.[7] In many instances, those powers are exercised without judicial[8] or even administrative[9] oversight. And yet it is precisely in this domain of expansive statutory powers where basic, constitutionalized rights protections are most critical that they have been repeatedly diluted.

The extent of the divergence between Charter law outside the immigration context and the application of the Charter *vis-à-vis* immigration law is perhaps best demonstrated by a recent trilogy of judgments of the Federal Court of Appeal: *Kreishan*, *Moretto* and *Revell.*[10] In all three cases, the Federal Court of Appeal found that the question of whether section 7 of the Charter is engaged by a legislative provision is context-sensitive, and adopted a novel legal standard in order to find that it was *not engaged*.[11]

In *Moretto*, on which the Court of Appeal then relied in *Revell*, the Court considered itself bound to apply the Supreme Court's judgment in *Medovarski* to the effect that consequences of deportation do not engage section 7 of the Charter, despite accepting that the evidence before it established a breach of the security of the person interest as defined by the Supreme Court itself.[12] By declining to apply the accepted legal standard for a breach of security of the person to the evidence before it and instead developing new standards for engagement in order to find that section 7 is not engaged by the provisions in issue, the Federal Court of Appeal maintained a state of exception for section 7 of the Charter when applied to immigration laws.

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[7] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 16, 33-50, 55-60.

[8] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 55(2), 55(3.1), 56(1).

[9] Bill C-98, *An Act to amend the Royal Canadian Mounted Police Act and the Canada Border Services Agency Act and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2019 would have placed the Canada Border Services Agency, which is primarily responsible for arrest and detention under the IRPA, under the authority of the Civilian Review and Complaints Commission. However, the Bill died on the Senate table at the end of the 2019 Parliamentary Session.

[10] *Kreishan v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 972, 2019 FCA 223 (F.C.A.); *Moretto v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 1194, 2019 FCA 261 (F.C.A.); and *Revell v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 1195, 2019 FCA 262 (F.C.A.).

[11] *Kreishan v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 972, 2019 FCA 223, at paras. 76-77 and 130 (F.C.A.); *Revell v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 1195, 2019 FCA 262, at paras. 55-56 (F.C.A.), as endorsed in *Moretto v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 1194, 2019 FCA 261, at para. 44 (F.C.A.).

[12] *Moretto v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 1194, 2019 FCA 261, at paras. 51-52 (F.C.A.), citing *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 31, 2005 SCC 51, [2005] 2 S.C.R. 539 (S.C.C.) and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124, at para. 59 (S.C.C.).

In *Kreishan*, the Federal Court of Appeal relieved itself of the burden of deciding whether the legislative provisions in issue were consistent with the principles of fundamental justice by applying a novel standard to find that section 7 is not engaged.[13] Each case eschewed any consideration of what the principles of fundamental justice actually entail for persons facing deportation. In all three cases, the Supreme Court refused to grant leave to appeal, effectively endorsing the application of a less-robust, immigration-specific standard for Charter protections.[14] These judgments are, as noted above, only the capstone of a long-standing trend of immigration exceptionalism in Canadian Charter jurisprudence. The judgment in *Chhina* is, in some critical respects, in lockstep with this trend.

As I will argue below, this phenomenon, whereby core questions regarding the rights of non-citizens remain unanswered — resulting in the erosion of those rights — may be explained by the struggle within liberal legal and political theories more generally on questions of delineating membership in liberal societies. The courts' collective failure to grapple with the justifications, or lack thereof, for creating and enforcing all forms of border controls, viewed as such, is thus both a product of deficiency in liberal theory and a perpetuation of a state of affairs where the most fundamental autonomies are abrogated without coherent justifications.

III. *HABEAS CORPUS*, IMMIGRATION DETENTION AND MR. CHHINA

1. Why *Habeas Corpus* Matters for Immigration Detainees

For decades, both before and after the advent of the Charter, non-citizens detained under Canadian immigration laws were denied the right to challenge their detentions by way of *habeas corpus*. Without succumbing to utopic visions of the power of *habeas corpus*, it is a mechanism that provides clear and widely recognized advantages for detainees seeking to challenge the legality of their detention.[15]

Under the IRPA, non-citizens can be detained, with or without a warrant and always without judicial oversight,[16] for a variety of reasons, including the belief that they will not appear for further examination or for removal, the Minister's ongoing

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[13] *Kreishan v. Canada (Minister of Citizenship and Immigration)*, [2019] F.C.J. No. 972, 2019 FCA 223, at paras. 76-77 and 130 (F.C.A.).

[14] *Kreishan v. Canada (Minister of Citizenship and Immigration)*, [2019] S.C.C.A. No. 398, 2020 CanLII 17609 (S.C.C.); *Moretto v. Canada (Minister of Citizenship and Immigration)*, [2019] S.C.C.A. No. 482, 2020 CanLII 25171 (S.C.C.); and *Revell v. Canada (Minister of Citizenship and Immigration)*, [2019] S.C.C.A. No. 482, 2020 CanLII 25169 (S.C.C.).

[15] See Siena Anstis, Joshua Blum & Jared Will, "Separate but Unequal: Immigration Detention in Canada and the Great Writ of Liberty" (2017) 63:1 McGill L.J. 1, at 8-17 for a more detailed description of the regime.

[16] See again *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 55(1)-(2), noting that, even where a warrant is required, it is issued by an immigration officer, not a judicial authority.

investigation into their background, and the belief that they may pose a danger to the public.[17] Once detained, they can be released by the detaining authority — the Canada Border Services Agency — within the first 48 hours of detention. If the CBSA holds the person longer, they must appear before the Immigration Division of the Immigration and Refugee Board of Canada. That administrative tribunal then periodically holds hearings at which it decides whether or not to maintain detention.[18] A detainee can challenge a detention order by the Immigration Division by way of judicial review in the Federal Court, but must first seek leave from the court to do so.[19] On judicial review, the detention order is reviewed on the deferential reasonableness standard. The Federal Court can overturn the detention order and require that the matter be redetermined by the Division but cannot — save very exceptional circumstances — order release.[20]

As the Supreme Court itself noted in *Chhina*, the onus and the relief available are clear and unmistakable advantages on a *habeas* application as compared to the detention review process under the IRPA even with the possibility of judicial review. Under the IRPA, where there has been a prior decision to detain, the Minister may rely on that decision and the absence of reasons to depart from it as the basis for a future detention order.[21] Thus, a past detention order relieves the Minister of at least part of the burden of justifying ongoing detention. On a *habeas* application, however, the Minister bears the full burden of proving the justification and legality of ongoing detention. The relief available is just as clearly more advantageous. A court on a *habeas* application must order release if the Minister fails to meet its burden. The only judicial process available under the IRPA framework is an application for judicial review, wherein the Federal Court's jurisdiction is, save exceptional circumstances, limited to ordering redetermination of the issue by the administrative tribunal.

Another clear advantage of *habeas* proceedings is that, whereas the Immigration Division lacks jurisdiction to remedy unnecessarily harsh or abusive conditions of detention, a superior court can order relief from those conditions on a *habeas* application. Thus, for example, if an immigration detainee is being held in a maximum-security criminal jail without justification (as they often are[22]), the

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[17] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 55, 57-58.

[18] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 57-58.

[19] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 72.

[20] *Chhina*, at para. 65.

[21] *Chhina*, at paras. 62-63.

[22] In the 2018–2019 fiscal year, 1,679 immigration detainees were held in provincial facilities: Canada Border Services Agency, "Annual Detention Statistics – 2012-2019", online: <www.cbsa-asfc.gc.ca/security-securite/detent/stat-2012-2019-eng.html>. At least of those with reported cases, many are subject to maximum-security conditions. See for example: *Chhina*, at para. 9; *Toure v. Canada (Minister of Public Safety)*, [2018] O.J. No.

Immigration Division cannot order a transfer to a specialized, non-criminal, low-security immigration facility.[23] A superior court can and in fact has done so.[24]

2. The Canadian Case Law before *Chhina*

Prior to the two appellate judgments directly at issue in *Chhina* — the Alberta Court of Appeal's decision that was before the Court and the Ontario decision in *Chaudhary*[25] which was endorsed and followed by the Alberta Court of Appeal[26] — *habeas corpus* had long been unavailable to immigration detainees. There had emerged a common law principle, known as the *Peiroo*[27] exception, whereby superior courts were to decline jurisdiction in "immigration matters" because of the existence of a "complete, comprehensive and expert" statutory schedule created by Parliament to deal with those issues.

Notably, neither *Peiroo* itself nor the Supreme Court's judgment endorsing it had anything to do with detainees challenging the legality of their detention.[28] These were cases where individuals sought review by way of *habeas corpus* of other types of immigration decisions that affected their liberty interests — usually challenges to acts that could lead to their deportation — without dealing with the legality of a detention. Thus, in some senses, it is perfectly logical that when the Supreme Court endorsed the generic "immigration matters" exception in *May* and *Khela*, it did so without considering section 10(c) of the Charter.[29] Their silence is justifiable in

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4230, 2018 ONCA 681, at para. 1 (Ont. C.A.); *Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services)*, [2016] O.J. No. 4002, 2016 ONSC 4126, at para. 50 (Ont. S.C.J.); and *Scotland v. Canada (Attorney General)*, [2017] O.J. No. 4242, 2017 ONSC 4850, at para. 2 (Ont. S.C.J.).

[23] *Chhina*, at para. 57; and *Brown v. Canada (Minister of Citizenship and Immigration)*, [2017] F.C.J. No. 761, 2017 FC 710, 25 Admin. L.R. (6th) 191, at para. 129 (F.C.), citing *Canada (Minister of Citizenship and Immigration) v. Jama*, [2007] I.D.D. No. 6, 2007 CanLII 12831 (Can. I.R.B.).

[24] *Toure v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2017] O.J. No. 5295, 2017 ONSC 5878, at paras. 68-92 (Ont. S.C.J.).

[25] *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2015] O.J. No. 1055, 2015 ONSC 1503 (Ont. S.C.J.).

[26] *Chhina v. Canada (Public Safety and Emergency Preparedness)* (September 2, 2016), No. 160576914X1 (Alta. Q.B.); *Chhina v. Canada (Public Safety and Emergency Preparedness)*, [2017] A.J. No. 840, 2017 ABCA 248, 56 Alta. L.R. (6th) 1 (Alta. C.A.).

[27] *Peiroo v. Canada (Minister of Employment and Immigration)*, [1989] O.J. No. 805, 69 O.R. (2d) 253, 60 D.L.R. (4th) 574 (Ont. C.A.) [hereinafter "*Peiroo*"].

[28] *Peiroo v. Canada (Minister of Employment and Immigration)*, [1989] O.J. No. 805, 69 O.R. (2d) 253, 60 D.L.R. (4th) 574 (Ont. C.A.); *Reza v Canada*, [1994] S.C.J. No. 49, [1994] 2 S.C.R. 394, at 405, 116 D.L.R. (4th) 61 [hereinafter "*Reza*"].

[29] See *May v. Ferndale Institution*, [2005] S.C.J. No. 84, 2005 SCC 82, [2005] 3 S.C.R. 809 (S.C.C.) [hereinafter "*May*"], which contains only a passing reference to s. 10(c) at para. 70; and *Mission Institution v. Khela*, [2014] S.C.J. No. 24, 2014 SCC 24, [2014] 1 S.C.R. 502,

those cases because the section 10(c) Charter right to *habeas corpus* was simply not in issue, as it applies only to persons who are actually detained.

Nonetheless, some lower courts[30] (and, in one instance each, the Quebec and Ontario Courts of Appeal[31]) came to apply the *Peiroo* exception even when the *habeas corpus* application in issue was brought by an immigration detainee in respect of the legality of his or her detention. As a result, immigration detainees were denied access to *habeas corpus*, despite the obvious breach of section 10(c) entailed by that denial, and without consideration of that issue.

The case that became the appeal before the Supreme Court of Canada was initiated by Tusif Chhina. When he filed his application for *habeas corpus* in May 2016, he had already been detained for 13 months. He argued before the Alberta Court of Queen's Bench that his detention was unlawful because of its length and uncertain duration and because of the conditions of his detention.

The Court of Queen's Bench, applying *Peiroo*, declined jurisdiction, finding that the IRPA regime provided Mr. Chhina with an adequate alternative to *habeas corpus*. On appeal, the Court of Appeal for Alberta overturned that decision, following instead the judgment of the Court of Appeal for Ontario in *Chaudhary* and noting that *habeas corpus* was a more advantageous remedy to which he should therefore have access pursuant to the Supreme Court's judgment in *May.*

The Crown appealed to the Supreme Court of Canada. By the time the case was before the Supreme Court, Mr. Chhina had been deported and his case was therefore moot. The Court nonetheless elected to hear the appeal because of "the importance of clearly delineating the exceptions to *habeas corpus*".[32]

At the Supreme Court, Mr. Chhina's counsel and some of the interveners argued in light of the protection of the right to *habeas corpus* under section 10(c) of the Charter, any limitation on that right must be justifiable under norms akin to those

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at para. 42 (S.C.C.) [hereinafter "*Khela*"]. See again *Peiroo* and *Reza*, neither of which so much as mention s. 10(c) of the Charter.

[30] *R. v. Pacificador*, [1998] O.J. No. 658, at para. 7 (Ont. Gen. Div.); *R. v. Zundel*, [2003] O.J. No. 4951, at para. 9 (Ont. S.C.J.); *Kippax v. Canada (Attorney General)*, [2013] O.J. No. 6324, 2014 ONSC 3685, at paras. 13-16 (Ont. S.C.J.); *Sancho c. Quebec (Directeur de l'établissement pénitencier à Rivière-des-Prairies)*, [2008] J.Q. no 11211, 2008 QCCS 5346, at paras. 3-6 (Que. S.C.); *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2015] O.J. No. 1055, 2015 ONSC 1503, at para. 26 (Ont. S.C.J.).

[31] *Apaolaza-Sancho c. Quebec (Director of Établissement de détention de Rivière-des-Prairies)*, [2008] Q.J. No. 7743, 2008 QCCA 1542 (Que. S.C.); *Baroud v. Canada (Minister of Citizenship and Immigration)*, [1995] O.J. No. 43, 22 O.R. (3d) 255, 121 D.L.R. (4th) 308 (Ont. C.A.).

[32] *Chhina*, at para. 15. As argued herein, the majority nonetheless failed to delineate, much less to "clearly delineate", the scope of the exceptions to *habeas corpus*.

imposed on legislative violations under section 1 of the Charter.[33] The Court was thus directly confronted with the question of whether a common law limitation on the right to *habeas corpus* was consistent with the Charter.

IV. THE SUPREME COURT JUDGMENT

1. Majority

(a) Overview

The majority of the Court essentially adopted the approach of the Alberta Court of Appeal, which had in turned followed the Court of Appeal for Ontario's judgment in *Chaudhary*. The Court found that in cases where *habeas corpus* provides a more advantageous remedy than that available for immigration detainees under the IRPA, superior courts should not decline jurisdiction and should hear and decide *habeas corpus* applications. Whether or not *habeas corpus* provides a more advantageous remedy will largely turn, in the majority's opinion, on the particular issues raised by the detainee seeking to challenge the legality of his or her detention. In other words, *habeas corpus* was found to be a more advantageous remedy for some but not all forms of unlawful detention. As detailed below, the judgment leaves many unanswered questions with respect to how lower courts are to assess which issues fall into which category.

(b) Sidestepping Section 10(c) and Section 1 of the Charter

In the very first two paragraphs of the decision, the majority's sidestep of the Charter issues is apparent. The judgment begins with the recognition that "[e]n-trenched in s. 10(*c*) of the *Canadian Charter of Rights and Freedoms*, the right to *habeas corpus* permits those in detention to go before a provincial superior court and demand to know whether the detention is justified in law".[34] This recognition is immediately followed by a caveat: "Despite the importance of *habeas corpus*, this Court has carved out two limited exceptions to its availability."[35] Thus, from the very outset, the issues are framed as there being common law exceptions to an otherwise Charter-protected right to *habeas corpus*.

This is of course not the only circumstance in which the courts have grappled with common law limitations on Charter rights. There is a well-developed body of jurisprudence on such situations. The Supreme Court has repeatedly held that judges must exercise the discretion afforded under common law rules in a manner

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[33] See *Chhina*: Factum of the Respondent Tusif Ur Rehman Chhina; Factum of the Intervener Queen's Prison Law Clinic; Factum of the Intervener Canadian Civil Liberties Association; and Factum of the Intervener Canadian Association of Refugee Lawyers, online: <www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=37770>.

[34] *Chhina*, at para. 1.

[35] *Chhina*, at para. 2.

consistent with the Charter.[36] Therefore, at least in principle, the question raised in *Chhina* was whether the exercise of the discretion to decline jurisdiction to hear *habeas* applications from immigration detainees constitutes a justifiable infringement of section 10(c) of the Charter. Elsewhere, the Court has made clear that the analytical framework adopted for determining whether an exercise of judicial discretion is consistent with the Charter must ensure that it "incorporates the essence of s. 1 of the *Charter* and the *Oakes* test" and is "subject to no lower a standard of compliance with the *Charter* than legislative enactment".[37] In other words, where judicial discretion is the state action that breaches a Charter right, that action is subject to a substantively similar standard of justification as is Parliament when it violates Charter rights legislatively.

This standard has come to be known as the *Dagenais/Mentuck* test. While the test was initially developed in the context of limitations on freedom of expression under section 2(b) of the Charter, the Court has already recognized that "its principles have broader application".[38] At the core of the analysis, as in the *Oakes* test for legislative violations of the Charter,[39] are the questions of rationality and proportionality: is the measure necessary to achieve some important objective, and, if so, do its salutary effects outweigh the infringement of a Charter right?[40] In some cases, the courts must weigh competing Charter rights.[41] In others, such as the case at bar, there are

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[36] *Dagenais v. Canadian Broadcasting Corp*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 865 and 875 (S.C.C.), *per* Lamer C.J.C. [hereinafter "*Dagenais*"] ("the common law rule does not authorize publication bans that limit *Charter* rights in an unjustifiable manner"); *Canadian Broadcasting Corp. v. The Queen*, [2011] S.C.J. No. 3, 2011 SCC 3, [2011] 1 S.C.R. 65, at paras. 13-14 (S.C.C.); and *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214, at para. 56 (S.C.C.).

[37] *R. v. Mentuck*, [2001] S.C.J. No. 73, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 27 (S.C.C.) [hereinafter "*Mentuck*"]; and *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 45*ff*. (S.C.C.). See also *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 56 (S.C.C.) ("The *Dagenais/Mentuck* rule requires neither more nor less than the one from *Oakes*"); and *R. v. Bernard*, [1988] S.C.J. No. 96, [1988] 2 S.C.R. 833, at para. 99 (S.C.C.), La Forest J., concurring ("[W]hen a common law rule is found to infringe upon a right or freedom guaranteed by the *Charter*, it must be justified in the same way as legislative rules").

[38] *R. v. S. (N.)*, [2012] S.C.J. No. 72, 2012 SCC 72, [2012] 3 S.C.R. 726, at para. 7 (S.C.C.).

[39] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103, at para. 71 (S.C.C.) [hereinafter "*Oakes*"]. See further *R. v. J. (K.R.)*, [2016] S.C.J. No. 31, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 79 (S.C.C.) on the residual yet critical role of the proportionality assessment.

[40] *R. v. Mentuck*, [2001] S.C.J. No. 73, 2001 SCC 76, at paras. 22-39 (S.C.C.).

[41] See, for example, *Dagenais v. Canadian Broadcasting Corp*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835 (S.C.C.) and *R. v. Mentuck*, [2001] S.C.J. No. 73, 2001 SCC 76 (S.C.C.),

no competing Charter rights, and courts are to weigh other public interests, such as the public interest in the effective administration of justice or the social value of the protection of the vulnerable, against the Charter infringement.[42]

Notwithstanding this framework and its uncontested applicability where other Charter rights are in issue, the Court in *Chhina* proceeded to endorse the common law exceptions to the right to *habeas corpus* notwithstanding their conflict with section 10(c) of the Charter. The majority did so in express terms:

> This appeal concerns the scope and application of the *Peiroo* exception, providing the Court with an opportunity to clarify when a complete, comprehensive and expert statutory scheme provides for review that is as broad and advantageous as *habeas corpus* such that an applicant will be precluded from bringing an application for *habeas corpus*.[43]

The Charter question is addressed solely in the footnote to the above-cited paragraph which stated that "Although Mr. Chhina sought to argue before this Court that the common law *Peiroo* exception violates s. 10(*c*) of the *Charter* and cannot be saved under s. 1, he failed to file a notice of constitutional question within the specified timeline. Accordingly, that argument is not before the Court in this appeal."[44]

The majority did not consider the converse proposition, namely that it was the Crown that was asking the Court to endorse a common law exception to a Charter

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where the Court weighed the right to a fair and public trial against the freedom of expression of the press.

[42] See, for example, *British Columbia Government Employees' Union v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214, at paras. 67*ff*. (S.C.C.); *R. v. Mentuck*, [2001] S.C.J. No. 73, 2001 SCC 76, at paras. 31-32 (S.C.C.); and *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] S.C.J. No. 23, [1991] 1 S.C.R. 671 (S.C.C.).

[43] *Chhina*, at para. 16.

[44] *Chhina*, at footnote 1 to para. 16. After the Crown's written arguments were put before the Court, Mr. Chhina's counsel filed a motion for an extension of time to state a constitutional question. They argued that Mr. Chhina was seeking to exercise his s. 10(c) Charter right to *habeas corpus* relief and that the Crown's argument in reply — that courts have discretion to decline to hear such applications and should exercise it against immigration detainees — necessarily raised the question of whether such an exercise of discretion could be justified under the "values and principles" enshrined in s. 1 of the Charter (*Chhina*,: Respondent's Motion for Extension of Time (September 28, 2018), SCC File 37770. In reply, the Crown argued that this issue had not been litigated in the courts below and that it would be prejudiced if it were decided without a full evidentiary record. The Crown also stated, without argument, that it cannot be "assumed" that refusing to hear a *habeas corpus* application breaches s. 10(c) of the Charter, which specifically guarantees access to *habeas corpus* for all detainees (*Chhina*: Appellant's Response to Motion to Extend Time (October 9, 2018), SCC File 37770. The Court dismissed the motion without reasons (*Canada (Public Safety and Emergency Preparedness) v. Chhina* (October 16, 2018), SCC File 37770 (Order of Côté J.). This of course foreshadowed the sidestep of the Charter in the judgment on the merits.

right without filing a notice of constitutional question within the specified time frame. As such, another way of phrasing what the majority elected to do in *Chinna* would be to say: "Although the Court recognizes that the right to *habeas corpus* is protected under s. 10(c) of the *Charter* for persons who are detained, it will endorse an exception to that right without consideration of s. 1 of the Charter."

That the Court is endorsing a common law exception to a Charter-protected right is made plain throughout the judgment. The majority finds that the "exceptions acknowledge the development of sophisticated procedural vehicles in our modern legal system and their ability to fully protect fundamental rights such as *habeas corpus*".[45] The right to *habeas corpus* is the right to a particular procedural vehicle to challenge the legality of one's detention, and the Court is expressly finding that courts can nonetheless rely on the common law to deny the right to *habeas corpus* where alternative procedural vehicles have been made available.

That the Court is endorsing a common law exception to a Charter right *in furtherance of other policy objectives* is also expressly stated in the majority's judgment:

> Both of these exceptions target similar concerns, primarily the "need to restrict the growth of collateral methods of attacking convictions or other deprivations of liberty" (*May*, at para. 35). By affirming such statutory schemes, the standard set out in *May* ensures the constitutional right to *habeas corpus* is protected, while also realizing judicial economy, avoiding duplicative proceedings, and reducing the possibility of inconsistent decisions and forum shopping.[46]

Had the issue been framed as the conditions under which courts can rely on the common law to deny Charter rights, one would have to ask whether those policy objectives are "pressing and substantial", whether this means of achieving them is minimally impairing and whether the infringements are proportionate to the objectives. Having declined to conceive of the judgment as endorsing a common law violation of a Charter right, the Court effectively sidestepped what are otherwise basic, mandatory thresholds for the justification of such violations.

A comparison to the Court's approach in its two other recent *habeas corpus* cases is instructive. In *May*, the Court acknowledged and affirmed the existence of the *Peiroo* exception, but declined to apply it or make any generalizable findings about its applicability in the prison law setting at issue.[47] Thus, there was no live question in that appeal as to whether the *Peiroo* exception could be applied to a detainee without applying some version of the *Dagenais/Mentuck* test. Similarly, in *Khela*, the Court was rejecting the argument that provincial superior courts should decline

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[45] *Chhina*, at para. 26.

[46] *Chhina*, at para. 29.

[47] *May v. Ferndale Institution*, [2005] S.C.J. No. 84, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 44 (S.C.C.).

habeas jurisdiction to review transfer decisions in the prison law context.[48] In both cases, there is no suggestion that the *Peiroo* exception could be applied to any proceedings under the legislative scheme at issue.[49] In *Chhina*, however, the Court finds that there may well be *habeas* applications brought to challenge detentions under the IRPA for which superior courts *should* decline jurisdiction.

It can of course be plausibly argued that the Court has simply left open, to be litigated another day, the question of when and whether an application of the *Peiroo* exception to an immigration detainee could be justified under the *Dagenais/Mentuck* framework. However, what the Court undeniably did was to leave the jurisdictional hurdle for each detainee contemplating or seeking *habeas corpus* relief to overcome in their own case, without subjecting that hurdle's existence or application to any requirement of Charter justification.

(c) What Goes Undecided?

In addition to leaving the Charter issues undecided or implicitly deciding them in favour of the Crown, the majority judgment also fails to define the scope of the potential application of the *Peiroo* exception. The result is that immigration detainees cannot determine with any degree of certainty whether or not they will be able to seize a superior court with the question of the legality of their detention.

The majority reaffirms the standard set in *May*, namely that "a provincial superior court should also decline jurisdiction where the legislator has put in place 'a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous'".[50] The question then becomes how courts are to determine what constitutes a "complete, comprehensive and expert statutory scheme" and whether it is "no less advantageous" than review by way of *habeas corpus*. Much, however, remains undecided on that point.

First, the Court in *Chhina* does not decide which party bears the burden of proof and persuasion on this issue. Is it a preliminary issue on which the detainee bears the burden, or is it a potential ground for the Crown to assert on which the Crown bears the burden? Who has to prove that there is or is not a "complete, comprehensive and expert statutory scheme" and whether it is "no less advantageous" in the circumstances at bar? While there is a good argument for it being the Crown's burden because it is the Crown asking the court to decline to exercise its jurisdiction, the practice in the lower courts pre-*Chhina* was to place that burden on the detainee,[51]

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[48] *Mission Institution v. Khela*, [2014] S.C.J. No. 24, 2014 SCC 24 (S.C.C.).

[49] *Corrections and Conditional Release Act*, S.C. 1992, c. 20.

[50] *Chhina*, at para. 2, citing *May v. Ferndale Institution*, [2005] S.C.J. No. 84, 2005 SCC 82, at para. 40 (S.C.C.).

[51] See *Canada (Minister of Citizenship and Immigration) v. Dadzie*, [2016] O.J. No. 5185, 2016 ONSC 6045, at paras. 33*ff*. (Ont. S.C.J.); *Ali v. Canada (Minister of Public Safety and*

and nothing in *Chhina* displaces that precedent.

Second, the judgment fails to clearly define the standard that will be applied to determine whether or not *habeas corpus* provides a more advantageous forum. The majority judgment emphasized that the jurisdictional question will be decided primarily as a function of the issue(s) raised by the detainee; *i.e.*, the grounds upon which the detainee challenges the legality of his or her detention. As the majority puts it, "whether such a scheme is as broad and advantageous as *habeas corpus* must be considered with respect to the *particular basis* upon which the lawfulness of the detention is challenged".[52] In the context of immigration detainees, the most specific question is "whether the *IRPA* provides a review procedure that is at least as broad and advantageous as *habeas corpus regarding the specific challenges* to the legality of the detention raised by the *habeas corpus* application".[53]

Sometimes, the question will be easily resolved. For example, as the Court itself notes, "it may be helpful to look at whether a statutory scheme fails entirely to include the grounds set out in the application for *habeas corpus*. If so, the scheme will not be as broad and advantageous as *habeas corpus*."[54] This is true in cases, including the one identified by the Court itself, where the issue is whether the *conditions* of detention have rendered it unlawful and where the remedy sought is an amelioration of those conditions.[55]

In all other cases, however, opacity prevails. As the Court puts it, the statutory "scheme will also fail to oust *habeas corpus* if it provides for review on the grounds in the application, but the review process is not as broad and advantageous as that available through *habeas corpus*, considering both the nature of the process and any advantages each procedural vehicle may offer".[56] While this may seem like a logical standard, it is problematic given that the Court itself identifies advantages to *habeas* litigation that will *always* be present for immigration detainees, namely: (a) the superior court's jurisdiction to grant release or other forms of direct relief (as opposed to the Federal Court's limited jurisdiction to simply refer the matter back for redetermination by the administrative decision-maker);[57] (b) that a court's review jurisdiction on judicial review is far more limited than on a *habeas*

Emergency Preparedness), [2017] O.J. No. 2145, 2017 ONSC 2660, at para. 20 (Ont. S.C.J.); and *Toure v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2017] O.J. No. 5295, 2017 ONSC 5878, at para. 20 (Ont. S.C.J.).

[52] *Chhina*, at para. 5 [emphasis in original].

[53] *Chhina*, at para. 6 [emphasis added]. See also para. 42: "First, it is necessary to ask upon what basis the legality of the detention is being challenged."

[54] *Chhina*, at para. 43.

[55] *Chhina*, at paras. 57-58.

[56] *Chhina*, at para. 43.

[57] *Chhina*, at para. 65.

application;[58] and (c) the fact that, whereas the Minister can rely on past detention orders to justify continued detention in the IRPA process, the burdens of proof and persuasion to justify the legality of a detention lie entirely on the Crown in *habeas* proceedings.[59]

Given the inherently more advantageous nature of *habeas* proceedings in these three respects, the judgment begs the question: in what circumstances could a superior court find that *habeas* proceedings are not more advantageous and therefore decline jurisdiction? The majority in *Chhina* unmistakably invites superior courts to perform this assessment each time and suggests that there will be occasions where jurisdiction should be declined, but it provides no guidance as to how a court could even find that the ubiquitous advantages are somehow outweighed.

While there is nothing new about an appellate court leaving some questions to be answered on the facts of each case litigated at first instance, the Court's decision in *Chhina* remains troubling in this respect. The Court not only maintained a common law exception to a Charter right in the absence of any Charter justification for that exception, while failing to define its scope in any meaningful way, but left that exception as an obstacle for immigration detainees (who are among the poorest and most disenfranchised litigants in the justice system) to climb in every case.

Immigration detainees and their counsel are left to wager in each case whether or not the issue they raise will be seen as one in which *habeas corpus* proceedings are *sufficiently* more advantageous for the superior court to elect to hear their application. They remain saddled with jurisprudence whereby justifying a court in providing a particular procedural form of relief, to which they are otherwise entitled under the Charter, is their *de facto* burden. They must meet that burden without clarity on what it will take to satisfy it. The chill effect is undeniable.

2. Dissent

While the majority judgment matters most for understanding the present state of the law and the trajectory of the jurisprudential developments, aspects of the dissenting opinion also warrant some exploration here.

Distilled to its essence, Abella J.'s dissenting opinion is that the majority position is based on an unduly restrictive interpretation of the relief available to detainees under the IPRA. In Abella J.'s opinion, rather than guaranteeing access to *habeas corpus* as the remedy where that statutory regime proves less advantageous, the IRPA should be read as providing, in all cases, a means of review that is just as beneficial as *habeas corpus*. According to her interpretation of the IRPA, the review regime *before the Immigration Division*, as supplemented by the right of judicial

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[58] *Chhina*, at para. 64.

[59] *Chhina*, at paras. 60-63.

review to the Federal Court, is sufficiently protective to oust the right of *habeas corpus*.[60]

Of course, what is said above concerning the majority's sidestep of the *Peiroo* exception as a patent violation of section 10(c) of the Charter applies *a fortiori* to the dissenting judgment, which would erect an insurmountable barrier to *habeas corpus* relief for all immigration detainees. Justice Abella relies on section 3(3)(d) of the IRPA, which provides that the Act must be "construed and applied in a manner that . . . ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*" in order to find that the detention provisions can be construed and applied in a manner that makes access *to a court* for *habeas* review unnecessary, without acknowledging that this approach amounts to a finding that Parliament would have intended for the IRPA to impliedly oust the section 10(c) Charter right to *habeas* review. Whatever the merits of the approach taken in the dissenting judgment, it undeniably entrenches a common law exception to the exercise of a Charter right without ever asking the question of justification.

3. Practical Implications

Under the majority judgment, it will sometimes be permissible for a detained non-citizen to seek relief by way of *habeas corpus*. Whether they have a Charter right to do so subject only to a sufficient *Dagenais/Mentuck* justification advanced by the Crown has been left undecided. What the detainee has to prove — if anything — in order to access *habeas* relief has also been left undecided.

Equivocation on the core questions is not without practical consequences. One can imagine the following exchange to appreciate the difficulty:

> Detainee to counsel: I think my detention is illegal. Can I seek release via *habeas corpus*?
>
> Counsel: Maybe.
>
> Detainee: I really need to get out. How do we know if my case is that kind of case that can be decided on a *habeas* application?
>
> Counsel: It's not entirely clear.
>
> Detainee: What do we have to prove to get the court to hear my case?
>
> Counsel: That's not entirely clear either.

The lack of clarity is itself an obstacle to the availability of relief by way of *habeas corpus*.

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[60] In its recent judgment in *Brown v. Canada (Minister of Citizenship and Immigration)*, [2020] F.C.J. No. 835, 2020 FCA 130 at para. 47 (F.C.A.), the Federal Court of Appeal takes a similar approach to Abella J., and indeed relies on her dissenting opinion, to find that the IRPA detention scheme, as supplemented by the obligation to apply it in conformity with the Charter, is constitutional. Notably, the Federal Court of Appeal expressly declined to follow a number of the key findings in *Chhina*. Those findings are beyond the scope of the present comment, and Mr. Brown and his co-appellant have sought leave to appeal to the Supreme Court of Canada.

4. Why the Sidestep and All of the Grey?

Seen in this light, the judgment in *Chhina* constitutes a repetition of the immigration exceptionalism and non-justification for state intrusions into otherwise protected spheres of individual autonomy that have long characterized the case law in this area.

Numerous possible explanations exist for these phenomena, and I do not wish to discount the degree to which such decision-making is informed by nativism, xenophobia and white supremacy. Such judgments are, however, revelatory of the failings of mainstream liberal legal and political theories of state power when it comes to the question of migration and the admission of the "other" among the "us".

Risking a slight overgeneralization, liberalism struggles to provide a standard of justice against which immigration controls can be measured. Most liberal political theories presume the existence of a community and then develop theories of justice *within* that community, with little to no attention to the question of how the community is defined or constituted. While some scholars have argued that liberal principles of individual autonomy and equality require open borders, others have arrived at exactly the opposite conclusion.[61] While arguments for open borders have gained little mainstream traction, efforts to provide justifications for access controls (*i.e.*, border controls) for liberal communities that are consistent with the central tenets of liberalism are, at best, controversial.[62]

The question of border control evokes a core tension within liberalism. Those articulating liberal open borders arguments are critiqued for failing to fully account for the "us" versus "other" distinction that is inherent to the imagination of a plurality of membership-based political communities that has been central to liberal political and legal theory. Those advancing arguments for border controls are critiqued for failing to adequately account for the notions of universal equality and individual autonomy that are equally central to liberalism. As Catherine Dauvergne has convincingly argued, the arguments for both open and closed borders require some departure from the central tenets of liberalism.[63]

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[61] See, for example, M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), especially Chapter Two: Membership; Kevin R. Johnson, "Open Borders?" (2003) 51 U.C.L.A. L. Rev. 193, at 213; and Joseph Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 The Review of Politics 251, at 251.

[62] See Catherine Dauvergne, "Beyond Justice: The Consequences of Liberalism for Immigration Law" (1997) 10 Can. J.L. & Jur. 323, at 328*ff.*, in which one prominent defence of closed borders on communitarian grounds is examined and critiqued for its departures of the central tenets of liberalism. For another such defence of closed borders on similar grounds, see M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

[63] Catherine Dauvergne, "Beyond Justice: The Consequences of Liberalism for Immigration Law" (1997) 10 Can. J.L. & Jur. 323, at 328*ff.*. Indeed, even where liberal legal and political theorists conclude that some form of border control is justified under the tenets of

This tension at the heart of liberal theory — whereby border controls are recognized prerequisites to the liberal social order but cannot be comfortably justified by liberalism itself[64] — reproduces itself sharply in the context of migrant detention. Border controls are expressions of "the raw sovereignty of the nation state" that liberal political theory presumes necessary to *constitute* the community within which liberal theories of justice are to be applied.[65] The violence of borders as such (as Joseph Carens has put it in the context of his liberal defence of open borders, "borders have guards and the guards have guns"[66]) is reproduced viscerally when the state physically denies the liberty of non-citizens in the process of enforcing its borders. The affected individual is not just an imagined non-member other, but a presumably rights-bearing individual that is physically within the nation state and being denied her or his most basic liberty.

However, as others have noted, the rights enjoyed by non-citizens with respect to liberty and equality somehow dissolve without so much as a proper rationalization for that outcome when they interact with the state's right to exclude,[67] and this is no different when it comes to migrant detention. The abstract problem of deeming that there are outsiders who are not rights-holders within a particular liberal society presents itself intractably to courts when faced with a person within its borders who is nominally entitled to basic civil and procedural rights, but whose conduct or sometimes mere presence pits them against the state's "raw sovereignty" to exclude non-members.

Against this background, it is not hard to understand why courts faced with a variety of questions of migrant justice have deployed a range of techniques to avoid confronting this central tension in liberalism, and to decline to even attempt to justify immigration controls according to the liberal logic within which they are constrained.[68] Similarly, as argued above, the Supreme Court in *Chhina* failed to

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liberalism, liberal theory becomes more starkly impotent when it comes to justifying the nature and degree of border controls. On this, see further, Kevin R. Johnson, "Open Borders?" (2003) 51 U.C.L.A. L. Rev. 193, at 213.

[64] For an accessible discussion on this tension and a review of the scholarship, see Kevin R. Johnson, "Open Borders?" (2003) 51 U.C.L.A. L. Rev. 193, at 205-208.

[65] Kevin R. Johnson, "Open Borders?" (2003) 51 U.C.L.A. L. Rev. 193, at 197.

[66] Joseph Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49:2 The Review of Politics 251, at 251.

[67] See Joshua Blum, "The Chiarelli Doctrine: Immigration Exceptionalism and the Canadian Charter of Rights and Freedoms" (June 20, 2020), U.B.C. L. Rev. [forthcoming], online: SSRN <https://ssrn.com/abstract=3636989>; and Phillip Cole, *Philosophies of Exclusion: Liberal Political Theory and Immigration* (Edinburgh: Edinburgh University Press, 2000), at 8-10.

[68] See Joshua Blum, "The Chiarelli Doctrine: Immigration Exceptionalism and the Canadian Charter of Rights and Freedoms" (June 20, 2020), U.B.C. L. Rev. [forthcoming], at 47, online: SSRN <https://ssrn.com/abstract=3636989>.

even acknowledge its judgment as a significant rights-limiting pronouncement, let alone engage the question of whether such limitations can be justified.

V. CONCLUSION

The judgment in *Chhina* encapsulates two mutually reinforcing trends in the Canadian courts' approach to the fundamental rights of non-citizens in the immigration and refugee law context. The judgment first maintains the trend whereby basic Charter rights are diluted in matters of immigration law. It is also emblematic of the courts' repeated sidestepping of the core questions of justification in immigration matters and the visceral enforcement of the member-other distinction. Insofar as it failed to counter either of those trends, it is unsurprising that the judgment leaves immigration detainees in the lurch with respect to the availability of *habeas corpus* to seek release from unlawful detention.