SCC Court File No.: 37770

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

B E T W E E N:

MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS and ATTORNEY GENERAL OF CANADA

Appellants

– and –

TUSIF UR REHMAN CHHINA

Respondent

– and –

QUEEN'S PRISON LAW CLINIC, END IMMIGRATION DETENTION NETWORK, EGALE CANADA HUMAN RIGHTS TRUST, CANADIAN COUNCIL FOR REFUGEES, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, COMMUNITY & LEGAL AID SERVICES PROGRAMME, AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH), THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, CANADIAN CIVIL LIBERTIES ASSOCIATION, DEFENCE FOR CHILDREN INTERNATIONAL – CANADA and CANADIAN PRISON LAW ASSOCIATION

Interveners

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STATEMENT OF FACTS

1. The Queen's Prison Law Clinic ("QPLC") takes no position on disputed facts and takes no position on the specific outcome of this appeal.

PART I – OVERVIEW AND POSITIONS ON QUESTIONS IN ISSUE

2. This case is about the circumstances under which the state can limit a detainee's right to *habeas corpus*. Long before the *Charter*, the right to *habeas corpus* was constitutionally entrenched in our legal system. Even in the pre-*Charter* era, the right could only be limited in exceptional circumstances. The inclusion of the right to *habeas corpus* under s. 10(c) of the *Charter* serves only to reinforce its availability as a constitutional right, as well as the exceptional nature of any limitations on that right. As with all *Charter* rights, the right to *habeas corpus* may only be limited where such measures are justified under s. 1 of the *Charter*.

3. QPLC intervenes in this appeal to make submissions on the nature of the state's burden in attempting to limit the right to *habeas corpus*. *First*, as a threshold requirement under s. 1 of the *Charter*, any limit to *habeas corpus* must be prescribed by law. Neither the *Immigration and Refugee Protection Act* (the "*IRPA*")[1] nor any other statute limits the right of immigration detainees to *habeas corpus*. Accordingly, it is available to them.

4. *Second*, where a limit is prescribed by law, the limit will pass constitutional muster only where the state meets its s. 1 burden under the test as set out in *R. v. Oakes*.[2] At a minimum, this requires that there is an alternative process of detention review that is equally efficacious and advantageous to the detainee as *habeas corpus*.[3] The Respondent and other intervener groups make submissions on why judicial review of *IRPA* detention decisions under the *Federal Courts Act*[4] is not an equally efficacious procedure to *habeas corpus*. QPLC relies on and adopts those submissions,[5] and further submits that the *IRPA* is not equally efficacious or advantageous as *habeas* review because it is limited to

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[1] S.C. 2001, c. 27 (Français).
[2] *R. v. Oakes*, [1986] 1 S.C.R. 103 ["*Oakes*"].
[3] *May v. Ferndale Institution*, 2005 SCC 82 ["*May*"], at para. 40.
[4] R.S.C., 1985, c. F-7 (Français).
[5] See Respondent's Factum on Appeal, dated September 23, 2018, at paras. 31-60.

a review of the reasonableness of the administrative decision-maker's decision. It does not permit a holistic review of the cumulative lawfulness of an extended period of detention.

PART II – LAW AND ARGUMENT

A. LIMITS TO *HABEAS CORPUS* JURISDICTION MUST BE PRESCRIBED BY LAW

(i) The Right of Access to *Habeas Corpus* Is a Constitutional Right

5. *Habeas corpus* is the birthright of a free people,[6] tracing its origins to the thirteenth century.[7] As early as 1215, the Magna Carta entrenched the principle that "[n]o free man shall be seized or imprisoned … except by the lawful judgement of his equals or by the law of the land."[8] Since that time, it has been the primary vehicle through which the superior courts review the legality of executive detention.[9] Unlike other writs available at common law, the writ of *habeas corpus* "has never been a discretionary remedy. It is issued as of right, where the applicant successfully challenges the legality of the detention."[10]

6. The right to *habeas corpus* formed part of Canada's Constitution before the *Charter* was enacted, and even prior to Confederation. In British North America, the Canadian provinces passed *habeas* statutes expressly incorporating the United Kingdom *Habeas Corpus Act, 1679*.[11] The preamble of the *Constitution Act, 1867*, which provided for "a Constitution similar in Principle to that of the United Kingdom",[12] is further textual support for the constitutional entrenchment of *habeas corpus* in Canada.

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[6] *D.G. v. Bowden Institution (Warden)*, 2016 ABCA 52 ["*Bowden*"], at paras. 69, 105.
[7] *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603, Queen's Prison Law Clinic's Book of Authorities ("BOA") Tab 4, at 609 (H.L.).
[8] *May*, *supra* (S.C.C.), at para. 19.
[9] See, generally, Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Harvard University Press, 2010), BOA Tab 11, at p. 6; David Phillip Jones, Q.C. and Ann S. de Villars, Q.C., *Principles of Administrative Law*, 5d ed. (Scarborough: Carswell, 2009), BOA Tab 7, at p. 634.
[10] *May*, *supra* (S.C.C.), at para. 33. See also *R. v. Goldhar*, [1960] S.C.R. 431, at p. 440; *St-Amand v. Canada (Attorney General)* (2000), 147 C.C.C. (3d) 48 (Que. C.A.), at para. 23, leave to appeal to S.C.C. refused, [2000] C.S.C.R. No. 558, BOA Tab 5.
[11] *Habeas Corpus: From England to Empire*, *supra*, BOA Tab 11, at p. 305; D.A Cameron Harvey, *The Law of Habeas Corpus in Canada* (Toronto: Butterworths, 1974), BOA Tab 6, at pp. 192-217. The framers of the United States Constitution explicitly incorporated the writ of *habeas corpus* and decreed that "[t]he Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it": U.S. Const., Art. I, §9, cl. 2.
[12] *Constitution Act, 1867* (U.K.) 30 & 31 Victoria, c.3 (Français).

7. The writ has evolved over time. Given its grand purpose, the scope of access to the right must be interpreted purposively, and should not be "denied or displaced by overly rigid rules."[13] Indeed, in the post-*Charter* era, this Court has expanded the scope of *habeas corpus* to enable prisoners to challenge their conditions of confinement and to protect their residual liberty interests.[14] Although its scope has expanded over time, the right to *habeas corpus* at its core remains a means to challenge executive detention.

(ii) Limits on the Right to *Habeas Corpus* Must Be Prescribed by Law

8. Although the right to *habeas corpus* was part of Canada's Constitution prior to the enactment of the *Charter*, its constitutional primacy was reaffirmed under s. 10(c) of the *Charter*, which provides that "***everyone*** has the right on arrest or detention … to have the validity of the detention determined by way of *habeas corpus*" (emphasis added).[15]

9. Any limit on access to *habeas corpus* is a *prima facie* violation of s. 10(c).[16] As with all limits on *Charter* rights, for a limit on s. 10(c) to withstand *Charter* scrutiny, the Crown must justify that limit under s. 1.[17] Any such limits must be: (1) "prescribed by law"; and (2) "demonstrably justified in a free and democratic society."[18]

10. Conduct that is not "prescribed by law" will never be justifiable, regardless of how reasonable or demonstrably justifiable it may be.[19] This Court has emphasized that a limit is "prescribed by law" under s. 1 only "if it is ***expressly provided for*** by statute, regulation or common law rule, or results by ***necessary implication*** from the terms of a

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[13] *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 641. See also *Jones v. Cunningham*, 371 U.S. 236 (1962), BOA Tab 3.
[14] *May*, *supra* (S.C.C.), at para. 27, citing the 1985 Supreme Court of Canada trilogy: *R. v. Miller*, [1985] 2 S.C.R. 613; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662. See also *Wang v. Canada*, 2018 ONCA 798, where the Court of Appeal for Ontario held that two foreign nationals could bring *habeas corpus* applications to challenge the conditions imposed on them after their release from immigration detention.
[15] *Charter*, s. 10(c) (Français).
[16] *Bowden*, *supra* (Alta. C.A.), at para. 49 (per Bielby J.).
[17] Requiring Parliament to justify its decision in this regard is a feature of every other s. 1 *Charter* (Français) context. See, for example, *Bowden*, *supra* (Alta. C.A.), at para. 106, citing Peter Hogg, *Constitutional Law of Canada*, 3rd ed., loose-leaf (Toronto: Carswell, 2013 rel. 1) ["*Hogg*"], BOA Tab 12, at p. 50-26 (now, 5th ed., loose-leaf, at p. 50-25).
[18] *Charter*, s. 1 (Français).
[19] *R. v. Therens*, [1985] 1 S.C.R. 613 ["*Therens*"], at para. 10.

statute or regulation or from its operating requirements" (emphasis added).[20] The statutory language "prescribed by law" is a mandate for specific action, and is not "merely permission for that which is not prohibited."[21]

11. For a limit on a constitutional right to be "prescribed by law", it must also be: (1) accessible to the public; and (2) sufficiently precise to allow people to regulate their conduct.[22] These requirements are necessary to ensure the state does not arbitrarily infringe constitutional rights.[23] Accessibility and precision are particularly important in the *habeas corpus* context as applicants have necessarily been deprived of their liberty and therefore require clear parameters to govern their options for redress.

12. This is not new law. The "prescribed by law" requirement of s. 1 dovetails with this Court's previous pronouncements on the exceptional nature of any limit to the superior courts' *habeas corpus* jurisdiction. As this Court held in *May v. Ferndale Institution*, "[g]iven the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked."[24] Therefore, "exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be ***well defined*** and ***limited***",[25] and removal of jurisdiction "would require ***clear*** and ***direct statutory language***" (emphasis added).[26] The Court should therefore be "reluctant to conclude that Parliament intended to limit the jurisdiction of a provincial superior court and to deny prisoners access to *habeas corpus* in the absence of an unmistakable text to that effect."[27]

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[20] *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, at para. 60; *R. v. Thomsen*, [1988] 1 S.C.R. 640, at pp. 650-51.
[21] *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 205 (per Sopinka J., concurring).
[22] *Greater Vancouver Transportation Authority v. Canadian Federal of Students*, 2009 SCC 31 ["*Greater Vancouver*"], at para. 50, citing *Hogg*, *supra*, BOA Tab 12, at p. 38-12 (now, 5th ed., loose-leaf, at p. 38-12).
[23] *Greater Vancouver*, *supra* (S.C.C.), at para. 51, citing *Therens*, *supra* (S.C.C.), at p. 654.
[24] *May*, *supra* (S.C.C.), at para. 50.
[25] *Ibid*. See also *Mission Institution v. Khela*, 2014 SCC 24 ["*Khela* SCC"], at para. 54: *Habeas corpus* should "rarely [be] subject to restrictions."
[26] *May*, *supra* (S.C.C.), at para. 29.
[27] *Bowden*, *supra* (Alta. C.A.), at para. 137. This Court has also held that "the provincial superior court is the only court of general jurisdiction and as such is the centre of the judicial system. None of our statutory

13. In *R. v. Miller*, this Court emphasized that "because of its importance as a safeguard of the liberty of the subject *habeas corpus* jurisdiction can only be affected by ***express words***" (emphasis added).[28] The Crown had argued in *Miller* that the *Federal Courts Act* had ousted the jurisdiction of the superior courts to hear *habeas* applications challenging inmates' conditions of confinement. In rejecting that argument, this Court held that, because the *Federal Courts Act* conferred *habeas corpus* jurisdiction on the Federal Court to hear applications from members of the armed forces but was silent on other matters, there was "a clear intention on the part of Parliament to leave the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority with the provincial superior courts."[29]

(iii) The *IRPA* Does Not Limit Access to *Habeas Corpus*

14. Even at common law in the seventeenth century, the writ of *habeas corpus* was available to "alien enemies and spies."[30] If Parliament intended to limit the right to *habeas corpus* of non-citizen detainees under the *IRPA*, Parliament would clearly prescribe that limit by law. Parliament has not done so.[31]

15. In a series of recent decisions, including the decision on appeal, provincial appellate courts have held that the superior courts retain jurisdiction to hear *habeas corpus* applications in immigration matters, particularly as they relate to immigration detention.[32] For the most part these appellate courts, such as the Court of Appeal for

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courts has the same core jurisdiction as the superior court and therefore none is as crucial to the rule of law": *MacMillan Bloedel v. Simpson*, [1995] 4 S.C.R. 725, at para. 37.

[28] *Miller*, *supra* (S.C.C.), at para. 14. See also *Mitchell v. The Queen*, [1976] 2 S.C.R. 570, at pp. 577-578 (per Laskin C.J.): "Nothing but express federal legislation directed to such an end would exclude a subject's resort to *habeas corpus*".

[29] *Miller*, *supra* (S.C.C.), at para. 14.

[30] *Habeas Corpus: From England to Empire*, *supra*, BOA Tab 11, pp. 28-29; *Boumediene v. Bush*, 553 U.S. 723 (2008), BOA Tab 1; T.B. Howell, *A Complete Collection of State Trial*, (London, England: T.C. Hansard, Peterborough-Court,1814), BOA Tab 13, at pp. 80-82.

[31] The United States Supreme Court has also applied this principle. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (U.S. Sup. Crt.), BOA Tab 2, the United States government argued that the *Detainee Treatment Act* ("DTA"), which purported to preclude the federal courts from hearing any *habeas corpus* applications from Guantanamo Bay detainees, applied retroactively. Given the absence of clear statutory language that the government intended the DTA to apply retroactively, the majority of the Court refused to give it retroactive effect.

[32] See, for example, *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700 ["*Chaudhary*"], at paras. 54, 73-74. See also *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 ["*Ogiamien*"]; *Wang*, *supra* (Ont. C.A.).

Ontario in *Chaudhary v. Canada (Minister of Public Safety & Emergency Preparedness)*,[33] frame these judgments as exceptions to the so-called "*Peiroo* exception."[34] Other courts have invoked the *Peiroo* exception as a ground to decline *habeas* jurisdiction in matters involving immigration detainees.[35]

16. Although QPLC submits that the Court of Appeal for Ontario in *Chaudhary* and the Alberta Court of Appeal in *Chhina* reached the correct result, we urge this Court to go further. There is no need to carve out an exception to an exception. Immigration detainees have access to the right of *habeas corpus* in the superior courts because the superior courts have inherent jurisdiction to hear *habeas* applications,[36] and no act or regulation prescribes a limit to immigration detainees' access to that right.[37] Nowhere in the *IRPA* or the *Federal Courts Act* does Parliament purport to limit the superior courts' inherent jurisdiction to hear *habeas corpus* applications. Nor does the *IRPA* regime for appeals and judicial review of immigration matters, including immigration detention, by implication displace the superior courts' jurisdiction to hear *habeas corpus* applications.[38]

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[33] *Chaudhary*, *supra* (Ont. C.A.).

[34] *Chaudhary*, *supra* (Ont. C.A.), at para. 73: "[t]here will be situations in which the Federal Court is not an effective and appropriate forum in which to seek the relief claimed. In those rare cases, the Superior Court can properly exercise its jurisdiction." See also *Chhina v. Canada*, 2017 ABCA 248 ["*Chhina*"].

[35] See, for example, *Apaolaza-Sancho v. Director of Établissement de détention de Rivière-des-Prairies*, 2008 QCCA 1542; *Komera v. Canada (Minister of Citizenship and Immigration)*, 1999 ABQB 267; *Kippax v. Attorney General of Canada*, 2014 ONSC 3685. The "*Peiroo* exception" comes from *Peiroo v. Canada (Minister of Employment & Immigration)* (1989), 69 O.R. (2d) 253 (C.A.) ["*Peiroo*"], and provides that a superior court should decline *habeas corpus* jurisdiction in immigration matters where another comprehensive scheme exists that is broad as, or broader than, *habeas corpus* review and no less advantageous.

[36] *Miller*, *supra* (S.C.C.), at para. 35: "As I have said in connection with the question of jurisdiction [to issue *certiorari* in aid] of *habeas corpus*, these concerns have their origin in the legislative judgment to leave the *habeas corpus* jurisdiction against federal authorities with the provincial superior courts."

[37] The logical implication of the foregoing is that *Peiroo*, *supra* (Ont. C.A.), should not be followed for a number of reasons. First, this Court's purported approval of *Peiroo* in *May*, *supra*, was made in *obiter dictum*. Second, *Peiroo* was decided at a time when immigration courts did not routinely lock people up for lengthy periods of time. See Luke Taylor, "Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" (2015), 60 McGill L.J. 333, BOA, Tab 10, at pp. 363-364. Third, *Peiroo* was about an immigration *decision* – the applicant sought to challenge a deportation order by way of *habeas corpus*. It was not about the lawfulness of a prolonged or indefinite *detention*. Indeed, in *Peiroo*, the applicant was not in custody at the time of the appeal. See *Peiroo*, *supra* (Ont. C.A.), at para. 6.

[38] Section 162(1) of the *IRPA* (Français) provides that each division of the Immigration and Refugee Board (which, under s. 2(1), consists of the Refugee Protection Division, Refugee Appeal Division, Immigration Division, and Immigration Appeal Division) has "sole and exclusive jurisdiction to hear and determine all

17. Parliament and the provincial legislatures know how to limit *habeas corpus* jurisdiction by law. They have done so on occasion, but even then the restriction is narrow.[39] The *Criminal Code*[40] — a seemingly complete code for dealing with the state's process to deprive an individual of his or her liberty — only partially ousts the inherent *habeas* jurisdiction of the superior courts. Indeed, Part XXVI the *Code* expressly contemplates *habeas corpus* applications within or parallel to the criminal process, and carves out only narrow exceptions to *habeas* jurisdiction.[41]

18. As the examples above demonstrate, it is open to Parliament to limit the right of access to *habeas corpus* provided that it can satisfy its persuasive justificatory burden. But absent a clear legislative prescription, a superior court should not decline its inherent *habeas corpus* jurisdiction merely because another, alternative remedy exists or because two or more adjudicative bodies have overlapping jurisdiction.[42] As Wakeling J.A. wrote in *D.G. v. Bowden Institution*, "[j]ust because a state builds a second highway to connect two communities does not support the conclusion that state planners intended commuters to forego travelling on the old familiar route. The opposite is the case. Had the planners intended such a result they would have closed the old road."[43] Parliament has not closed the road to *habeas corpus* for immigration detainees. It remains the surest procedural path to secure one's liberty, and as this Court has held in another case involving immigration detention, the right to *habeas corpus* "remains as fundamental to our modern conception of liberty as it was in the days of King John."[44]

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questions of law and fact, including questions of jurisdiction". This language is far from the required "unmistakable text" that ousts jurisdiction from the superior courts.

[39] See, for example, s. 18(2) of the *Federal Courts Act* (Français) (Federal Court has exclusive jurisdiction to hear *habeas corpus* applications from members of Canadian Forces serving outside of Canada); s. 216 of the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sch. 1 (Français) (adoption orders cannot be challenged by *habeas corpus* applications or other prerogative writs); *Liquor Control Act*, R.S.P.E.I. 1988, c. L-14, s. 83(1) (no conviction or order, or warrant for enforcing … or other process shall, upon application by way of judicial review or for *habeas corpus* or upon any appeal, be held insufficient or invalid).

[40] R.S.C., 1985, c. C-46 (Français).

[41] See, for example, *Criminal Code*, s. 776 (no *certiorari* to collaterally attack appeals); s. 784(3) (precludes *habeas corpus* applications on the same grounds as previous applications absent fresh evidence).

[42] *May*, *supra* (S.C.C.), at para. 34; *Miller*, *supra* (S.C.C.), at para. 35; *Khela*, *supra* (S.C.C.), at para. 55.

[43] *Bowden*, *supra* (Alta. C.A.), at para. 138 (per Wakeling J.A,). Similarly, in *Wang*, *supra* (Ont. C.A.), at para. 22: "[t]he most common use should neither eclipse nor exclude other possible uses."

[44] *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350 ["*Charkaoui*"], at para. 28.

B. JUDICIAL REVIEW IS NOT EQUALLY EFFICACIOUS OR ADVANTAGEOUS

19. Even where the legislature prescribes a limit on the superior courts' *habeas* jurisdiction, that limit must also meet the justificatory criteria established under this Court's *Oakes* test.[45] At a minimum, this requires that the alternative review process be equally efficacious and equally advantageous to the detainee.[46] QPLC focuses on one reason why judicial review under the *Federal Courts Act* is necessarily less efficacious and less advantageous than *habeas* review: judicial review under the *Federal Courts Act* is limited to the review of a single administrative decision.[47]

20. The Federal Court and Federal Court of Appeal strictly apply the single-review procedure.[48] Such a narrow scope of review undermines the reviewing court's ability to assess the lawfulness of an ongoing detention in the light of its entire history and its predictable trajectory to determine whether it can still be justified.

21. As Morgan J. noted in *Scotland v. Canada (Attorney General)*, once the administrative decision-maker makes the initial decision to detain, the *IRPA* review process can lead to situations where a detainee is caught in "an endless circuit of mistakes, unproven accusations, and technicalities",[49] the result being that "the detention review process becomes a closed circle of self-referential and circuitous logic from which there is no escape."[50] Courts have also recognized the potential for mandated detention review to prolong detention, or keep a detainee in indefinite detention,[51] noting that

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[45] *Oakes*, *supra* (S.C.C.).
[46] *May*, *supra* (S.C.C.), at para. 40.
[47] Absent a court order otherwise, s. 302 of the *Federal Courts Rules*, SOR/98-106 (Français) limits an application for judicial review to a single order in respect of which relief is sought.
[48] *Canada (Prime Minister) v. Khadr*, 2009 FCA 246 at para. 36; *Dufour v. Canada (Attorney General)*, 2008 FC 1063, at paras. 24-25; *Escalante v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 897, at paras. 20-22; *Korn v. Canada (Attorney General)*, 2014 FC 590, at paras. 29-30; *McDougall v. Canada (Attorney General)*, 2011 FC 285, at paras. 39-44; *Williams v. Canada (Attorney General)*, 2010 FC 704, at paras. 16-17.
[49] *Scotland v. Canada (Attorney General)*, 2017 ONSC 4850 ["*Scotland*"], at para. 3. See also *Canada (Citizenship and Immigration) v. B386*, 2011 FC 175 ["*B386*"], at para. 14, where the court commented that a mandated detention review every 30 days may allow the government to obtain a prolonged, if not indefinite, stay of release order(s), which could potentially lead to an unending cycle from which the detainee would never benefit.
[50] *Scotland*, *supra* (Ont. S.C.J.), at paras. 73-74.
[51] *B386*, *supra* (F.C.), at para. 14.

detention hearings are often "rough and ready" proceedings[52] of a "revolving" nature.[53]

22. By contrast, *habeas corpus* review is particularly adept at identifying where a form of detention appears, or is likely to become, indefinite, or where a detention is no longer justified in view of its original purpose. This situation arises particularly where the unlawfulness of the detention stems not from a single unreasonable decision but from a cumulative set of administrative decisions made by a series of decision-makers.[54] *Habeas corpus* facilitates an assessment of the "forest", whereas judicial review is limited to an assessment of a single "tree".[55]

23. This is how the writ has operated since at least the sixteenth century — "moving prisoners forward in the proceedings rather than looking backwards to review earlier magisterial decisions."[56] The British Columbia Court of Appeal's remarks in *Khela v. Mission Institution (Warden)* are apposite:

> Whether there is an 'underlying administrative decision' is quite irrelevant. The question is whether the prisoner's detention is lawful or unlawful. The prisoner ought to be able to rely on any ground, which, if made good, would entitle him to his release. To this he is entitled as of right, as has been clear law for centuries.[57]

24. *Habeas corpus* thus "retains an important constitutional function above and beyond judicial review"; it enables "anyone in detention to have a case brought speedily to court and to seek release as of right whereas the law and procedures of judicial review are in their very essence discretionary."[58]

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[52] *Canada (Minister of Citizenship & Immigration) v. B004*, 2011 FC 331, at para. 18; *Canada (Minister of Citizenship & Immigration) v. X*, 2010 FC 1095, at para. 18; *Canada (Citizenship and Immigration) v. B386*, 2011 FC 140, at para. 9.

[53] *Bruzzese v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 230, at para. 2.

[54] In the prison context see, for example, *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at paras. 63, 67; *Bradley v. Canada (Correctional Service)*, 2011 NSSC 503; *Musitano v Canada (Attorney General)*, [2006] O.J. No. 1152 (S.C.J.), at paras. 1, 34-41; *Nguyen v. Mission Institution*, 2012 BCSC 103, at paras. 60-61, 63. See also, in the immigration context, *Scotland*, *supra* (Ont. S.C.J.); *Chaudhary*, *supra* (Ont. C.A.); *Ogiamien*, *supra* (Ont. C.A.); *Phillip v Canada (Attorney General)*, 2018 ABQB 167.

[55] See, for example, *Scotland*, *supra* (Ont. S.C.J.), at para. 76: "At some point, the adjudicator hearing a detention review under the IRPA must step back from the thick foliage of technical enforcement and have [a] look at the trees."

[56] *Habeas Corpus: From England to Empire*, *supra*, BOA Tab 11, at p. 29.

[57] *Khela v. Mission Institution (Warden)*, 2011 BCCA 450 ["*Khela* BCCA"], at para. 77 quoting H.W.R. Wade, "*Habeas Corpus* and Judicial Review", (1997) L.Q.R. 55, BOA Tab 8, at p. 62.

[58] *Khela* BCCA, *supra*, at para. 77, citing Judith Farbey, Professor, now Mr. Justice Sharpe, and Simon Atrill, *The Law of Habeas Corpus*, 3rd ed. (Oxford: Oxford University Press, 2011), BOA Tab 9, at p. 63.

25. This Court's decision in *Charkaoui v. Canada (Citizenship and Immigration)*[59] reinforces the ongoing availability and importance of *habeas* review in the immigration detention context. *Charkaoui* was a sweeping constitutional challenge to the security certificate detention regime under the *IRPA*. This Court held that the provision that limited foreign nationals' right to detention review violated the right to *habeas corpus* protected by s. 10(c) of the *Charter*.[60] Moreover, in upholding other sections of the security certificate regime, this Court emphasized that detainees retained the right to bring *Charter* challenges to extended periods of detention, presumably by way of a *habeas* application.[61] Nowhere in *Charkaoui* does this Court suggest that technical rules — or the "*Peiroo* exception" — limits a detainee's access to the superior courts to challenge a detention that has become prolonged or indefinite.

26. The superior courts thus retain an ongoing role in assessing whether a detention has become arbitrary or cruel and unusual in contravention of ss. 9, 7, or 12 of the *Charter*. As it has for centuries, the writ of *habeas corpus* remains the primary means by which a detainee can bring detention-related claims before the court for adjudication. As this Court set out in *May*, a detainee has a presumptive right to choose the forum in which he or she challenges the legality of a decision affecting his or her liberty.[62]

PART III – COSTS AND ORDER REQUESTED

27. QPLC does not seek costs and ask that none be awarded against it. QPLC does not seek any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 31st day of October, 2018.

Nader R. Hasan / Lindsay Board /
Gillian Moore / Paul Quick
Counsel for the Intervener, Queen's Prison Law Clinic

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[59] *Charkaoui*, *supra* (S.C.C).
[60] *Ibid*, at paras. 90-91.
[61] *Ibid*, at para. 123: "However, this does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment or is inconsistent with the principles of fundamental justice, and therefore infringes the *Charter*".
[62] *May*, *supra* (S.C.C.), at paras. 33, 44.

PART IV – TABLE OF AUTHORITIES

CASE LAW	**Para(s) in Factum**
R. v. Miller, [1985] 2 S.C.R. 613	7, 13, 16, 18
R. v. Oakes, [1986] 1 S.C.R. 103	4, 19
R. v. Therens, [1985] 1 S.C.R. 613	10, 11
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Scotland v. Canada (Attorney General), 2017 ONSC 4850	21, 22
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Steele v. Mountain Institution, [1990] 2 S.C.R. 1385	22
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D.A Cameron Harvey, *The Law of Habeas Corpus in Canada* (Toronto: Butterworths, 1974)	6
David Phillip Jones, Q.C. and Ann S. de Villars, Q.C., *Principles of Administrative Law*, 5d ed. (Scarborough: Carswell, 2009)	5
H.W.R. Wade, "*Habeas Corpus and Judicial Review*", (1997) L.Q.R. 55	23
Luke Taylor, "Designated Inhospitality: The Treatment of Asylum Seekers Who Arrive by Boat in Canada and Australia" (2015), 60 McGill L.J. 333	16
Judith Farbey, Professor, now Mr. Justice Sharpe, and Simon Atrill, *The Law of Habeas Corpus*, 3rd ed. (Oxford: Oxford University Press, 2011)	24

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Paul D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Harvard University Press, 2010)	5, 6, 14, 23
Peter Hogg, *Constitutional Law of Canada*, 5th ed., loose-leaf (Toronto: Carswell, 2016)	9, 11
T.B. Howell, *A Complete Collection of State Trial*, (London, England: T.C. Hansard, Peterborough-Court, 1814)	14

PART V – LEGISLATION

***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**

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

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

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Detention or imprisonment

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

Arrest or detention

10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;

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

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

Treatment or punishment

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

GARANTIE DES DROITS ET LIBERTÉS

Droits et libertés au Canada

1. La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

GARANTIES JURIDIQUES

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Détention ou emprisonnement

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraries.

Arrestation ou détention

10. Chacun a le droit, en cas d'arrestation ou de détention :

(a) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

(b) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit;

(c) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.

Cruauté

12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

EFFECT OF ADOPTION ORDER

Order final

216 (1) An adoption order under section 199 is final and irrevocable, subject only to section 215 (appeals), and shall not be questioned or reviewed in any court by way of injunction, declaratory judgment, *certiorari*, *mandamus*, prohibition, *habeas corpus* or application for judicial review.

Validity of adoption order not affected by openness order or agreement

(2) Compliance or non-compliance with the terms of an openness order or openness agreement relating to a child does not affect the validity of an order made under section 199 for the adoption of the child.

EFFET DE L'ORDONNANCE D'ADOPTION

Ordonnance définitive

216 (1) Une ordonnance d'adoption rendue en vertu de l'article 199 est définitive et irrévocable, sous réserve seulement de l'article 215 (appels). Elle ne doit pas être contestée ni révisée par un tribunal au moyen d'une injonction, d'un jugement déclaratoire, d'un bref de *certiorari*, de *mandamus*, de prohibition ou *d'habeas corpus*, ou d'une requête en révision judiciaire.

Validité de l'ordonnance d'adoption : ordonnance ou accord de communication

(2) La conformité ou la non-conformité aux conditions d'une ordonnance de communication ou d'un accord de communication visant un enfant n'a pas pour effet d'invalider une ordonnance d'adoption de l'enfant rendue en vertu de l'article 199.

***Constitution Act*, 186730 & 31 Victoria, c. 3 (U.K.)**

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(*29th March 1867*)

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America

Loi concernant l'Union et le gouvernement du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick, ainsi que les objets qui s'y rattachent

(*29 mars 1867*)

Considérant que les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ont exprimé le désir de contracter une Union Fédérale pour ne former qu'une seule et même Puissance (*Dominion*) sous la couronne du Royaume-Uni de la Grande-Bretagne et d'Irlande, avec une constitution reposant sur les mêmes principes que celle du Royaume-Uni :

Considérant de plus qu'une telle union aurait l'effet de développer la prospérité des provinces et de favoriser les intérêts de l'Empire Britannique :

Considérant de plus qu'il est opportun, concurremment avec l'établissement de l'union par autorité du parlement, non seulement de décréter la constitution du pouvoir législatif de la Puissance, mais aussi de définir la nature de son gouvernement exécutif :

Considérant de plus qu'il est nécessaire de pourvoir à l'admission éventuelle d'autres parties de l'Amérique du Nord britannique dans l'union

***Criminal Code* (R.S.C., 1985, c. C-46)**

EXTRAORDINARY REMEDIES

Where conviction or order not reviewable

776 No conviction or order shall be removed by *certiorari*

(a) where an appeal was taken, whether or not the appeal has been carried to a conclusion; or

(b) where the defendant appeared and pleaded and the merits were tried, and an appeal might have been taken, but the defendant did not appeal.

R.S., c. C-34, s. 710.

Appeal in mandamus, etc.

784 (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of *mandamus, certiorari* or prohibition.

Application of Part XXI

(2) Except as provided in this section, Part XXI applies, with such modifications as the circumstances require, to appeals under this section.

Refusal of application, and appeal

(3) Where an application for a writ of *habeas corpus ad subjiciendum* is refused by a judge of a court having jurisdiction therein, no application may again be made on the same grounds, whether to the same or to another court or judge, unless fresh evidence is adduced, but an appeal from that refusal shall lie to the court of appeal, and where on the appeal the application is refused a further appeal shall lie to the Supreme Court of Canada, with leave of that Court.

Where writ granted

(4) Where a writ of *habeas corpus ad subjiciendum* is granted by any judge, no appeal therefrom shall lie at the instance of any party including the Attorney General of the province concerned or the Attorney

RECOURS EXTRAORDINAIRES

Lorsque la condamnation ou l'ordonnance ne peut faire l'objet d'un nouvel examen

776 Aucune condamnation ou ordonnance ne peut être écartée par *certiorari* dans les cas suivants :

(a) un appel a été interjeté, que l'appel ait été ou non poursuivi jusqu'à sa conclusion;

(b) le défendeur a comparu et plaidé, l'affaire a été jugée au fond et un appel aurait pu être interjeté, mais le défendeur ne l'a pas interjeté.

S.R., ch. C-34, art. 710.

Appel concernant un mandamus, etc.

784 (1) Appel peut être interjeté à la cour d'appel contre une décision qui accorde ou refuse le secours demandé dans des procédures par voie de *mandamus*, de *certiorari* ou de prohibition.

Application de la partie XXI

(2) Sauf disposition contraire du présent article, la partie XXI s'applique, compte tenu des adaptations de circonstance, aux appels interjetés sous le régime du présent article.

Rejet de la demande et appel

(3) Lorsqu'une demande de bref *d'habeas corpus ad subjiciendum* est refusée par un juge d'un tribunal compétent, aucune demande ne peut être présentée de nouveau pour les mêmes motifs, soit au même tribunal ou au même juge, soit à tout autre tribunal ou juge, à moins qu'une preuve nouvelle ne soit fournie, mais il y a appel de ce refus à la cour d'appel et, si lors de cet appel la demande est refusée, un nouvel appel peut être interjeté à la Cour suprême du Canada, si celle-ci l'autorise.

Si le bref est émis

General of Canada.

Appeal from judgment on return of writ

(5) Where a judgment is issued on the return of a writ of *habeas corpus ad subjiciendum*, an appeal therefrom lies to the court of appeal, and from a judgment of the court of appeal to the Supreme Court of Canada, with the leave of that Court, at the instance of the applicant or the Attorney General of the province concerned or the Attorney General of Canada, but not at the instance of any other party.

Hearing of appeal

(6) An appeal in *habeas corpus* matters shall be heard by the court to which the appeal is directed at an early date, whether in or out of the prescribed sessions of the court.

R.S., 1985, c. C-46, s. 784; 1997, c. 18, s. 109.

(4) Lorsqu'un bref *d'habeas corpus ad subjiciendum* est émis par un juge, aucun appel de cette décision ne peut être interjeté à l'instance d'une partie quelconque, y compris le procureur général de la province en cause ou le procureur général du Canada.

Appel d'un jugement lors du rapport du bref

(5) Lorsqu'un jugement est délivré au moment du rapport d'un bref *d'habeas corpus ad subjiciendum*, il peut en être interjeté appel à la cour d'appel et il y a appel d'un jugement de ce tribunal à la Cour suprême du Canada, si celle-ci l'autorise, à l'instance du demandeur ou du procureur général de la province en cause ou du procureur général du Canada, mais non à l'instance de quelque autre partie.

Audition d'un appel

(6) Un appel en matière *d'habeas corpus* est entendu par le tribunal auquel il est adressé à une date rapprochée, que ce soit pendant les sessions prescrites du tribunal ou en dehors de cette période.

L.R. (1985), ch. C-46, art. 784; 1997, ch. 18, art. 109.

***Federal Courts Act*, (R.S.C., 1985, c. F-7)**

JURISDICTION OF FEDERAL COURT

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

COMPÉTENCE DE LA COUR FÉDÉRALE

Recours extraordinaires: offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour:

(a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

(b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Recours extraordinaires: Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

L.R. (1985), ch. F-7, art. 18; 1990, ch. 8, art. 4; 2002, ch. 8, art. 26.

***Federal Courts Rules*, SOR/98-106**

APPLICATIONS – GENERAL

Limited to single order

302 Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

DEMANDES DISPOSITIONS GÉNÉRALES

Limites

302 Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

***Immigration and Refugee Protection Act*, S.C. 2001, c. 2007**

INTERPRETATION

Definitions

2 (1) The definitions in this subsection apply in this Act.

Board means the Immigration and Refugee Board, which consists of the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division. (Commission)

Convention Against Torture means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed at New York on December 10, 1984. Article 1 of the Convention Against Torture is set out in the schedule. (Convention contre la torture)

designated foreign national has the meaning assigned by subsection 20.1(2). (étranger désigné)

foreign national means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person. (étranger)

permanent resident means a person who has acquired permanent resident status and has not subsequently lost that status under section 46. (résident permanent)

Refugee Convention means the United Nations Convention Relating to the Status of Refugees, signed at Geneva on July 28, 1951, and the Protocol to that Convention, signed at New York on January 31, 1967. Sections E and F of Article 1 of the Refugee Convention are set out in the schedule. (Convention sur les réfugiés)

PROVISIONS THAT APPLY TO ALL DIVISIONS

Sole and exclusive jurisdiction

162 (1) Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive

DÉFINITIONS ET INTERPRÉTATION

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

Commission La Commission de l'immigration et du statut de réfugié, composée de la Section de la protection des réfugiés, de la Section d'appel des réfugiés, de la Section de l'immigration et de la Section d'appel de l'immigration. (Board)

Convention contre la torture La Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants, signée à New York le 10 décembre 1984 dont l'article premier est reproduit en annexe. (Convention Against Torture)

Convention sur les réfugiés La Convention des Nations Unies relative au statut des réfugiés, signée à Genève le 28 juillet 1951, dont les sections E et F de l'article premier sont reproduites en annexe et le protocole afférent signé à New York le 31 janvier 1967. (Refugee Convention)

étranger Personne autre qu'un citoyen canadien ou un résident permanent; la présente définition vise également les apatrides. (foreign national)

étranger désigné S'entend au sens du paragraphe 20.1(2). (designated foreign national)

résident permanent Personne qui a le statut de résident permanent et n'a pas perdu ce statut au titre de l'article 46. (permanent resident)

ATTRIBUTIONS COMMUNES

Compétence exclusive

162 (1) Chacune des sections a compétence exclusive pour connaître des questions de droit et de fait — y compris en

jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction.

Procedure

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

matière de compétence — dans le cadre des affaires dont elle est saisie.

Fonctionnement

(2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

***Liquor Control Act*, R.S.P.E.I. 1988, c. L-14**

JUDICIAL REVIEW AND APPEAL

French version not available

Defect in proceedings, affect on conviction

83(1) No conviction or order, or warrant for enforcing it, or other process shall, upon application by way of judicial review or for *habeas corpus* or upon any appeal, be held insufficient or invalid for any irregularity, informality or insufficiency therein or by reason of any defect of form or substance, if the court or judge hearing the application or appeal is satisfied by a perusal of the depositions that there is evidence on which the provincial court judge might reasonably conclude that an offence against this Act has been committed.

"Any defect in form or substance" defined

(2) In particular the words "any defect in form or substance" include any excess or defect in the punishment imposed or order made, but the inclusion does not affect the generality of the words.

United Kingdom *Habeas Corpus Act, 1679*

***United States Constitution*, Art. I § 9, cl. 2**

SUSPENSION OF HABEAS CORPUS

Currentness

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

French version not available