

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)**

BETWEEN:

**DURRELL DIGGS**

Appellant

- and -

**ATTORNEY GENERAL OF NOVA SCOTIA and  
NOVA SCOTIA HEALTH AUTHORITY**

Respondents

AND BETWEEN:

**RYAN TAYLOR WILBAND**

Appellant

- and -

**ATTORNEY GENERAL OF NOVA SCOTIA**

Respondent

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**FACTUM OF THE INTERVENER CANADIAN CIVIL LIBERTIES ASSOCIATION**  
(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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## PARTS I AND II – OVERVIEW AND QUESTIONS IN ISSUE

1. These appeals concern the superior court's jurisdiction to entertain a *habeas corpus* application from a prisoner who is enduring conditions of solitary confinement as a result of operational or policy decisions that also affect other prisoners in the institution. These appeals also invite consideration of the appropriate role of declaratory relief if the court concludes that the release of the applicant prisoner cannot be effected, because the matter has become moot as a result of intervening events or because the court exercises its residual discretion to refuse the remedy of release. The outcome of this appeal has potentially wide-reaching consequences for accessible and unobstructed access to *habeas corpus*.
2. The Canadian Civil Liberties Association (the "CCLA") intervenes to address the question of whether placement in conditions of solitary confinement as a result of an operational or policy decision that affects other inmates is reviewable by way of *habeas corpus*.
3. The CCLA submits that limitations on *habeas corpus* jurisdiction must be consistent with the right of access to *habeas corpus* guaranteed in s 10(c) of the *Charter* and this Court's prior decisions regarding the availability of *habeas corpus*. More specifically, the CCLA submits that:
  - a. Removing *habeas corpus* jurisdiction for operational or policy decisions is inconsistent with the right of access to *habeas corpus* guaranteed in s 10(c) of the *Charter* and this Court's decision in *May* regarding the limited circumstances in which a superior court may decline *habeas corpus* jurisdiction.
  - b. Affirming the availability of *habeas corpus* to review deprivations of liberty resulting from operational or policy decisions of general application is entirely compatible with the purpose underlying *habeas corpus* review, and with this Court's jurisprudence regarding the nature and scope of the evidence that can be considered on a *habeas corpus* application and the bases on which unlawfulness can be established.
  - c. A declaration regarding the lawfulness of the impugned detention is appropriate where release of the applicant cannot be effected and serves an important purpose in meaningfully vindicating the *Charter* rights of the applicant.
4. The CCLA takes no position on the facts in, or on the outcome of, these appeals.

### PART III – STATEMENT OF ARGUMENT

**a) *The rule set out in May regarding the limited circumstances in which a superior court may decline habeas corpus jurisdiction reflects and gives effect to the right of access to habeas corpus guaranteed in s 10(c) of the Charter***

5. In *May*, this Court confirmed that the discretion available to a superior court to decline to exercise its *habeas corpus* jurisdiction is limited. This Court described the contours of this constrained discretion as follows:

As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court...

The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited... In principle, the governing rule is that provincial superior courts should exercise their jurisdiction. However, in accordance with this Court's decisions, provincial superior courts should decline *habeas corpus* jurisdiction only where (1) a statute such as the *Criminal Code*, R.S.C. 1985, c. C-46, confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision.<sup>1</sup>

6. In the case at bar, the Nova Scotia Court of Appeal referenced *May* in its discussion of the applicable standard of review in respect of an issue involving the superior court's assumption or declining of jurisdiction to exercise *habeas corpus*.<sup>2</sup> The court below did not, however, advert to or consider the above guidance provided in *May*, regarding the limited circumstances in which a superior court may properly decline *habeas corpus* jurisdiction. The court below nevertheless held that the superior court judge had "exceed[ed] his jurisdiction" by "using a *habeas corpus* proceeding to address operational policy decisions in the management of CNSCF",<sup>3</sup> and concluded that "[this] approach was an improper exercise of the court's *habeas corpus* jurisdiction".<sup>4</sup>

7. The rule set out by this Court in *May* reflects and gives effect to the right of access to the

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<sup>1</sup> *May v Ferndale Institution*, 2005 SCC 82 at paras 44, 50 [*May*].

<sup>2</sup> *Nova Scotia (Attorney General) v Diggs and Wilband*, 2025 NSCA 20 at para 27 [*Diggs NSCA*], quoting *Pratt v Nova Scotia (Attorney General)*, 2020 NSCA 39 at para 12, including a citation to *May*, *supra* note 1.

<sup>3</sup> *Diggs NSCA*, *supra* note 2 at para 6.

<sup>4</sup> *Ibid* at para 28.

*habeas corpus* procedure that forms part of the right that is enshrined in s 10(c) of the *Charter*. The existence of this constitutional guarantee serves to further reinforce the importance of rigorous application of the guidance provided in *May*, regarding the limited circumstances in which *habeas corpus* jurisdiction may properly be declined.

8. Section 10(c) guarantees an individual’s right, “on arrest or detention... to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.” According to the text of s 10(c), the right of access to *habeas corpus* is triggered by “arrest or detention”. Upon such arrest or detention, the s 10(c) guarantee protects three intertwined but distinct rights: the right of access to the courts by way of the *habeas corpus* procedure; the right to have the lawfulness or validity of the detention determined; and the right in the event the detention is found to be unlawful, to be ordered released. “Detention” is the operative concept that defines the point at which access to the guaranteed right of *habeas corpus* is triggered, along with other rights subsidiary to detention that are set out in s 10.<sup>5</sup>

9. A purposive interpretation of s 10(c) should give a consistent meaning to the concept of liberty and detention across ss 7, 9 and 10(c).<sup>6</sup> The purpose served by s 10(c) is to guarantee access to a particular procedure – *habeas corpus* – in circumstances of constitutionally-cognizable “detention”, and thereby to ensure that the constraint on liberty that arises with detention will persist only when lawful. Any jurisprudential development regarding the superior court’s discretion to decline *habeas corpus* jurisdiction that has the effect of rendering the s 10(c) *habeas corpus* procedure and remedy unavailable in the context of a *Charter*-cognizable “detention” ought therefore at minimum to be subjected to careful scrutiny.

10. This Court’s jurisprudence establishes that the existence of a “detention” under ss 9 and 10 of the *Charter* is to be assessed by considering the qualitative degree and nature of the limit on liberty experienced by the individual.<sup>7</sup> This analysis parallels well-established insights from this Court’s carceral jurisprudence, in which it has been recognized that certain interferences with residual liberty can constitute *Charter*-cognizable “detention”,<sup>8</sup> and that residual liberty interests

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<sup>5</sup> *R v Grant*, [2009 SCC 32](#) at para [22](#) [*Grant*].

<sup>6</sup> *R v Kirkpatrick*, [2022 SCC 33](#) at para [46](#); *R v Kapp*, [2008 SCC 41](#) at para [87](#), *per* Bastarache J concurring; *R v Hebert*, [\[1990\] 2 SCR 151](#) at 176.

<sup>7</sup> *Grant*, *supra* note 5 at paras [19-23](#), [29](#).

<sup>8</sup> *R v Miller*, [\[1985\] 2 SCR 613](#) at 637-641 [*Miller*].

“cover a spectrum from the less important to the fundamental”.<sup>9</sup> Not every qualification of a prisoner’s expectation of liberty is cognizable as a “deprivation of liberty”; the “qualification must be serious enough to warrant constitutional protection”.<sup>10</sup>

11. This Court has long held that confinement in conditions of segregation is a distinct and separate form of detention – in fact, a new detention of the prisoner – that constitutes a deprivation of residual liberty and is reviewable by way of *habeas corpus*. Thus, as *Miller* confirmed, while *habeas corpus* is not available to challenge “any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population”, it is available “to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from mere loss of privileges, is more restrictive or severe than the normal one in an institution”.<sup>11</sup> Similarly, *Dorsey* held that “[t]he first stage [of the *habeas corpus* test] functions to filter out frivolous claims where there is no qualitative difference in liberty as between two states of confinement”.<sup>12</sup> Interference of a qualitatively significant kind with the residual liberty of a prisoner constitutes a deprivation of a *Charter*-cognizable liberty interest under s 7, and a *Charter*-cognizable detention under s 9.<sup>13</sup> It is the qualitative nature of the conditions of segregation – the significance of the restraint on residual liberty that such conditions entail – that gives rise to a constitutionally-cognizable detention.

12. The fact that an individual’s conditions of confinement might be the same or similar to those of the general prisoner population at a particular point in time is not a bar to a determination, on the facts of the individual’s case, that those conditions constitute a detention under the *Charter*. Equally, such circumstance is not a bar to a finding that the individual has suffered a deprivation

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<sup>9</sup> [Cunningham v Canada](#), [1993] 2 SCR 143 at 149 [Cunningham].

<sup>10</sup> [Cunningham](#), *supra* note 9 at 151. See also [R v Gamble](#), [1988] 2 SCR 595 at 644.

<sup>11</sup> [Miller](#), *supra* note 8 at 641.

<sup>12</sup> [Dorsey v Canada \(Attorney General\)](#), 2025 SCC 38 at para 44 [Dorsey]; see also [Dorsey](#) at paras 41, 67, 71.

<sup>13</sup> [Grant](#), *supra* note 5 at paras 19-20, 22, 26, 29; [Cunningham](#), *supra* note 9 at 148-149, 151; [John Howard Society of Saskatchewan v Saskatchewan \(Attorney General\)](#), 2025 SCC 6 at para 44; [Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen](#), 2017 ONSC 7491 at paras 87, 89, 97-101 (with respect to s. 7 interests), *aff’d* and varied on appeal [Canadian Civil Liberties Association v Canada](#), 2019 ONCA 243 at paras 2, 4-5 (no appeal with respect to s. 7 violation finding, violation also found under s. 12), leave to appeal *ref’d* (2020), [Attorney General of Canada v Corporation of the Canadian Civil Liberties Association](#), 2020 CanLII 10506 (CanLII).

of residual liberty. The respondent's submission to the contrary<sup>14</sup> depends upon a misreading of this Court's statements in *Dorsey* and *Miller*, effectively interpreting certain passages of these judgments in which an illustrative example was provided – *i.e.*, that one example of a deprivation of liberty can be identified in comparing the conditions of an individual in segregation to those of the general inmate population – as if this Court was thereby articulating a necessary condition – *i.e.*, that a deprivation of liberty cannot exist unless the applicant can point to peers in the general inmate population who are not experiencing the complained-of deprivation. At the first step of the *habeas corpus* test, if the qualitative conditions of solitary confinement are experienced by the individual, it matters not that those conditions result from the exercise of the statutory authority that applies to all prisoners (a rotational lockdown) as opposed to an individualized decision (administrative segregation). It is the qualitative nature of the conditions of confinement that must be assessed to determine whether a deprivation of liberty exists, not the reason for those conditions.

13. The approach propounded by the Nova Scotia Court of Appeal in the instant cases would exclude from the superior court's *habeas corpus* jurisdiction any challenges to conditions of confinement that arise from "operational policy decisions" or that relate to "systemic issues in the management" of a correctional facility.<sup>15</sup> This approach would create a broad, ill-defined exemption that would effectively require a superior court to decline *habeas corpus* jurisdiction at a preliminary stage by reference to the nature of the reason for the complained-of detention, without consideration of whether the qualitative conditions of confinement constitute a deprivation of liberty. In practice, the Court of Appeal's approach would introduce a new threshold issue into the *habeas corpus* framework, one defined by an awkward negative content. In order to be successful on a *habeas corpus* application, an applicant would not only have to show a deprivation of liberty and raise a legitimate ground upon which to question its legality, but they would also have to show that the decision to restrict their liberty did *not* arise as a result of an operational policy decision. Applicants, who are often self-represented, would face significant structural barriers in meeting this additional threshold requirement, as they are unlikely to have the ability to determine why the complained-of deprivation has occurred.<sup>16</sup>

14. An individual in custody who is detained on a prolonged and sustained basis in conditions

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<sup>14</sup> Factum of the Respondent Attorney General of Nova Scotia at paras 76, 78, 80-81.

<sup>15</sup> [Diggs NSCA](#), *supra* note 2 at paras 3, 6.

<sup>16</sup> [Mission Institution v Khela](#), 2014 SCC 24 at para 40 [*Khela*].

of segregation, and who thus experiences a constitutionally-cognizable “detention”, has the constitutional right pursuant to s 10(c) to access to the *habeas corpus* procedure in order to have the validity of that distinct detention determined. The common law jurisprudential development articulated by the court below, that purports to restrict access to *habeas corpus* in the context of such a *Charter*-cognizable “detention”, is inconsistent with this *Charter* guarantee.

***b) Detention resulting from operational policy decisions is reviewable by way of habeas corpus***

15. Over the past four decades, this Court has progressively and purposively expanded the availability and scope of *habeas corpus* review. Affirming the availability of *habeas corpus* to review deprivations of liberty resulting from operational or policy decisions of general application is entirely compatible with the purpose underlying *habeas corpus* review. It is also consistent with this Court’s jurisprudence which has repeatedly taken an expansive approach to the nature and scope of the evidence that can be considered on a *habeas corpus* application and the bases on which unlawfulness can be established. Contrary to the assertion in the judgment below and the submission of the respondent,<sup>17</sup> neither the perceived evidentiary complexity of a particular *habeas corpus* application, nor the presumptively summary nature of the *habeas corpus* procedure, furnishes a legitimate basis for a superior court to decline to exercise its jurisdiction.

16. In *Mitchell*, decided prior to the advent of the *Charter*, a majority of this Court held that the superior court would have no jurisdiction to issue a writ of *certiorari* in light of s 18 of the *Federal Court Act*, which conferred on what was then the Trial Division of the Federal Court exclusive original jurisdiction to issue a writ of *certiorari* against any federal board, commission, or other tribunal.<sup>18</sup> Under *Mitchell*, the jurisdiction of the superior court was therefore confined to consideration of the facts contained on the warrants of apprehension and committal. Nine years later, in *Miller*, this Court rejected that view. Writing for a unanimous Court, Le Dain J adopted the dissenting view expressed by Laskin CJ and Dickson J (as he then was) in *Mitchell* that “there is a marked difference between *certiorari*, used to quash a conviction or an order by its own

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<sup>17</sup> *Diggs NSCA*, *supra* note 2 at paras [52-53](#); Factum of the Respondent Attorney General of Nova Scotia at paras 78, 110, 128, 152-153.

<sup>18</sup> Section 18(1) of the [Federal Courts Act, RSC 1985, c F-7](#) confers that same jurisdiction on what is now known as the Federal Court.

strength, and *certiorari* in aid of *habeas corpus* to make the latter remedy more effective by requiring production of the record of proceedings for that purpose.”<sup>19</sup>

17. As Le Dain J observed, *certiorari* in aid is “important if not essential to the effectiveness of *habeas corpus*. ... In many cases it may not be possible for a court to determine whether there has been an absence or excess of jurisdiction if the record of the tribunal which imposed or authorized the detention is not brought before it.”<sup>20</sup> He concluded that given the importance “of *habeas corpus* itself, and by implication the importance of maintaining it as a fully effective remedy” – underscored by constitutionalization of the right in s 10(c) of the *Charter* – reference to *certiorari* in the *Federal Court Act* could not have been intended to undermine or weaken the *habeas corpus* jurisdiction of provincial superior courts by excluding or denying *certiorari* in aid, that is, as a procedural or evidentiary device.<sup>21</sup>

18. Le Dain J went on to hold that affidavit or other extrinsic evidence could also be considered on an application for *habeas corpus*, noting that even where the record is brought up by *certiorari* in aid, it may only be possible to establish jurisdictional error – particularly a violation of natural justice or a denial of procedural fairness – by extrinsic evidence.<sup>22</sup>

19. In *Khela*, this Court held that the scope of review on a *habeas corpus* application extends to substantive review of the merits of the decision on a reasonableness standard. As Le Bel J observed, “A decision that is within the decision maker’s jurisdiction but that lacks the safeguards of procedural fairness will not be lawful. Likewise, a decision that lacks an evidentiary foundation or that is arbitrary or unreasonable cannot be lawful, regardless of whether the decision maker had jurisdiction to make it.”<sup>23</sup> In other words, *habeas corpus* review embraces what might now be described as Vavilovian reasonableness.

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<sup>19</sup> [Mitchell v. R, \[1976\] 2 SCR 570](#) at 578, *per* Laskin CJ for himself and Dickson J, as he then was, dissenting on this point, quoted in [Miller](#), *supra* note 8 at 624.

<sup>20</sup> [Ibid](#) at 625.

<sup>21</sup> Notably, the Nova Scotia [Liberty of the Subject Act, RSNS 1989, c 253](#) s 9 also confirms the jurisdiction of a superior court to issue a writ of *certiorari* in aid of an application for *habeas corpus*.

<sup>22</sup> [Miller](#), *supra* note 8 at 632-633.

<sup>23</sup> [Khela](#), *supra* note 16 at para 67.

20. The evidentiary record may thus be as full, and the inquiry as broadly encompassing, on a *habeas corpus* application as on an application for judicial review. Both processes play the same essential role, namely supervision by the courts “to ensure that executive power is exercised in a manner consistent with the rule of law.”<sup>24</sup>

21. What is unique to *habeas corpus* is the shift in onus: once the applicant has established a deprivation of liberty and raised a legitimate ground upon which to challenge its legality, the burden rests with the detaining authorities to demonstrate that the deprivation is justified. The shift in the legal burden does not mean that *habeas corpus* review must be summary in nature. Rather, as this Court held in *Khela*, it is “compatible with the very foundation of the law of *habeas corpus* namely that a deprivation of liberty is permissible only if the party effecting the deprivation can demonstrate that it is justified.”<sup>25</sup> Further, the shift is particularly understandable in the context of an emergency or involuntary inmate transfer – as in *Khela* – or, as in the present case, in the context of detention in conditions amounting to solitary confinement. In either instance, the individual deprived of their liberty “will not have the requisite resources or the ability to discover why the deprivation has occurred or to build a case that it was unlawful.”<sup>26</sup>

22. The focus at the justification stage is properly on the reasons for the individual applicant’s detention, but this does not mean that the Court’s *habeas corpus* jurisdiction is somehow restricted to review of individualized detention decisions. If the reasons for the individual applicant’s detention involve “operational or policy decisions” that affected many inmates, there is no principled reason why these cannot be examined in the context of a *habeas corpus* application. The burden on the state remains the same: to establish the lawfulness of the applicant’s detention. If a particular *habeas corpus* application relates to an individual’s detention that is based upon operational or policy decisions regarding the management of a prison, it is appropriate to require the state to demonstrate the lawfulness of the decision in question, including the legal authority for the decision, the identity of the decision-maker, and the reasons for the decision. The Court’s inquiry into lawfulness in this context also properly includes consideration of the reasonableness of the decision, and whether all relevant factors were considered – including, notably, the impacts of the decision on the ss 7, 9 and 15 *Charter* interests of the individual applicant. Such review is

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<sup>24</sup> *Ibid* at para 37.

<sup>25</sup> *Ibid* at para 40.

<sup>26</sup> *Ibid*.

to be conducted with appropriate deference to the expertise of prison authorities,<sup>27</sup> but equally with an expectation that prison authorities must adopt a culture of justification and may properly be called upon to demonstrate the rationality, fairness and intelligibility of a decision that gives rise to a deprivation of liberty.<sup>28</sup> An inquiry of this kind is in no way inconsistent with the procedure or purpose of *habeas corpus*.

23. The Court of Appeal in the judgment below, and the respondent on appeal, point to the availability of judicial review as both justification and authorization for the superior court to decline *habeas corpus* jurisdiction. This submission – which has been a steady thread in the *habeas corpus* jurisprudence of lower courts – has been repeatedly and authoritatively rejected. In *Miller*, *May*, *Khela* and *Dorsey*, this Court has held that it is an error to decline *habeas corpus* jurisdiction on the basis that it overlaps in substance or process with judicial review: “The proper scope of the availability of *habeas corpus* must be considered first on its own merits, apart from possible problems arising from concurrent or overlapping jurisdiction,”<sup>29</sup> as “[t]he availability of the writ is not circumscribed by alternative avenues of redress”.<sup>30</sup>

***c) A declaration regarding the lawfulness of the impugned detention is appropriate where release cannot be effected***

24. As noted above, the s 10(c) guarantee protects three intertwined but distinct rights. With respect to remedy, the text of s 10(c) directly provides for a presumptively applicable remedy, namely “release”. As a matter of purposive constitutional interpretation, the content of the “release” remedy ought to match the content of the “detention” that was found to be invalid or unlawful, thereby vindicating the individual’s *Charter*-protected interests.

25. In some instances, a successful *habeas corpus* application will not result in an order of release. This may be because, by the time the court rules on the application, the applicant has already been “released” from the form of detention at issue, rendering the remedy moot.<sup>31</sup> Alternatively, following a hearing on the merits, the court may choose to exercise its residual

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<sup>27</sup> *Ibid* at paras [74-75](#), [89](#).

<sup>28</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) at paras [2](#), [13-15](#).

<sup>29</sup> *Dorsey*, *supra* note 12 at para [82](#), quoting *May*, *supra* note 1 at para [31](#), quoting *Miller*, *supra* note 8 at 641; see also *Khela*, *supra* note 16 at para [72](#).

<sup>30</sup> *Dorsey*, *supra* note 12 at para [89](#).

<sup>31</sup> See, for example, *Khela*, *supra* note 16 at paras [13-14](#); *Dorsey*, *supra* note 12 at para [30](#).

discretion to decide not to discharge the applicant.<sup>32</sup> Neither circumstance can have a retroactive effect on the applicant's entitlement to a hearing on the merits. Contrary to the respondent's submission,<sup>33</sup> that the remedy of release may ultimately be unavailable because of mootness, or may be found to be inappropriate in the circumstances as an exercise of the court's residual discretion, is not an indication that the case falls outside the proper scope of *habeas corpus*.

26. Where a "release" remedy cannot be granted because the *habeas corpus* application has become moot as a result of intervening events, or where the court exercises its residual discretion to decide not to discharge the applicant, the court nevertheless has jurisdiction to grant a remedy that vindicates as much as possible the individual's s 10(c) entitlement to "release". A declaration that the impugned deprivation was unlawful meaningfully vindicates the *Charter* rights at stake, and is especially significant where the applicant remains in the custody of the detaining authorities and is therefore at risk of suffering further such deprivations in the future.

27. Declarations serve an important purpose in confirming both the legal rights of the parties and the breach of a right.<sup>34</sup> A declaration by the superior court that authoritatively determines that the state has infringed the claimant's rights can encourage corrective action.<sup>35</sup> With respect to *Charter* rights in particular, declarations can provide an effective means to vindicate rights, correct violative state conduct, and deter future *Charter* breaches.<sup>36</sup>

#### **PARTS IV & V – COSTS AND ORDER REQUESTED**

28. The CCLA takes no position on the outcome of these appeals, seeks no costs, and asks that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 2nd day of July, 2026



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**Jessica Orkin and Amanda Bruce**  
Counsel for the Intervener, Canadian Civil Liberties Association

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<sup>32</sup> *Khela*, *supra* note 16 at para 78; *Dorsey*, *supra* note 12 at paras 86, 88-89.

<sup>33</sup> Factum of the Respondent Attorney General of Nova Scotia at para 119.

<sup>34</sup> *Shot Both Sides v Canada*, 2024 SCC 12 at para 66.

<sup>35</sup> *Ibid* at para 68.

<sup>36</sup> *Vancouver (City) v Ward*, 2010 SCC 27 at paras 34, 37.

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