S.C.C. FILE NO. 37770

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

BETWEEN:

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

APPELLANTS
(Respondents)

- and -

TUSIF UR REHMAN CHHINA

RESPONDENT
(Applicant)

- and -

END IMMIGRATION DETENTION NETWORK, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS, DEFENCE FOR CHILDREN INTERNATIONAL-CANADA, AMNESTY INTERNATIONAL CANADA, THE COMMUNITY & LEGAL AIDE SERVICES PROGRAMMES, THE CANADIAN COUNCIL FOR REFUGEES, THE QUEEEN'S PRISON LAW CLINIC, THE EGALE CANADA HUMAN RIGHTS TRUST, THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE CANADIAN CIVIL LIBERTIES ASSOCIATION and THE CANADIAN PRISON LAW ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW

1. Wrongful incarceration is illegal executive action at its most heinous. Historic restrictions on the availability of *habeas corpus* have left prisoners without a remedy, resulting in unjustified infringements of the liberty right and undermining the rule of law. Superior courts engaging in a purposive analysis of the *May*[1] factors can assume jurisdiction, provide an additional option to the detainee, question the legality of a person's detention, grant effective remedies, and ensure that the liberty right is enforced. Superior court jurisdiction over *habeas corpus* applications thus promotes access to justice, an essential component of the rule of law.

2. BCCLA adopts the facts as presented by the Respondent.

PART II: INTERVENER'S POSITION ON THE QUESTIONS IN ISSUE

3. The Alberta Court of Appeal correctly held that the Court of Queen's Bench should not have declined jurisdiction over the Respondent's *habeas corpus* application.

PART III: STATEMENT OF ARGUMENT

A. RESTRICTIONS ON *HABEAS CORPUS* LEAD TO ILLEGAL LIBERTY INFRINGEMENTS

4. Traditionally linked to the liberty right of the *Magna Carta*[2], *habeas corpus* is at the core of the rule of law.[3] A review of historical restrictions on *habeas corpus* supports the theory that broad access to *habeas corpus* is essential to the maintenance of the rule of law. Limits on the availability of *habeas corpus* and the ability to review the cause for detention have left prisoners without adequate recourse to address liberty infringements and abuses of power by the state. An expansive reading of *habeas corpus* procedure ensures that the liberty right is vindicated.

5. *Habeas corpus* was initially available in a limited form to bring a defendant before a court.[4] By the 17th century, prisoners began to use *habeas corpus* to test arbitrary executive power and unlawful imprisonment, which was met by opposition from courts deferential to the

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[1] *May v. Ferndale Institution*, 2005 SCC 82 [*May*].
[2] *May* at para. 19.
[3] *Chhina v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 ABCA 248 at para. 5.

king and council.[5] *Darnel's Case* is a 17th century example of this restrictive approach to *habeas corpus*. In 1627 Charles I, without Parliamentary sanction, imprisoned a number of men who refused to pay into compulsory loans. The prisoners were detained "*per speciale mandatum regis*"; no justification other than the king's special command was given for arrest and imprisonment. The King's Bench was tasked with determining whether the king's word that there was legal justification for the detention was sufficient, or whether the failure to disclose the underlying reason for detention was in itself enough reason to order release. Ultimately the court found that the king need provide no justification for detention, however arbitrary.[6] *Darnel's Case* demonstrates that *habeas corpus* requires not only access to the courts, but a robust review of the state's justification for detention in order to remedy executive abuses of power.

6. In answer to *Darnel's Case*, the English Parliament enacted the *Petition of Right* (1628), which required warrants of remand to state the cause or reason of imprisonment, and then the *Habeas Corpus Act* (1641 and 1679),[7] the historical foundation for modern *habeas corpus* procedure. The *Habeas Corpus Act* was the first legislation to truly give effect to the right to liberty in English law. In *Re Thaw*, a 1913 decision of the Quebec Court of King's Bench, the court quoted from Lord MacCauley's *History of England on the Habeas Corpus Act:*

> From the time of the Great Charter the substantive law respecting the personal liberty of Englishmen had been nearly the same as at present; but it had been inefficacious for want of a stringent system of procedure. What was needed was not a new right but a prompt and searching remedy; and such a remedy the *Habeas Corpus Act* supplied.[8]

Without a "prompt and searching remedy", the liberty right means little for those detained illegally. The *Habeas Corpus Act* specified that prisoners could bring the writ at any time and were to be given a copy of the warrant, specifying the reasons for detention. Judges had to render decisions quickly and could be fined for wrongfully denying the writ.[9]

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[4] *Mission Institution v. Khela*, 2014 SCC 24 at para. 27 [*Khela*].
[5] *Ibid*.
[6] Judith Farbey, RJ Sharpe, & Simon Attrill, *The Law of Habeas Corpus*, 3rd ed (Oxford: Oxford University Press, 2011) at pp. 8-11 ["The Law of Habeas Corpus"].
[7] *Ibid* at p. 11-17.
[8] *Re Harry K. Thaw; Thaw v. Robertson et al.*, 13 D.L.R. 715 at p. 13.
[9] The Law of Habeas Corpus, *supra* at pp. 18-22; *Khela*, *supra* at para. 28.

7. Since the passage of the *Habeas Corpus Act*, and its eventual adoption in Canada, the tendency has been to expand *habeas corpus* review power, with a few notable exceptions. As Professor Parkes writes in "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada", prisoners had poor access to *habeas corpus* in 19th and 20th century Canada due to the common law concept of "civil death" (the loss of civil and proprietary rights upon criminal conviction), leading courts to "adopt a deferential, 'hands off' approach to correctional decision-making such that abuses and illegalities went unremedied."[10]

8. In 1980, this Honourable Court held in *Martineau v. Matsqui Institution Disciplinary Board* that procedural fairness meant prisoners were entitled to seek judicial review of decisions made by prison officials that deprived them of their residual liberty.[11] However, a prisoner's right to *habeas corpus* was not re-examined in Canada until the advent of the *Canadian Charter of Rights and Freedoms*[12] and this Honourable Court's decisions in *Miller*, *Cardinal* and *Morin*, which held that *habeas corpus* was available to free inmates from a "prison within a prison".[13]

9. Since the *Miller* trilogy, the primary procedural hurdle faced by detainees seeking remedies through *habeas corpus* applications has been through claims of competing jurisdiction between provincial superior courts, administrative tribunals and the Federal Court. The so-called "*Peiroo* exception"[14] has led to superior courts declining *habeas corpus* applications dealing with persons detained under mental health acts,[15] parole suspensions and revocations[16] and for those in immigration detention,[17] thus limiting the ability of a prisoner to question the legality of their detention. Although the fundamental purpose of *habeas corpus* as a means of obtaining liberty has largely remained unchanged since the 17th century, a prisoner's access to courts has suffered from a variety of procedural difficulties throughout the centuries.

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[10] Debra Parkes, "The 'Great Writ' Reinvigorated? *Habeas Corpus* in Contemporary Canada" (2012) 36:1 M.L.J. 351 ["The 'Great Writ' Reinvigorated?"] at 353.
[11] *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 SCR 602 [*Martineau*] at 624.
[12] *Canadian Charter of Rights and Freedoms*, s. 10(c), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 182* (UK), 1982, c. 11.
[13] See *May*, *supra* at paras. 27-32.
[14] *Peiroo v. Canada (Minister of Employment and Immigration)*, 60 D.L.R. (4th) 574 [*Peiroo*].
[15] *Capano v. Centre for Addiction and Mental Health*, 2010 ONSC 1687 at paras. 35-42.
[16] *Armaly v. Canada*, 2001 ABCA 280 at para. 2.
[17] *Peiroo*, *supra*.

10. Jurisprudential developments should err on the side of expanding *habeas corpus*, not restricting access through jurisdictional disputes, procedural hurdles or limiting the remedies available to a prisoner. In *Khela*, LeBel J. reflected on this Honourable Court's role in upholding the ancient roots of this writ: "This Court has recognized in its decisions that *habeas corpus* should develop over time to ensure that the law remains consistent with the remedy's underlying goals: no one should be deprived of their liberty without lawful authority".[18] Post-*Khela*, the trend has been towards a renewed recognition of the importance of the liberty right for prisoners, and a reinvigoration of the superior court's inherent jurisdiction over *habeas corpus*.

B. SUPERIOR COURTS AND DETENTION REVIEW IN THE MODERN, ADMINISTRATIVE STATE

11. Notwithstanding the fact that administrative tribunals and the Federal Court are empowered to address detention, and the resulting cautionary words in *Peiroo* that have prevented superior court review, superior courts have unquestionably maintained their inherent jurisdiction to hear *habeas corpus* applications. Even the most restrictive interpretation of *habeas corpus* recognizes the continued jurisdiction of superior courts to question a prisoner's detention, grounded as it is in history and the core jurisdiction of the court to review state action.

12. Superior courts have had jurisdiction over *habeas corpus* since the inception of the writ in mediaeval England. Today, the review of state action by superior courts for constitutional compliance is recognized as essential to our constitutional democracy. In *A.G. Can. v. Law Society of B.C.*, Etsey J., writing for the Court, concluded that provincial superior courts could not be stripped of their power to rule on the constitutional validity of federal statutes. He found that "provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction".[19] To prevent superior courts from engaging in this review "would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in

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[18] *Khela*, *supra* at para. 54.
[19] *A.G. Can. v. Law Society of B.C.*, [1982] 2 SCR 307, pp. 326-327 [*Law Society of B.C.*].

the *Constitution Act*".[20] Reviewing state action is at the heart of what the superior court is and does. The writ of *habeas corpus* is a quintessential example of this review power.

13. By contrast, the Federal Court lacks the jurisdiction to hear and determine an application for *habeas corpus*. In *Pannu*[21], an immigration detainee brought an application for *habeas corpus* with *certiorari* in aid in Federal Court, hoping that the addition of the writ of *certiorari* would empower the Federal Court to hear the case. Smith J. reasoned that since "unlike the English Courts of Common Law and Equity [the Federal Court] has no inherent jurisdictional powers", its jurisdiction must be found within the four corners of the *Federal Courts Act.*[22] Foreshadowing the arguments of Le Dain J. in *Miller*, Smith J. also held that since *habeas corpus* is not explicitly conferred to Federal Courts in s. 18 of the *Federal Courts Act*, jurisdiction remained with provincial superior courts.[23] For prisoners, the Federal Court's review power is thus limited to a highly discretionary and deferential judicial review of administrative decisions, not the robust review of the legality of detention that is inherent in *habeas corpus*.

14. The tension between superior courts and administrative tribunals in dealing with detention has, at times, resulted in restrictive interpretations of the right to *habeas corpus*. This Honourable Court's decision in *Steele*[24] marked the beginning of a pendulum swing in provincial appellate courts away from an expansive interpretation of the writ, in deference to administrative expertise. Cory J. held that future applicants should challenge Parole Board decisions via the statutory scheme and judicial review rather than going through a *habeas corpus* application. Justice Cory noted concerns with the creation of a "costly and unwieldly parallel system", and held that it was important that the release of long term inmates was supervised by proper experts from the field.[25] As Professor Parkes notes, subsequent appellate decisions like *Spindler*[26] and

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[20] *Ibid* at p. 28.
[21] *Pannu v. Canada (Minister of Employment & Immigration)*, [1983] 1 F.C. 204 [*Pannu*].
[22] *Ibid* at paras. 1 and 6.
[23] *Ibid* at para 8.
[24] *Steele v. Mountain Institution*, [1990] 2 SCR 1385 [*Steele*].
[25] *Steele* at p. 1418.
[26] *Spindler v. Warden of Millhaven Institution*, [2003] OJ No 3449 (Q.L.) (O.N.C.A.).

Hickey[27] applied Cory J.'s caution as a legal rule, erroneously characterized *habeas corpus* as a "discretionary remedy" and assuming that alternative methods would provide adequate justice.[28]

15. More recently, the pendulum has swung back towards an interpretation that best gives effect to a prisoner's liberty interest through both access and a probing review. The BCCLA submits this is the correct approach. This Honourable Court's decision in *Khela* presents the high water mark for an expansive interpretation of the writ. In *Khela*, a prisoner sought to have the reasonableness of an administrative decision reviewed – traditionally the task of the Federal Court, as set out in the *Federal Courts Act*. Justice LeBel wrote that declining jurisdiction only because reasonableness review is the purview of the Federal Court does not fall within the narrow exceptions to availability of the writ, and does not follow the purposive approach to *habeas corpus* developed by this Honourable Court in *May*.[29]

16. Post-*Khela*, there has been a reinvigoration of *habeas corpus* for detainees in a number of settings. In *D.G. v. Bowden Institution*, the majority of the Alberta Court of Appeal, following *Khela*, held that the Court of Queen's Bench was right to accept jurisdiction over a *habeas corpus* application; the detainee had exhausted procedures available at the Parole Board of Canada through the *Corrections and Conditional Release Act*, but had not sought judicial review in Federal Court.[30] In *Abbass*[31], the Newfoundland Court of Appeal, also following *Khela*, held that the trial judge erred in his decision to decline jurisdiction over a mental health detainee's *habeas corpus* application. Instead, the Court relied on a purposive analysis of *May* to conclude that the provincial *Mental Health Care and Treatment Act* did not provide the detainee with a review process as advantageous as *habeas corpus*.[32] The Alberta Court of Appeal's decision in the current case, as well as the Ontario Court of Appeal's decision in *Chaudhary*,[33] similarly apply a purposive analysis that promotes the liberty interest of prisoners and removes jurisdictional hurdles. Implicit in these decisions is a finding that superior courts must engage in

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[27] *Hickey v. Kent Institution*, 2003 BCCA 23.
[28] The 'Great Writ' Reinvigorated?, *supra* at 356.
[29] *Khela*, *supra* at paras. 43–50.
[30] *D.G. v. Bowden Institution*, 2016 ABCA 52 [*D.G.*] at paras. 185 and 195.
[31] *Abbass v. The Western Health Care Corporation*, 2017 NLCA 24 [*Abbass*].
[32] *Ibid*.
[33] *Chaudhary v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 ONCA 700 [*Chaudhary*].

a purposive review of the *May* factors, with the prisoner's right to liberty grounding the analysis, not concerns about competing jurisdiction.

17. The Ontario Court of Appeal's decision in *Ogiamien*[34] demonstrates a further opening up of *habeas corpus* for immigration detainees – beyond the exception for detentions of a lengthy, indeterminate nature identified in *Chaudhary* and by the Alberta Court of Appeal in the current case. Sharpe J.A. held that the general rule for *habeas corpus* is that "provincial Superior Courts retain residual jurisdiction to entertain *habeas corpus* applications in the case of wrongful imprisonment", and that *habeas corpus* is not and has never been a discretionary remedy.[35] As such, *Chaudhary* should not be limited to the facts of that case, but rather stands for the general proposition that the "Superior Court retains its residual jurisdiction to entertain *habeas corpus* applications where the *IRPA* process of review under the supervision of the Federal Court is less advantageous than *habeas corpus*, and where releasing the applicant would not alter the immigration status of the applicant or amount to a collateral attack on an immigration decision."[36] Sharpe JA.'s comments in *Ogiamien* thus leave open the possibility that post-*Chaudhary,* there will be a further expansion of provincial superior courts' inherent jurisdiction in other immigration detention contexts, where a purposive analysis akin to the one conducted by Rouleau JA. in *Chaudhary* leads to the conclusion that *habeas corpus* is more advantageous than the statutory scheme under *IRPA* and supervision by the Federal Courts.

18. *Khela* and the subsequent decisions demonstrate that the historical rationale for the superior court's jurisdiction over *habeas corpus* remains relevant in the modern, administrative state. Allowing superior courts to hear *habeas corpus* applications provides prisoners from a number of different settings with access to justice, a robust review mechanism, and effective remedies. Reviewing detention for *Charter* compliance and providing remedies to those who have been wrongfully detained continue to be core functions of superior courts, regardless of who made the decision to detain, and the existence of administrative tribunals who may have concurrent powers to order a prisoner released.

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[34] *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 839 [*Ogiamien*].
[35] *Ibid* at para. 41.
[36] *Ibid.*

19. As *habeas corpus* is not a discretionary remedy, the existence of an alternate remedy is not in itself grounds for refusing relief. The availability of another more direct remedy should not preclude the right to apply for *habeas corpus*. Ultimately, whether a superior court or the Federal Court is better for the detainee is not the question. The question is how to ensure detainees retain broad access to both courts and tribunals, given the importance of the liberty right.

C. *HABEAS CORPUS* IMPROVES ACCESS TO JUSTICE AND ENHANCES THE RULE OF LAW

20. The rule of law is a constitutional value[37] requiring access to justice to be fulfilled. In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, citing from *B.C.G.E.U. v. British Columbia (Attorney General)*, this Honourable Court recently re-affirmed that access to the courts is an essential component of the rule of law:

> [a]s Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" …
>
> … access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens ... Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court.[38] [Internal citations omitted.]

Thus, any "interference" with access to the courts may result in undermining the rule of law.

21. Broad access to justice is especially critical for addressing infringements of the liberty right. All rights are intrinsically tied to the availability of effective remedies, which implies a need for favourable procedure to ensure access to justice. As this Honourable Court held in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*:

> Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as

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[37] Peter W. Hogg and Cara F. Zwibel, "The Rule of Law in the Supreme Court of Canada", (2005) 55 U.T.L.J. 716 at 732.

[38] *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 at para. 38, citing from *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214 at p. 230.

> meaningful as the remedy provided for its breach". A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.[39] [Internal citations omitted.]

A purposive approach to *habeas corpus*, as described in *Doucet-Boudreau* and applied by this Court in *May* and *Khela*, promotes the liberty interest by enhancing access to justice for detainees, and explicitly focusing on crafting a responsive remedy for the rights infringement.

22. *Habeas corpus*, one of the best means to review state action and enforce a prisoner's rights, may be the earliest access to justice remedy for a uniquely vulnerable population. In particular, the onus of proof and burden of proof in a *habeas corpus* application presents an advantage to the detainee. The standard of proof in *habeas corpus* applications is, for the detainee, a low one – the detainee must only establish that they have been deprived of liberty, and raise a "legitimate ground" to question the legality of their detention.

23. The onus then shifts to the detaining authority to prove the detention is lawful, who rightfully bears this burden as they hold the keys to an individual's liberty. As implicitly recognized in *Khela*, the respondent may also be the only party in possession of crucial information related to the liberty deprivation.[40] *Habeas corpus* presents a significant advantage to the detainee as compared to detention review procedures in other forums, including the Immigration Division, where the onus remains on the detainee throughout to demonstrate why they should be released. The low standard of proof and shifting onus in *habeas corpus* procedures promotes access to justice by ensuring low barriers for detainees, many of whom are particularly vulnerable due to intersecting forms of discrimination on the basis of race or national origin, disability, poverty, language barriers, and inability to obtain legal counsel.

24. Concerns about meritless *habeas corpus* applications clogging the courts fail to appreciate the undertaking involved in mounting a legitimate case. In *D.G.*, the Alberta Court of Appeal cited Justice Wilmot, who noted in 1758 that "[t]he King's Court of Justice should not

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[39] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 25.
[40] *Khela*, *supra* at para. See also *DeMaria v. Canada (Attorney General)*, 2014 ONSC 3683.

suffer [*habeas corpus*] to issue upon a mere suggestion; put upon some proof of a wrong and injury done to a subject."[41] The initial step for a prisoner to have the writ issued is thus a *real* step. The prisoner cannot make a "mere suggestion"; evidence must be proffered to trigger the respondent's need to justify the detention. The importance of the prisoner's task is emphasized by this Honourable Court's requirement that the prisoner raise a "legitimate ground" to question the legality of the detention.[42] The expansive nature of the remedy does not remove this responsibility. Superior court judges are always empowered to dismiss meritless applications and exercise control over their own processes to prevent abuse.[43] The key is that superior courts must be, at all times, empowered to consider the application itself.

25. For prisoners, the liberty interest is best promoted through the ability to question the legality of the detention, the central issue in a *habeas corpus* application. The shifting onus in a *habeas corpus* application ensures that the reviewing court can effectively interrogate the state's justification for detention, enhancing access to justice and supporting the rule of law.

PART IV: SUBMISSIONS ON COSTS

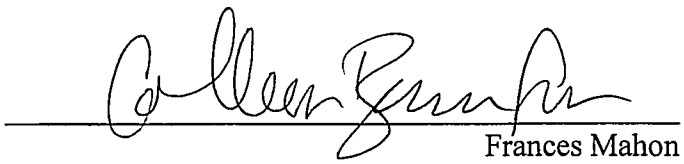
26. BCCLA does not seek its costs, and asks that no costs be awarded against it.

PART V: NATURE OF THE ORDER SOUGHT

27. Leave has already been granted to make oral argument of five minutes, pursuant to the Order of Justice Karakatsanis dated September 27, 2018.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 31, 2018



Frances Mahon
Counsel for the Intervener,
British Columbia Civil Liberties Association

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[41] *D.G.*, *supra* at para. 110.
[42] *May*, *supra* at para. 71; *Khela*, *supra* at para. 30.
[43] See, e.g., *Lee v. Canada (Attorney General)*, 2018 ABQB 40.

PART VI: TABLE OF AUTHORITIES

SECONDARY SOURCES

PART VII: STATUTORY PROVISIONS

***Canadian Charter of Rights and Freedoms*, s. 10(c), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 182* (UK), 1982, c. 11.**

Arrest or detention

10. Everyone has the right on arrest or detention

…

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

Arrestation ou detention

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

…

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