



March 31, 2021

Honourable Justice Scott Norton
The Law Courts
1815 Upper Water Street
Halifax Nova Scotia
B3J 1S7

BY EMAIL Yvonne.Dooks@courts.ns.ca

RE: Potential Impact to Habeas Corpus Applications in Nova Scotia

Dear Honourable Justice Scott Norton,

I write to you on behalf of the British Columbia Civil Liberties Association (BCCLA) to share our concerns about the proposals by the habeas corpus judicial working group regarding habeas corpus applications. We found out about this initiative from other members of civil society and we thank you for being open to submissions from experts beyond those that you directly reached out to.

BCCLA Support for Detainee Rights

The BCCLA's mandate is to preserve, defend, maintain and extend civil liberties and human rights in Canada. As Canada's oldest active civil liberties association, the BCCLA has a long history of work in detainee's rights, including prisoners and migrants in detention.

The BCCLA has significant expertise in the law and policy governing detention in Canada. The work that the BCCLA has done regarding detainee rights, through litigation and with oversight agencies, include the following:

- With John Howard Society, we led the constitutional challenge to the practice of prolonged solitary confinement in federal prisons across Canada, which the BC Court of Appeal has held to be an unconstitutional practice in its current form.

- We have intervened with the Union of BC Indian Chiefs at the Supreme Court of Canada in the *Ewert v. Canada* case, which challenges the use of prisoner risk assessment tests that can be culturally biased against Indigenous prisoners.
- We have called for transparency and accountability in a number of prison deaths, including the Soleiman Faqiri's death in an Ontario correctional facility; and the case of Christopher Robert Roy, who committed suicide in his prison cell after spending two months in solitary confinement.
- We participated in a report on arbitrary imprisonment and cruel treatment of migrant detainees with mental health issues in Canada.

Support for the Timely Judicial Oversight of Decisions Infringing Prisoners' Rights

The BCCLA has consistently argued for a robust interpretation of habeas corpus in numerous interventions before the Supreme Court of Canada.

In *May v. Ferndale Institution*, we argued that the BC and Ontario Courts of Appeal erred by reading in limitations on the availability of habeas corpus. To ensure timely judicial oversight in matters such as involuntary transfer, the provincial courts should play a coordinate, not subordinate, role to the Federal Court. We submitted that when federal prisoners seek to challenge the lawfulness of derivations on their residual liberty, they should not first have to exhaust all alternative remedies, such as a judicial review application to the Federal Court. In support of this argument, we placed habeas corpus in its historic context, discussing the role of judicial intervention in the prison decision-making context, the evolution of the "hands-off" common-law doctrine, the inadequacy of the prison grievance system, and the imperative to provide access to justice behind prison walls.

In *Mission Institution v. Khela*, the BCCLA argued that to preserve the rule of law in the corrections context, the level of deference afforded on a habeas corpus application must be commensurate with both the importance of the liberty interests at stake, and the unique challenges faced in maintaining the rule of law behind prison walls.

Our most recent intervention about habeas corpus was in *Canada (Minister of Public Safety and Emergency Preparedness) v. Chhina* where we again argued in favour of superior court jurisdiction over habeas corpus applications to promote access to justice, an essential component of the rule of law. Specifically, we argued that immigration detainees should be able to challenge the lawfulness of their indefinite detention through the writ of habeas corpus.

Concern that Proposed Changes to Civil Procedure Rules (CPR) will Undermine s. 10(c) Charter Rights

Habeas corpus is at the core of the rule of law and provides a necessary counterbalance to guard against the well-documented failures and abuses by correctional authorities. 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 leave prisoners without adequate recourse to address liberty infringements and abuses of power by the state.

The BCCLA completely agrees with the main argument submitted to your group by Program Director Hanna B. Garson on behalf of the East Coast Prison Justice Society (ECPJS): that because prisoners have little to no legal support in making these applications in Nova Scotia, there is an overarching structural failure to ensure that their applications are meaningful. In their letter to your working group dated March 30, 2021, they highlight the foundational issue that cannot be ameliorated through procedural reforms – ***“that habeas applicants (the most vulnerable, under-educated demographic) are self-represented.”***

The BCCLA concurs with the ECPJS that the perceived lack of merit in habeas corpus applications ***must not*** be addressed by instituting a more aggressive summary dismissal procedure, as this would likely clear the docket of both *bona fide* and *non bona fide* applications. Given the constitutionally entrenched nature of the right to habeas corpus, we strongly urge against any recommending procedural changes that could weaken prisoner access to timely judicial oversight.

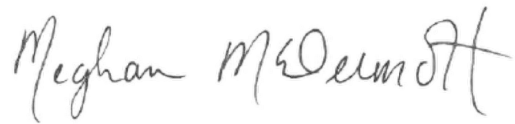
Social Context of Habeas Corpus Applications

In addition to the legal principles informing our advocacy in support of expansive and meaningful access to habeas corpus, the BCCLA is further motivated by the social context which gives rise to such applications. Many individuals detained by the state are particularly vulnerable due to intersecting forms of discrimination based on race or national origin, disability, poverty, language barriers, and inability to obtain legal counsel. We know from our recent litigation on solitary confinement, as well as from reports by the Office of the Correctional Investigator and stories in the news media, that detainees can and do face serious and persistent rights breaches at the hands of the state. Against this backdrop – in which many detainees already feel powerless – it is crucial for those of us committed to the rule of law to fight against any further barriers to access to justice.

Summary

Due to our long-standing advocacy for an expansive reading of habeas corpus procedure in Canada, the BCCLA will continue to monitor the proposals being made regarding Nova Scotia's CPR. We are grateful that your working group has been open to consultation about this important matter.

Sincerely,

A handwritten signature in black ink that reads "Meghan McDermott". The signature is written in a cursive, flowing style.

Meghan McDermott

Interim Policy Director

BC Civil Liberties Association

CC: Hanna B. Garson, Program Director, East Coast Prison Justice Society
Abbey Deshman, Director of Criminal Justice Program, Canadian Civil Liberties Association
Emma Halpern, Executive Director, Mainland Elizabeth Fry Society
Nora Diamante, Advocacy Committee, Canadian Prison Law Association
Tom Engle, President, Canadian Prison Law Association