

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

APPELLANT

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF
ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY
GENERAL OF BRITISH COLUMBIA, ALBERTA PRISON JUSTICE
SOCIETY, ASSOCIATION DES AVOCATS.ES CARCÉRALISTES DU
QUÉBEC, BLACK LEGAL ACTION CENTRE, BRITISH COLUMBIA CIVIL
LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES
ASSOCIATION, CANADIAN PRISON LAW ASSOCIATION, DAVID ASPER
CENTRE FOR CONSTITUTIONAL RIGHTS, INMATE WELFARE
COMMITTEE OF STONY MOUNTAIN INSTITUTION, MENTAL HEALTH
LEGAL ADVOCACY COALITION, QUEEN'S PRISON LAW CLINIC, WEST
COAST PRISON JUSTICE SOCIETY

INTERVENERS

FACTUM OF THE INTERVENER
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
Rule 42 of the Rules of the Supreme Court of Canada

PENDER LITIGATION

1175-510 Burrard Street
Vancouver, B.C. V6C 3A8

Frances Mahon

Tel: 604-669-6699

Fax: 604-681-0652

Email: fdm@penderlitigation.com

**Counsel for the Intervener, the British Columbia
Civil Liberties Association**

ORIGINAL TO:

THE REGISTRAR

Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario K1A 0K1

COPIES TO:

PATH LEGAL

85 Queen Street
Dartmouth, NS B2Y 1G7

Benjamin Perryman

Hanna Garson

Tel: (902) 293-0479

Email: ben@benjaminperryman.com

hanna@hannagarsonlaw.ca

Counsel for the Appellants

**ATTORNEY GENERAL OF NOVA
SCOTIA**

Nova Scotia Department of Justice
1690 Hollis Street
Halifax, NS B3J 2L6

Agnes MacNeil, KC

Andrew Hill

Caitlin Menczel-O'Neill

Tel: (902) 220-6313

Email: Agnes.MacNeil@novascotia.ca

SUPREME ADVOCACY LLP

340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 220-7490

Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Appellants

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Léa Desjardins

Tel: (613) 786-0106

Email: lea.desjardins@gowlingwlg.com

**Agent for Counsel for the Respondent,
Attorney General of Nova Scotia**

Andrew.Hill@novascotia.ca
Caitlin.Menczel-ONeill@novascotia.ca

**Counsel for the Respondent, Attorney
General of Nova Scotia**

STEWART MCKELVEY
600-1741 Lower Water Street
PO Box 997
Halifax, NS B3J 2X2

Erin McSorley
Tel: (902) 444-8819
Fax: (902) 420-1417
Email: emcsorley@stewartmckelvey.com

**Counsel for the Respondent, Nova Scotia
Health Authority**

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 8th Floor
Toronto, ON M7A 1W3

Michael J. Sims Shayna Levine-Poch
Tel: (416) 420-4983 Email:
michael.sims@ontario.ca

**Counsel for the Intervener, Attorney
General of Ontario**

TRUDEL JOHNSTON & LESPÉRANCE
750, côte de la Place-d'Armes, suite 90
Montréal, QC H2Y 2X8

Louis-Alexandre Hébert-Gosselin
Marie-Laure Dufour
Tel: (514) 871-8385 Ext: 219
Email: louis-alexandre@tjl.quebec

**Counsel for the Intervener, Association des
Avocats.es Carcéralistes du Québec**

JURISTES POWER LAW
50 O'Connor St., Suite 1313
Ottawa, ON K1P 6L2

Darius Bossé
Tel.: (613) 702-5566
Email: dbosse@powerlaw.ca

**Agent for Counsel for the Intervener,
Attorney General of Ontario**

**MINISTRY OF JUSTICE
SASKATCHEWAN**
820-1874 Scarth Street Constitutional Law
Branch Regina, SK S4P 4B3
Noah Wernikowski
Johnna Van Parys
Tel: (306) 786-0206 Email:
noah.wernikowski@gov.sk.ca

**Counsel for the Intervener,
Attorney General of Saskatchewan**

**ATTORNEY GENERAL OF BRITISH
COLUMBIA**
Legal Services Branch 1301 - 865 Hornby
Street Vancouver, BC V6Z 2G3

Freya Zaltz
Alison Brown
Tel: (604) 660-3004
Email: freya.zaltz@gov.bc.ca

**Agent for Counsel for the Intervener,
Attorney General of British Columbia**

ATTORNEY GENERAL OF CANADA
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

John Provart
Anusha Aruliah
Tel: (647) 256-0784
Email: john.provart@justice.gc.ca
anusha.aruliah@justice.gc.ca

**Counsel for the Intervener,
Attorney General of Canada**

GOWLING WLG (CANADA) LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 563-9869
Email: matthew.estabrooks@gowlingwlg.com

**Agent for Counsel for the Intervener,
Attorney General of Saskatchewan**

OLTHUIS VAN ERT
66 Lisgar St.
Ottawa, ON K2P 0C1

Dahlia Shuhaibar
Tel: (613) 408-4297
Email: dshuhaibar@ovcounsel.com

**Agent for Counsel for the Intervener,
Attorney General of British Columbia**

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
National Litigation Sector
50 O'Connor Street
Ottawa, ON K1A 0H8

Zoe Oxaal
Email: zoe.oxaal@justice.gc.ca

**Agent for Counsel for the Intervener,
Attorney General of Canada**

QUEEN'S PRISON LAW CLINIC

505-303 Bagot Street
Kingston, ON K7K 5W7

Paul Quick**Adriel Weaver**

Tel: (613) 929-4092

Email: p.quick@queensu.ca

**Counsel for the Intervener,
Queen's Prison Law Clinic**

BORYS LAW

Barrister and Solicitor
11 Princess Street, Suite 301
Kingston, ON K7L 1A1

Simon Borys

Tel: (613) 777-6262

Email: simon@boryslaw.ca

**Counsel for the Intervener, Canadian
Prison Law Association**

SAVARDS LLP

26 Soho Street, Suite 400
Toronto, ON M5T 1Z7

Megan Savard

Tel: (416) 789-7843

Email: megan@savards.ca

**Counsel for the Intervener,
David Asper Centre for Constitutional
Rights**

GOLDBLATT PARTNERS LLP

270 Albert St., suite 1400
Ottawa, ON K1P 5G8

Colleen Bauman

Tel.: (613) 235-5327

Fax: (613) 235-3041

Email: cbauman@goldblattpartners.com

**Agent for Counsel for the Intervener,
Queen's Prison Law Clinic**

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695-8855

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
Canadian Prison Law Association**

**NORTON ROSE FULBRIGHT CANADA
LLP**

500 – 99 Bank St.
Ottawa, ON K1P 6B9

Jean-Simon Schoenholz

Tel.: (613) 780-1537

Email: jean-simon.schoenholz@nortonrosefulbright.com

**Agent for Counsel for the Intervener,
David Asper Centre for Constitutional
Rights**

GOLDBLATT PARTNERS LLP
20 Dundas Street West, suite 1039
Toronto, ON M5G 2C2

Jessica Orkin
Amanda Bruce
Tel: (416) 977-6070
Email: jorkin@goldblattpartners.com
abruce@goldblattpartners.com

**Counsel for the Intervener,
Canadian Civil Liberties Association**

PRISON AND POLICE LAW
1206 20 Ave SE
Calgary, AB T2G 1M8

Amy Matychuk
Tel: (587) 433-7272
Email: amy@prisonpolicelaw.ca

CHRIS SAMUEL
Barrister & Solicitor
473 Law Centre, University of Alberta
Edmonton, AB T6G 2H5
Tel: (780) 966-8195
Email: cnsamuel@ualberta.ca

RODIN LAW FIRM
1405 2nd St SW
Calgary, AB T2R 0W7

Sarah Rankin
Email: SRankin@Rodinlawfirm.com

**Counsel for the Intervener,
Alberta Prison Justice Society**

UNIVERSITY OF MANITOBA
100 – 297 Broadway Ave
Winnipeg, MB R3C 0R9
Leif Jensen
Allison Fenske
Tel: (204) 985-5210
Email: leif.jensen@umanitoba.ca

GOLDBLATT PARTNERS LLP
270 Albert St., suite 1400
Ottawa, ON K1P 5G8

Colleen Bauman
Tel.: (613) 235-5327
Fax: (613) 235-3041
Email: cbauman@goldblattpartners.com

**Agent for Counsel for the Intervener,
Canadian Civil Liberties Association**

SUPREME ADVOCACY LLP
340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
Alberta Prison Justice Society**

JURISTES POWER LAW
50 O'Connor St., Suite 1313
Ottawa, ON K1P 6L2

Millie Lefebvre
Tel: (613) 702-5564
Email: mlefebvre@powerlaw.ca

**Counsel for the Intervener,
Inmate Welfare Committee of Stony
Mountain Institution**

**Agent for Counsel for the Intervener,
Inmate Welfare Committee of Stony
Mountain Institution**

PRISONERS' LEGAL SERVICES

625 Agnes Street, Suite 310
New Westminster, BC V3M 5Y4

Pierre E. Hawkins

Tel: (604) 636-0470

Email: phawkins@pls-bc.ca

**Counsel for the Intervener,
West Coast Prison Justice Society**

GOLDBLATT PARTNERS LLP

20 Dundas St W, Suite 1039
Toronto, ON M5G 2C2

Saneliso Moyo

Ikram Handulle

Tel: (416) 979-4641

Email: smoyo@goldblattpartners.com

**Counsel for the Intervener,
Black Legal Action Centre**

GOLDBLATT PARTNERS LLP

270 Albert St., suite 1400
Ottawa, ON K1P 5G8

Colleen Bauman

Tel.: (613) 235-5327

Fax: (613) 235-3041

Email: cbauman@goldblattpartners.com

**Agent for Counsel for the Intervener,
Black Legal Action Centre**

ANITA SZIGETI ADVOCATES

55 University Ave., Suite 1100
Toronto, ON M5J 2H7

Anita Szigeti

Tel: (416) 504-6544

Email: anita@asabarristers.com

MARTELL DEFENCE

55 University Ave., Suite 1100
Toronto, ON M5J 2H7

Carter Martell

Tel: (647) 748-7487

Email: csm@martelldefence.com

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695-8855

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
Mental Health Legal Advocacy Coalition**

THOMPSON RIVERS UNIVERSITY

Faculty of Law

805 TRU Way

Kamloops, BC V2C 0C8

Dr. Ruby Dhand

Tel: (778) 471-8457

Email: rdhand@tru.ca

DEMELO HEATHCOTE

275 Colborne Street

London, ON N6B 2S7

Cassandra DeMelo

Tel: (519) 204-7966

Email: team@demelolaw.com

**Counsel for the Intervener,
Mental Health Advocacy Coalition**

INDEX

PART I – OVERVIEW	1
PART II – POSITION ON QUESTION IN ISSUE	1
PART III – STATEMENT OF ARGUMENT	1
A. Purposive interpretation of the s. 10(c) Charter right	1
B. Accessibility of habeas corpus	9
PART IV – TABLE OF AUTHORITIES	11

PART I – OVERVIEW

1. Illegal detentions must be dealt with swiftly and effectively. The *Charter* demands no less. The right to *habeas corpus* enshrined in section 10(c) of the *Charter* is the procedural mechanism allowing a prisoner to ensure their section 7 right to liberty is upheld inside the walls of a prison. The exceptions to *habeas corpus* review are narrow and have been carefully determined to ensure they still give primary effect to the section 7 liberty interest. When a purposive approach to the section 10(c) right is taken, there is no principled, *Charter*-compliant reason to shield a state actor's operational or policy-based decisions causing deprivations of liberty from *habeas corpus* review.

PART II – POSITION ON QUESTION IN ISSUE

2. The BCCLA takes no position on the facts or outcome of this case, but makes the following submissions:

- a. Taking a purposive approach to sections 7 and 10(c) of the *Charter*, *habeas corpus* is available to challenge residual deprivations of liberty regardless of whether those deprivations are the product of operational or policy decisions impacting multiple prisoners; and
- b. Superior courts have jurisdiction to hear *habeas corpus* applications even if those operational or policy-based decisions deal with systemic issues that could be addressed through a *Charter* challenge.

PART III – STATEMENT OF ARGUMENT

A. Purposive interpretation of the s. 10(c) *Charter* right

3. *Habeas corpus* must be available to prisoners challenging deprivations of liberty arising from operational or policy decisions impacting all detainees inside a prison. Deciding otherwise would be contrary to a prisoner's section 10(c) *Charter* right to have their detention reviewed for lawfulness through a *habeas corpus* application.

4. A purposive approach to interpreting section 10(c) of the *Charter* supports this conclusion. A purposive approach in *Charter* interpretation requires the purpose of the right in question to be examined in light of the meaning and purpose of other related *Charter* rights, and the goals of the *Charter* as a whole. As held by this Court in *Power*, “the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text”.¹

5. *Habeas corpus* is an ancient common law right, now enshrined in section 10(c) of the *Charter*. The primary purpose of the writ is to uphold the rule of law by protecting prisoners from illegal erosions of their liberty interest.² This Court’s modern *habeas corpus* jurisprudence has ensured the writ has “grown to achieve its grand purpose”.³ It must “as both a right and remedy... remain flexible and purposive in order to respond to unlawful deprivations of liberty”.⁴

6. Section 10(c) must be considered alongside its associated sections to determine its scope. Section 10(c) is contained within the legal rights at sections 7-14 of the *Charter*. These rights are meant to be read together. As held by this Court in *Hebert*, “it must be assumed that the framers of the *Charter* intended that [sections 7-14] should be interpreted in such a manner that they form a cohesive and internally consistent framework for a fair and effective criminal process”.⁵

7. Section 7 is the backbone of these legal rights. It informs, and is informed by, the legal rights in sections 8-14 meant to protect detainees from unlawful incursions on their liberty. Sections 8-14 are specific examples of deprivations to life, liberty, and security of the person not in accordance with the principles of fundamental justice. They are designed to uphold and protect section 7 guarantees in particular settings and circumstances.⁶ The right to be free from arbitrary detention protected by section 9 of the *Charter* illustrates this connection: an arbitrary detention infringes the right to liberty in a way that could never be in accordance with the principles of fundamental justice because there is no *Charter*-compliant legal basis for the detention.

¹ *R. v. Big M Drug Mart*, [1985] 1 SCR 295 (CanLII) at paras. 116-7; *Canada (Attorney General) v. Power*, 2024 SCC 26 at paras. 26-7, citing *Reference re Senate Reform*, 2014 SCC 32 at para. 25..

² *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 at para. 1 [*Chhina*].

³ *Chhina* at para. 19, citing *May v. Ferndale Institution*, 2005 SCC 82 at para. 21 [*May*].

⁴ *Dorsey v. Canada (Attorney General)*, 2025 SCC 38 at para. 2 [*Dorsey*].

⁵ *R. v. Hebert*, [1990] 2 SCR 151 at p. 176.

⁶ *Re B.C. Motor Vehicle Act*, [1985] 2 SC.R 486 (CanLII) at para. 29 [*MVA*].

8. The same is true for section 10(c). Like sections 7 and 9, section 7 is inextricably linked with section 10(c).⁷ It is a procedural mechanism that fulfills the liberty interest. As held by this Court in *May*, *habeas corpus* is a “crucial remedy” for violations of sections 7 and 9.⁸ If the state cannot prove the lawfulness of a detention when responding to a *habeas corpus* application, the prisoner’s right to liberty will have been infringed and they must be released from the conditions causing the deprivation of liberty.

9. The procedure in a *habeas corpus* application is a practical application of the link between sections 7 and 10(c). Section 7 “seeks to impose limits on the power of the state over the detained person... to effect a balance between the interests of the detained individual and those of the state”.⁹ Balance is achieved by permitting infringements of life, liberty, and security of the person only when they are in accordance with principles of fundamental justice.

10. The key is that the interests of the state and the detainee must be balanced fairly, without sacrificing or watering-down the *Charter* protections in play. *Habeas corpus* applications attain this goal through their unique procedure. A detainee’s right to liberty is protected through the ready availability of superior courts to hear the application, the relatively simple procedure, and the shift in onus to the state once the applicant establishes they have been deprived of their liberty and raises a legitimate ground upon which to question its legality.¹⁰ These aspects of a *habeas corpus* application are meant to, and do, assist a prisoner whose means to bring the application are constrained by the fact of their incarceration.

11. The state’s interest is protected by the two initial hurdles for the prisoner. By weeding out cases where the applicant cannot meet its onus, the state does not have to justify a detention that is not a true deprivation of residual liberty, or answer frivolous claims.¹¹ This overall procedure results in an appropriate balancing of interests vis-à-vis the incarcerated person and the state with the right to liberty given the priority it deserves.

⁷ *Dorsey* at para. 21.

⁸ *May* at para. 22.

⁹ *Hebert* at pp. 180.

¹⁰ *Mission Institution v. Khela*, 2014 SCC 24 at para. 30 [*Khela*].

¹¹ *Dorsey* at paras. 44, 73.

12. The principles underlying section 7 must be used as an interpretive lens and similarly given priority when deciding if the scope of section 10(c) allows a prisoner to bring a *habeas corpus* application in response to deprivations of liberty arising from operational or policy decisions which impact all inmates. This purposive approach ensures that the legal rights in the *Charter* are read together harmoniously and gives effect to the grand purpose of the writ: to protect a prisoner's liberty interest.

13. In this case, the Nova Scotia Court of Appeal held that because *habeas corpus* applications are meant to be summary proceedings and given high priority so courts may address deprivations of residual liberty on an expedited basis, they are “not intended to be a review of how correctional facilities are managed”.¹² For that reason, the court concluded the *habeas corpus* judge exceeded his jurisdiction by addressing operational and policy decisions made by the prison impacting the general population.¹³

14. This conclusion is not in accordance with this Court's direction that *habeas corpus* must remain flexible and purposive to protect a prisoner's liberty interests.¹⁴ Just as section 7 rights cannot be interpreted more narrowly than sections 8-14, those rights, including section 10(c), cannot be interpreted more narrowly than section 7.¹⁵ A harmonious reading of sections 7 and 10(c) demonstrates that state actors cannot shield their actions from scrutiny in a *habeas corpus* application by describing its failures as policy or operational decisions, or by arguing that the deprivations of liberty impact multiple prisoners.

15. Operational or policy-based decisions are choices made by state actors and subject to section 7 *Charter* review by superior courts. This is not a novel issue. In *PHS Community Services Society*, the state action in question was the Minister of Health's refusal to extend an exemption from federal drug laws to a supervised injection-site. This was a discretionary, policy-based decision which engaged the claimants' section 7 rights to liberty and security of the person. As

¹² *Nova Scotia (Attorney General) v. Diggs and Wilband*, 2025 NSCA 20 at para. 52 [Diggs].

¹³ *Diggs* at para. 6.

¹⁴ *Dorsey* at para. 2.

¹⁵ *MVA* at para. 28.

held by this Court, “[j]ustice requires us to consider this issue. The claimants have established that their s. 7 rights are at stake”.¹⁶

16. There is no principled reason to exclude operational or policy decisions made by state actors from *habeas corpus* review, whether or not those decisions impact multiple prisoners, and even if *habeas corpus* applications are meant to be summary in nature. This court’s jurisprudence on when superior courts may decline jurisdiction over *habeas corpus* applications is clear that exceptions to the *habeas corpus* right embedded in section 10(c) are meant to be rare, narrow in scope, and must give effect to a prisoner’s right to liberty. Superior courts have jurisdiction to hear *habeas corpus* applications once a prisoner has established a deprivation of residual liberty. Carving out a new exception for policy or operational decisions would go well beyond the rationales for why a superior court may, in limited circumstances, decline its jurisdiction.

17. Superior courts may only decline jurisdiction over *habeas corpus* applications in situations where a prisoner tries to challenge the legality of their conviction or sentence in lieu of an appeal,¹⁷ or where there is a “complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous”.¹⁸ Balance is achieved by ensuring the “constitutional right to *habeas corpus* is protected, while also realizing judicial economy, avoiding duplicative proceedings, and reducing the possibility of inconsistent decisions and forum shopping”.¹⁹

18. In these narrow instances, the prisoner would have already had access to a court to determine the legality of their detention through a conviction or sentence appeal, or could seek access through an adequate alternative administrative scheme to challenge deprivations of their residual liberty. These exceptions “acknowledge the development of sophisticated procedural vehicles in our modern legal system and their ability to fully protect fundamental rights such as *habeas corpus*.”²⁰ Crucially, they also ensure that a prisoner’s right to liberty is fulfilled.

¹⁶ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 117, 125-6.

¹⁷ *May* at para. 36.

¹⁸ *May* at paras. 40, 50.

¹⁹ *Chhina* at para. 29.

²⁰ *Chhina* at para. 26.

19. In *Chhina*, this Court summarized these exceptions and their underlying rationales. Citing *Gamble*,²¹ this Court re-affirmed that the first exception – attacking a conviction or sentence – is permitted because a prisoner may appeal their conviction or sentence to ensure both are legal and that the resulting incarceration is compliant with section 7. There is long-standing support for this view, including that statutory appeals in criminal matters were introduced 500 years after *habeas corpus*, and that the rule “pre-empting *habeas corpus* applications where a statutory appeal is available long pre-dates the *Charter*”.²² Nevertheless, *Gamble* is a good example of taking a broad, purposive approach to *habeas corpus* in order to maintain a prisoner’s section 7 right to liberty, even though the application in *Gamble* appeared on its face to be a collateral attack.

20. *Gamble* dealt with an unusual situation in which the prisoner was permitted to challenge her parole ineligibility period through a *habeas corpus* application because her sentence was rendered in accordance with *Criminal Code* provisions not in effect at the time the crime was committed. Justice Wilson for the majority of this Court held this was not a collateral attack on her conviction and sentence, because the applicant was not challenging the sentence that would have been imposed had the correct *Criminal Code* provision been applied. The applicant’s situation thus properly fell into the third *Dumas*²³ category of as a continuing deprivation of liberty. Importantly, this analysis was done in line with the need to maintain a purposive approach to deciding when *habeas corpus* should be available, and in accordance with superior courts since the advent of the *Charter* displaying “both creativity and flexibility in adapting the traditional remedy of *habeas corpus* to its new role” in line with section 7 of the *Charter*.²⁴

21. The second exception outlined in *Chhina* deals with the availability of alternative methods to attack deprivations of liberty through administrative processes. This exception is limited to situations where there is a “complete, comprehensive and expert scheme as broad and advantageous as *habeas corpus* in relation to the specific grounds in the *habeas corpus* application”.²⁵ Even where there is such a scheme, superior courts still maintain concurrent jurisdiction – this approach “properly recognizes the importance of affording prisoners a

²¹ *R. v. Gamble*, [1988] 2 SCR 595 [*Gamble*].

²² *Chhina* at para. 27.

²³ *Dumas v Leclercq Institution*, [1986] 2 SCR 459, 1986 CanLII 38 (SCC).

²⁴ *Gamble* at para. 66.

²⁵ *Chhina* at para. 43.

meaningful and significant access to justice in order to protect their liberty rights, a *Charter* value”.²⁶ Importantly, *May* and *Chhina* make it clear that not just any alternative administrative scheme will do. In order to be section 7 compliant, the legal and regulatory framework must be examined as a whole to ensure that it is as good or better than the *habeas corpus* remedy.

22. *Chhina* demonstrates this principle in the context of immigration detainees. Like *Gamble*, this Court took a more nuanced approach to the application, which could have on its face appeared to fall within the second exception. Rather than simply apply earlier cases finding that superior courts must decline jurisdiction because immigration legislation and accompanying Federal Court review provided a complete, comprehensive, and expert scheme, this Court went deeper to look at the particular circumstances of the prisoner’s detention.

23. The lengthy, indeterminate nature of the detention in issue could not be meaningfully addressed by the statutory scheme because of the narrow scope of review available, the remedies in Federal Court are limited and less advantageous to prisoners experiencing this type of immigration detention, and *habeas corpus* provides a timelier remedy.²⁷ Mr. Chhina’s right to liberty – and thus his right to bring a *habeas corpus* application in superior court – outweighed the concerns identified by this Court about judicial economy, duplicative proceedings, inconsistent decisions, and forum shopping.

24. Applications in response to operational or policy decisions do not run afoul of these concerns. There is no alternative statutory scheme whereby a prisoner can address deprivations of liberty arising from operational or policy decisions, nor is there a possibility of inconsistent decisions or forum shopping. As will be developed below, bringing a *Charter* application to challenge operational or policy decisions is less accessible, and thus less advantageous, to the prisoner. For this reason, superior courts should not decline jurisdiction to hear such applications, much less be found to have exceeded their jurisdiction to hear the case at all.

25. The lower court decisions cited by the Nova Scotia Court of Appeal in this case do not assist in determining whether *habeas corpus* may be used to remedy deprivations of liberty arising

²⁶ *May* at para. 72.

²⁷ *Chhina* at paras. 59-66.

from rotational lockdowns. The court first cited *Trang*²⁸ in support of its conclusion that it is inappropriate for *habeas corpus* judges to examine prison conditions such as rotational lockdowns. First, *Trang* is not a *habeas corpus* case, nor were the prisoners seeking relief from deprivations of their liberty as they were no longer in custody. Second, the Alberta Court of Appeal held that the real problem with the trial judge's conclusion about the safety risks of prisoner transport vans was that it resembled a mandatory injunction rather than declaratory relief – not because it dealt with issues impacting multiple prisoners.²⁹ In this case, the Court of Appeal's concerns also revolve around how the *habeas corpus* judge issued a declaration purporting to bind all superior courts.

26. Even if the judge in this case, like the chambers judge in *Trang*, improperly made a declaration about the use of rotational lockdowns which impact multiple prisoners, it does not mean that *habeas corpus* should never be available to those prisoners. That would be an impoverished interpretation of section 10(c) and discordant with section 7.

27. Indeed, the Court of Appeal in this case did not comment on the *habeas corpus* judge's conclusion that the rotational lockdowns constituted a deprivation of liberty, despite impacting the general population, or that the applicants had met their onus to establish there was a legitimate ground to question the legality of the deprivation of liberty. The application was thus squarely within the superior court's jurisdiction to hear the application. The onus then properly shifted to the state to justify the legality of the detention. In these circumstances, that justification touched on operational policies arising from staffing shortages.

28. There is nothing overly burdensome about this approach, when considered against the extreme incursions on liberty imposed on inmates by near-constant lockdowns, and the broad protection afforded to the section 7 liberty interests of prisoners. State actors must be guided by section 7 principles when creating and implementing policy on issues that clearly impact a prisoner's residual liberty and be prepared to prove these policies are compliant with the *Charter*. If appropriate care is taken when making operational and policy decisions it should not be difficult to prove that any resulting detention is lawful.

²⁸ *Trang v. Alberta (Edmonton Remand Centre)*, 2007 ABCA 263.

²⁹ *Trang* at para. 22.

29. As *Chhina* demonstrates, to be section 7 compliant, any decision carving out exceptions allowing superior courts to decline their jurisdiction to hear *habeas corpus* cases must look at the real-life circumstances of the prisoner, as well as the adequacy of the alternative procedural options available to them. When a person's right to liberty is brought into stark relief by constant lockdowns brought about by a state actor failing to effectively manage its own prisons, the prisoner must have ready recourse to the courts.

B. Accessibility of *habeas corpus*

30. Prisoners must be able to address deprivations of liberty in a *habeas corpus* application, even if relief may also be available to them through a traditional *Charter* challenge. Describing the conditions causing the deprivation of liberty as “systemic” does not displace a prisoner's right to swiftly and effectively review the legality of their detention. Any other conclusion would be contrary to this Court's modern *habeas corpus* jurisprudence.

31. The expansion of *habeas corpus* since the advent of the *Charter* underscores the deep relationship between *habeas corpus* and section 7 of the *Charter*: the writ is a crucial means for a prisoner to protect their right to liberty. The revived recognition of the liberty right for prisoners in different contexts ensures the rule of law is upheld by limiting procedural hurdles and accounting for the reality prisoners currently face.

32. A prisoner must be able to choose between challenging operational or policy decisions impacting the liberty of the general prison population through a *Charter* application or *habeas corpus*. Even if other inmates experience the same or similar deprivation of liberty, the remedy sought and the court's analysis is still individualized to the prisoner's particular circumstances.

33. A *habeas corpus* application has obvious benefits to the prisoner, as this Court has found time and time again. It is fast, accessible, and the shifting onus of proof reduces barriers for the prisoner. By contrast, *Charter* challenges are much less advantageous to prisoners. They can take years to complete and require significant litigation resources. The procedure is complex and the burden on a prisoner to prove a *Charter* violation on a balance of probabilities is much higher than in a *habeas corpus* application, where the prisoner only need raise a legitimate ground upon which to question the legality of their detention before the onus shifts to the state to prove its legality.

34. It is a core component of the rule of law that every right needs a remedy. This implies a need for favourable procedures to ensure access to justice. As this Court held in *Doucet-Bourdreau*, “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”.³⁰

35. Permitting prisoners facing near-constant lockdowns to make *habeas corpus* applications responds to the challenges faced by a prisoner when coming to the courts. The ready availability of superior courts to hear *habeas corpus* applications makes it an effective remedy.

36. The section 10(c) right must not be construed more narrowly than section 7. The right to *habeas corpus* embedded in section 10(c) should be interpreted to apply to operational and policy-based decisions and subject to superior court review outside of a traditional *Charter* challenge. This approach better protects the prisoner, gives full effect to the liberty interest protected by sections 7 and 10(c), and is in keeping with this Court’s modern *habeas corpus* jurisprudence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of July, 2025.



FRANCES MAHON

Counsel for the Intervener, British Columbia Civil Liberties Association

³⁰ *Doucet-Bourdreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 at para. 25 [Emphasis in original].

PART IV – TABLE OF AUTHORITIES

Jurisprudence	Paragraph(s)
<u><i>Canada (Attorney General) v. PHS Community Services Society</i>, 2011 SCC 44</u>	15
<u><i>Canada (Attorney General) v. Power</i>, 2024 SCC 26</u>	4
<u><i>Canada (Public Safety and Emergency Preparedness) v. Chhina</i>, 2019 SCC 29</u>	5, 17, 18, 19, 21-23
<u><i>Doucet-Boudreau v. Nova Scotia (Minister of Education)</i>, 2003 SCC 62</u>	33
<u><i>Dumas v Leclercq Institution</i>, [1986] 2 SCR 459, 1986 CanLII 38 (SCC)</u>	20
<u><i>Nova Scotia (Attorney General) v. Diggs and Wilband</i>, 2025 NSCA 20</u>	13, 25, 27,
<u><i>Dorsey v. Canada (Attorney General)</i>, 2025 SCC 38</u>	5, 8, 11, 14
<u><i>May v. Ferndale Institution</i>, 2005 SCC 82</u>	5, 8, 17, 21
<u><i>Mission Institution v. Khela</i>, 2014 SCC 24</u>	10
<u><i>Re B.C. Motor Vehicle Act</i>, [1985] 2 S.C.R. 486</u>	7, 14
<u><i>R. v. Big M Drug Mart</i>, [1985] 1 SCR 295</u>	1
<u><i>R. v. Gamble</i>, [1988] 2 SCR 595</u>	19, 20
<u><i>R. v. Hebert</i>, [1990] 2 S.C.R. 151</u>	6, 9
<u><i>Trang v. Alberta (Edmonton Remand Centre)</i>, 2007 ABCA 263</u>	25