Creative Uses of Habeas Corpus
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Introduction

Habeas corpus plays a vital role in correctional law, providing inmates with a relatively expeditious and accessible mechanism for challenging the basis and conditions of their incarceration. Although the nature and scope of the remedy has never been entirely clear, historically, the writ seems to have been flexibly applied to deal with a wide range of issues. However, in recent years, the trend in the case law seems to be toward a more restrictive view of habeas corpus.

The Supreme Court of Canada in *Dumas v Leclerc Institution of Laval*, [1986] 2 S.C.R. 469 (*Dumas*), at para 12, outlined three broad categories of deprivation of liberty:

> (1) the initial deprivation of liberty;
> (2) a substantial change in conditions amounting to a further deprivation of liberty; or
> (3) a continuation of the deprivation of liberty

The Supreme Court returned to the issue of habeas corpus in *May v Ferndale Institution*, 2005 SCC 82 ("*May*") and *Khela v Mission Institution*, 2014 SCC 24 ("*Khela*"). *May* and *Khela* were both involuntary transfer cases that neatly fit into the second category of deprivation of liberty described in *Dumas*, and the deprivation of liberty in these cases was a loss of something the inmate once had. The inmate was transferred to a higher security level. He lost the liberty he had at the lower level of security, and this change in conditions amounted to a further deprivation of liberty.

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However, nothing in *May* or *Khela* overrules, either explicitly or implicitly, the fact that there are still two other types of deprivation of liberty, as set out in *Dumas*, so either the test set out in *May* and *Khela* does not apply to the other two types of deprivation of liberty, or the test must be applied flexibly in those situations. I prefer the latter–because it's easier than trying to come up with a new test.

Unfortunately, the trend in the case law over the past few years appears to be to find that there is no deprivation of liberty in situations *other than* where the inmate has lost something they once had, but I argue that this is not correct, and I believe we need to push back against this, or any attempt to restrict the scope of habeas corpus.

History of habeas corpus in Canada

Known as The Great Writ, habeas corpus dates back as early as the year 1215, to the principle enshrined in the Magna Carta that "no free man shall be seized or imprisoned except by the lawful judgment of his equals or by the law of the land". The first legislation respecting habeas corpus was enacted in 1641 in England.

After a series of incidents in the federal prison system in Canada in the 1970s, the Supreme Court formally acknowledged the right of inmates to litigate the loss of their residual liberty in *Martineau v Matsqui Institution*, [1980] 1 S.C.R. 602 ("*Martineau*"). This case dealt with the writ of certiorari in relation to the handling of a disciplinary offence. The court recognized that abuses of power

flourish when authorities are shielded from review by the courts. Dickson J. (as he then was) explained that, "The rule of law must run within penitentiary walls" (*Martineau*, at para 4).

In 1982, habeas corpus was incorporated into s. 10(c) of the *Charter*, which states that "everyone has the 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".

In the post-*Charter* context, habeas corpus is understood as one of the key mechanisms to enforce certain fundamental constitutional promises, including the right not to be deprived of liberty except in accordance with the principles of fundamental justice (s. 7) and the right not to be arbitrarily detained or imprisoned (s. 9) (*May*, at para 22; *Khela*, at para 29).

This point was recently reiterated by the Ontario Court of Appeal in *Chaudhary v Canada (Minister of Public Safety & Emergency Preparedness)*, 2015 ONCA 700, at paras 38-39, where the court said:

> The prerogative writ of habeas corpus is "a cornerstone of liberty" and "a means of judicial control over the arbitrary behaviour of the executive government". It is "one of the most important safeguards of the liberty of the subject." It is also "the most significant means of protecting individual liberty." The writ is thus often referred to as the "Great Writ of Liberty." It has also been described as "the great and efficacious writ, in all manner of illegal confinement."

Other than the *Charter*, there is no federal legislation dealing specifically with habeas corpus; however, several provinces have enacted their own legislation about habeas corpus (i.e. *Habeas Corpus Act*, RSO 1990, c H.1; *Liberty of the Subject Act*, R.S.N.S. 1989, c. 253; *Habeas Corpus Act*, R.S.P.E.I. 1974, c. H-1). These statutes deal largely with procedural aspects and not with what

constitutes a deprivation of liberty, or how the lawfulness of a deprivation of liberty should be determined. These issues have been left to the courts.

As noted above, only a few years after the *Charter* was enacted, the Supreme Court set out three types of deprivation of liberty in *Dumas*, though they left the issue of how a deprivation of liberty should be defined until *May* in 2005.

The test for habeas corpus

May sets out the two-step procedure for habeas corpus (at para 74). This test was affirmed in *Khela* (at para 30). The test is:

(1) The applicant must show that there has been a deprivation of their liberty and raise a legitimate ground upon which to question the legality of that deprivation; and
(2) The onus then shifts to the Respondent (the Attorney General on behalf of the Correctional Service of Canada) to establish the lawfulness of that deprivation of liberty.

Once the applicant raises a legitimate ground upon which to question the legality of the deprivation of liberty, a court has no discretion to refuse to examine the substance of the decision, and determine whether the deprivation of liberty is lawful (*Khela*, at para 78).

Traditionally, a decision depriving an inmate of their liberty would be considered unlawful if the decision maker lacked the jurisdiction to order the deprivation of liberty, if the decision was not made in accordance with the *Charter* (including the principles of fundamental justice ("PFJ")), or if there was a breach of procedural fairness (*May*, at para 77). In *Khela*, the Supreme Court added reasonableness as another ground to challenge the lawfulness of a decision, recognizing that an unreasonable decision will be considered unlawful (at paras 3 & 52).

As a side note, there is arguably some overlap between the principles of fundamental justice in s. 7 of the *Charter* and procedural fairness in the context of a habeas corpus application. As Lamer J. (as he then was) stated in *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, at para 73, "we should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures…". These comments were adopted by the Federal Court in the involuntary transfer case of *Demaria v Canada (Regional Transfer Board)*, [1988] 2 FC 480, at para 21.

Moreover, in *R v Liu*, 2010 ONSC 798, at para 11, (a habeas corpus application contesting an involuntary transfer), Wood J. stated that, "a decision to [involuntarily transfer an inmate] can only be taken in accordance with the principles of fundamental justice pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*. Fundamental justice in this administrative context means fairness."

So what's the problem?

Since the Supreme Court's decisions in *May* and *Khela*, the trend has been to restrict habeas corpus to cases involving a deprivation of liberty stemming from the loss of something the inmate once had (namely, the freedom the inmate had at a lower level of security before being transferred). I argue that this is wrong–because it is. This essentially limits habeas corpus to only one of the three categories outlined in *Dumas* (category 2).

Again, both *May* and *Khela* were involuntary transfer cases that, on the facts, involved a change in conditions that clearly fit into the category 2 deprivation of liberty, but neither case contains any language that overrules *Dumas*, or restricts habeas to only those cases that involve a change in circumstances and the loss of something the inmate once had. So, unless you want to come up with a new test for habeas corpus for categories 1 and 3, I suggest the "flexible application" approach to situations involving either of these categories.

Since most of the cases we deal with through habeas corpus in the correctional law context (aside from the standard involuntary transfers and segregations) fall into category 3, I will focus my comments from hereon on that category. Remember that, *by definition*, this category does not involve something that an individual once had. Category 3 is a situation where a deprivation of liberty that was once lawful, *no longer is*, meaning the inmate is entitled to have that deprivation of liberty removed. The situation I most commonly make this argument in is where the inmate is stuck at maximum or medium security, and feels they should be at a lower security level (a "refusal to transfer" situation). In those situations, I argue that they are being deprived of their liberty by being kept at this higher security level.

The difficulty with this, of course, is pinpointing when the inmate acquires a *legal entitlement* to a lesser form of deprivation of liberty. The argument I use is that when, objectively, the inmate meets the criteria (as set out in Annex B of Commissioner's Directive 710-6 – Review of Inmate Security Classification) for the institutional adjustment, public safety, and escape risk ratings that correspond with a lower level of security, as per s. 18 of the *Corrections and Conditional Release Regulations*, then they are legally entitled to that lower level of security. However, I admit that this is not a perfect argument. If it was, I would have won all my refusal to transfer cases and I wouldn't be writing this paper.

If the situation were as clear as an inmate being detained after their warrant expiry, then it would be easy to point to their warrant expiry date as the point at which they acquired a legal entitlement to a lesser form of deprivation of liberty (i.e. being back home with their wife and kids), but in a refusal to transfer to a lower security level situation, it is not this clear.

Still, my example of the inmate being held beyond their warrant expiry date shows that there must be situations where habeas corpus can be used, in which the inmate has not lost anything they once had. The Department of Justice (I hope) wouldn't argue that habeas corpus isn't applicable in such a situation because the inmate hasn't suffered "a substantial change in conditions amounting to a further deprivation of liberty". Or maybe they would, I don't know…

Habeas Corpus Case Law

I'm not the only one who believes that habeas corpus can be used in situations other than the standard change in conditions amounting to a further deprivation of liberty situation. At the Superior Court level, across the country, some judges are willing to recognize this. Appellate courts generally seem to be more conservative, but even they accept it can be done.

Below is a list of cases from the courts of appeal, and the Supreme Court, involving habeas corpus applications in situations other than involuntary transfer or segregation. This is a comprehensive list of appellate cases from Westlaw. Part 1 illustrates the broad and flexible nature of habeas corpus, pre-*Dumas*, post-*Dumas* and pre-*May*, and post-*May*–and then Part 2 is 10 pages of cases that say the complete opposite of what I want them to say.

1. Cases where appellate courts have explicitly or implicitly accepted habeas corpus is an appropriate forum for situations other than involuntary transfer and segregation

(a) Pre-*Dumas* cases

Morgan v Stony Mountain Institution, 1982 CarswellMan 6 (CA)

- Director of institution challenging granting of habeas corpus (there was a warrant of apprehension and suspension of day parole after Board decision revoking parole had been quashed by the FCA)
- Granting of habeas corpus upheld, focused on lack of authority to continue to hold the inmate

R v Moore, [1983] 1 S.C.R. 658

- Crown challenging revocation of mandatory supervision
- Upheld court of appeal and Seaton JA in *Truscott v Dir of Mountain Institution*
- Board has no jurisdiction to suspend and thereby detain past release date based on *Penitentiary Act, Parole Act*, etc.
- Habeas corpus upheld

Truscott v British Columbia (Director of Mountain Institution), 1983 CarswellBC 518 (CA)

- Inmate challenging immediate revocation of mandatory supervision upon release
- Board has no statutory authority to detain
- Habeas corpus granted and upheld on appeal

R v Frankum, 1986 CarswellBC 660 (CA)

- Inmate challenging concurrent sentence for trying to escape custody
- Interpreted the *Parole Act* and *Criminal Code*
- Appeal allowed and habeas corpus granted as statute requires the sentence to run consecutively only to part of sentence serving at time of escape
- Entitled to mandatory supervision based on time served, so habeas corpus granted

R v Zitek, 1986 CarswellOnt 898 (CA)

- Inmate challenging detention after one conviction overturned (sentenced four months for common assault, one month unlawful possession, and five months on obstruction—total sentence was 10 months, consecutive)
- Considered *Criminal Code* and *Parole Act*, and served six months of his consecutive sentence by time of application
- Appeal allowed, ordered released

(b) <u>Post-*Dumas* cases, pre-*May* cases</u>

R v Gamble, [1988] 2 S.C.R. 595

- Inmate challenging not being tried and sentenced based on law in force at the time
- Habeas corpus available where punished greater than provided by law in effect at time of commission of offence
- Cites *Dumas* and found deprivation of liberty unlawful by virtue of s. 7
- Appeal allowed and inmate declared eligible for parole

Chester v Canada (National Parole Board), 1989 CarswellBC 699 (CA)

- Inmate challenging the reduction in recredited earned remission following revocation of his day parole
- Focused on authority of Board to change decision on recrediting earned remission, finding no jurisdiction
- Appeal allowed and habeas corpus granted

Steele v Mountain Institution, [1990] 2 S.C.R. 1385

- Inmate challenging indeterminate detention after 37 years under s. 12 of the Charter
- Upheld granting of habeas corpus, but said judicial review is most appropriate
- Only granted habeas corpus given inmate's age, length of incarceration, and difficulties of commencing new proceedings

R v Berquist, 1991 ABCA 338

- Inmate challenging dismissal of habeas corpus application that sought to challenge continued detention after serving several years of a life sentence
- Citing *Gamble*, found that court has jurisdiction to inquire as to whether or not convicted under the "wrong law" and grant s. 24(1) remedy if liberty deprived contrary to the PFJ

- Convictions based on laws deemed unconstitutional would contravene the PFJ, but not the situation in that case
- Appeal dismissed

R v Swain, [1991] 1 S.C.R. 933
- Inmate challenging acquittal by reason of insanity
- Mentions that habeas corpus available after 30 days in transitional period ,if court order for psychiatric observation does not limit the time
- Appeal allowed, and judicial stay entered

Cruikshanks v. Canada, 1992 CarswellBC 941 (CA)
- Inmate challenging revocation of mandatory supervision from evidence that infringed his Charter rights
- Urinalysis breached s. 8
- Appeal allowed, and habeas corpus and certiorari in aid granted

Idziak v Canada (Minister of Justice), [1992] 3 S.C.R. 631
- Inmate challenging warrant of surrender under *Extradition Act*
- Citing *Miller, Cardinal, Morin, Gamble, and Re Isbell*, found that the threat of detention sufficient to ground habeas application
- No comprehensive review scheme
- But no violation of s. 7 in procedure
- Appeal dismissed

R v Pearson, [1992] 3 S.C.R. 665
- Attorney General of Quebec challenging the granting of habeas corpus in response to a denial of bail on s. 52 *Charter* challenge
- Habeas corpus unavailable to challenge denial of bail as bail review offers an alternative remedy
- But court said in narrow circumstances it might, such as this case where the matter was a s. 52 *Charter* challenge
- Appeal allowed, habeas corpus application dismissed

R v Mallett, 1992 CarswellMan 344 (CA)
- Inmate seeking leave to review a bail order after a previous review led to his incarceration
- Habeas corpus with certiorari in aid can be invoked to quash a defective warrant
- Leave granted as defective in form and does not adequately recognize accused's right to be on bail

Vukelich v Vancouver Pre-trial Centre, 1993 CarswellBC 515 (CA)
- Inmate challenging detention after failure to conduct a hearing within 90 days to consider pre-trial custody per the *Criminal Code*, s. 525
- Director cannot apply before 90 days and then must do so "forthwith", not instantaneously
- If s. 525 application made, then appropriate to refer habeas corpus to that judge; if no application made, habeas corpus may be used to determine validity of detention
- Habeas corpus may be appropriate if no s 525 application made

- Inmate's detention not unlawful on 91st day of detention
- Appeal dismissed

Pinheiro v Canada (National Parole Board), 1994 CarswellBC 2708 (CA)
- Challenging detention past statutory release
- Accepted it was a deprivation, but appeal was moot
- Appeal dismissed, habeas corpus denied

R v Ferris, 1994 CarswellNB 9 (CA)
- Inmate challenging parole eligibility restricted until half of sentence served
- While appeal was one avenue, *Charter* violations of ss. 7 and 11(i) sufficient to grant remedies requested (which included habeas corpus)
- Appeal granted, grants certiorari

Gallichon v Canada (Commissioner of Corrections), 1995 CarswellOnt 986 (CA)
- Challenging indeterminate preventive detention based on ss. 9 and 12 of the Charter
- Seeking unconditional release after 26 years
- Found that the sentence was so excessive as to outrage standards of decency given limited danger to the public he posed
- Appeal allowed and habeas corpus granted

Mooring v Canada (National Parole Board), [1996] 1 S.C.R. 75
- Inmate challenging revocation of statutory release based on evidence obtained in violation of Charter
- Habeas corpus available where unlawfully detained after Parole Board failed to exercise its jurisdiction to determine the constitutional issue raised (in most instances the more appropriate remedy is to remit the matter to the Board)
- Parole Board functus officio as inmate's sentence had expired

R v Ignace, 1996 CarswellBC 2733 (CA)
- Inmate challenging denial of bail
- Citing *Pearson*, reaffirms that habeas corpus is not available to challenge denial of bail as bail review exists as an alternative remedy
- Exception for narrow circumstances, such as s. 52 *Charter* challenge in this case, but other factors weighed against granting the appellant bail
- Appeal dismissed

Ruest v Atlantic Institution Penitentiary, 1997 CarswellNB 61 (CA)
- Challenge to calculation of statutory release of inmate with multiple sentences who had already had statutory release revoked
- Interpreted the *CCRA* and found errors in previous calculation
- Appeal allowed in part, directed CSC to determine release in accordance with guidance given

Fraser v Kent Institution, 1998 CarswellBC 3022 (CA)

- Institution challenging habeas corpus granted in response to revocation of parole after post-suspension hearing (Board would not grant an adjournment)
- Focused on *CCRA* interpretation and detention being unlawful due to revocation without the mandated hearing
- Citing *Steele* and *Dumas*, found that habeas corpus was appropriate, as review procedure did not offer an adequate remedy in light of system backlogs
- Appeal dismissed

Savard c Lavallee, 1998 CarswellQue 4926 (CA)

- Inmate challenging conditions of day parole that prevented him from enjoying his day parole
- Cited *Dumas* and *Miller* on deprivation of liberty
- Habeas corpus is available in such a case, but not appropriate case for it given availability of judicial review

R v C(JA), 1999 CarswellMan 422 (CA)

- Challenging young offender's detention in secure disposition when sentenced to serve open custody disposition
- Appeal allowed, habeas corpus granted to transfer youth

Armaly v Canada (Correctional Service), 2001 ABCA 280

- Crown challenging habeas corpus granted for revocation of full parole
- Habeas corpus not available where alternative remedy like Appeal Division, citing *Steele*
- Court of Appeal did not find that the application judge erred by finding a deprivation of liberty
- Procedural breach did not result in loss of jurisdiction
- Appeal allowed

Hickey v Kent Institution, 2003 BCCA 23

- Inmate sought to prevent an inter-provincial transfer
- Applied *Idziak, Mesalla, Isbell* (case law looking at habeas corpus in the context of extradition)
- Judge had jurisdiction to hear this habeas corpus application, but bound to exercise discretion to refuse to hear it if there is a viable alternative to the writ (i.e. judicial review)
- Appeal dismissed

Spindler v Millhaven Institution, 2003 CarswellOnt 3312 (CA)

- Habeas corpus available for those convicted of murder subject to different initial classification scheme that made maximum security mandatory
- The fact that there is a significant restriction on the liberty of certain prisoners allows a habeas corpus application to be made, even if judicial review is available
- Analysis relies on *Steele* and *Miller*
- But judicial review in Federal Court more appropriate unless exceptional circumstances
- Appeal dismissed

R v Gustavson, 2005 BCCA 32

- Inmate challenging not being allowed to attend his own hearings (designated dangerous offender), five habeas corpus appeals, and he was not allowed to attend any
- BC practice of not allowing unrepresented applicants to attend violates principles of natural justice
- Appeal granted, and remitted the applications to the Supreme Court to be dealt with

(c) <u>Post-*May* cases–which show, regardless of whether *May/Khela* test is explicitly referenced, that there is still more to habeas corpus than challenging the loss of something an inmate once had</u>

Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9

- Habeas corpus available to challenge continuing detention of foreign nationals under national security legislation

Bergeron v Quebec, 2007 QCCA 1212

- Inmate pled after negotiating an agreement to be a special witness, and transferred to facility denying him special treatments agreed to
- Special witness rights were guaranteed by s. 7 and habeas corpus relief was granted
- Stay of transfer allowed

R v Graham, 2011 ONCA 138

- Challenging revocation of accelerated day parole
- Habeas corpus jurisdiction is discretionary, but judge correct not to exercise here as no extraordinary circumstances, cites *May*
- Recognized detention while parole suspended would otherwise entitle one to habeas corpus
- Appeal dismissed

S(P) v Ontario, 2014 ONCA 900

- Inmate challenging involuntary commitment to a psychiatric hospital under the *Mental Health Act* following release from penitentiary
- Citing *Steele* and *Charkaoui*, held that habeas corpus appropriate to challenge the constitutionality of legislation authorizing detention—expressly recognized as a deprivation of liberty
- But case decided on *Charter* challenges and did not need to address habeas corpus issue
- Appeal allowed, and matter referred for redetermination

Lapple v Canada (AG), 2015 ONCA 386; *Canada (Attorney General) v Lewis*, 2015 ONCA 379; *Frost v Canada (AG)*, 2015 ONCA 386

- Inmates challenging denial of APR; they committed offences when APR was still in force
- APR still applies to those who committed offences before abolished—habeas corpus application in *Lapple* and *Frost*, but decision is mostly in *Lewis* in which a declaration was sought and s. 11(i) of the Charter was basis of the decision
- Appeal allowed, inmates entitled to APR

Chaudhary v Canada (Minister of Public Safety & Emergency Preparedness), 2015 ONCA 700

- Challenge to delay pending deportation
- Citing *May/Khela*, found a deprivation of liberty that attracted habeas corpus
- *Peiroo* exception was not a bar to habeas corpus in immigration-related matters
- Appeal granted and set aside order and remitted applications to SCJ

Bowden Institution v Khadr, 2015 SCC 26

- Confirmed ABCA holding on placement in a federal penitentiary when *International Transfer of Offenders Act* mandates a provincial facility
- Upheld ABCA, which applied *Khela* and "residual liberty" test
- Habeas corpus granted

G.D. v. Bowden Institution, 2016 ABCA 52

- Board and warden challenging habeas corpus granted in relation to revocation of day parole
- Judicial review is not an alternative to a habeas corpus application, and judge entitled to exercise discretion to hear the application
- Cites *May/Khela*
- Appeal dismissed

Parent v Guimond, 2016 QCCA 159

- Inmate challenging abolition of APR
- Relied on *Frost, Whaling, Liang* and other APR cases, finding habeas corpus is appropriate given breach of s. 11(i) rights
- Appeal granted

Chhina v Canada (Public Safety and Emergency Preparedness), 2017 ABCA 248

- Detainee challenging extended immigration detention
- Citing *Chaudhary, Charkaoui, Apaolaza*, court found that habeas corpus is available as detention is deprivation of liberty
- *Peiroo* exception is not complete bar to habeas corpus in immigration cases
- Appeal allowed and application returned to Queen's Bench for determination

Gogan v Canada (AG), 2017 NSCA 4

- Inmate challenging an initial security classification
- Inmate challenging initial placement at maximum security from Regional Reception Centre, which was less than maximum security
- Because this was an increase in the inmate's deprivation of liberty, this was actually decided as a category two *Dumas* case, but the fact that habeas was granted on an initial security classification makes this a case that demonstrates the flexibility nature of habeas corpus
- This case hinges on the fact that the initial placement was at max; it does not stand for the proposition that all initial placements can be challenged, particularly those at medium

Abbass v Western Health Care Corp, 2017 NLCA 24

- Detainee challenging detention under the *Mental Health Care and Treatment Act*

- Citing *May/Khela*, habeas corpus available as mental health legislation did not give fulsome review and the review procedure is slower
- Court did not determine merits of the habeas corpus application based on an incomplete record, but suggests that detention under the act could be a deprivation of liberty
- Appeal granted and remitted to trial division for continuation of hearing

Toure v Canada (Public Safety & Emergency Preparedness), 2018 ONCA 681

- Unlike in *Chaudhary*, the appellant could not show his detention was indeterminate so as to be deprived of liberty
- Appeal dismissed

2. Cases that show a more restrictive nature of habeas corpus

(a) Appellate case law

R v Dinardo, 1982 CarswellOnt 1315 (CA)

- Challenging transfer from provincial institution
- Habeas corpus not available to get transfer back to provincial institution when *Criminal Code* requires the sentence be served in a penitentiary (implicitly not a deprivation)
- Appeal dismissed

R v Munday, 1982 Carswell BC 730/1982 CarswellBC 2351 (CA)

- Crown appeal after judge granted habeas corpus following revocation of mandatory supervision
- Appeal court held that judge on habeas corpus should not interfere with assessment of designated person unless made in bad faith or contrary to s. 16(1)–judge erred in finding no grounds for first apprehension of prisoner based on anticipated breach
- Implicit no deprivation if decision is made in accordance with statute and is within the authority of the officer
- Appeal allowed

Roach v Director of Kent Institution, 1983 CarswellBC 670 (CA)

- Challenging revocation of parole without proceedings required under the *Parole Act*, s. 16 (warrant and review within 14 days)
- Case law shows that parolee who has not been discharged and sentence not expired may have parole revoked without regard for s. 16 (implicit that it is not a deprivation of liberty as rights depend on status as a parolee)
- Appeal dismissed

R v Belliveau, 1984 CarswellNB 131 (CA)

- Inmate challenging revocation of mandatory supervision after conviction on other charges
- No violation of s. 11(h) if condition not complied with
- Implicit that there is no deprivation of liberty if inmate breaches the conditions of parole

- Appeal dismissed

R v Scott, 1984 CarswellBC 2319 (CA)
- Inmate challenging recalculation of earned remission after revocation of mandatory supervision
- Calculations in line with *Parole Act* (implicit that it is not a deprivation of liberty if calculations conform with statute)
- Appeal dismissed

Evans v Kingston Penitentiary, 1986 CarswellOnt 143; 1986 CarswellOnt 3499 (CA)
- Challenging detention past expiry of sentence
- Detaining inmate until expiry of sentence does deprive one of liberty, but not a breach of PFJs under s. 7 of the Charter
- Appeal dismissed

Logan v William Head Institution, 1987 CarswellBC 1376 (CA)
- Inmate challenging receiving no recrediting of remission when mandatory supervision was revoked and imposition of conditions upon his release
- Sentence not complete on release to mandatory supervision, sentence continues to run under *Parole Act* (implicit that calculations are not unlawful deprivations of liberty if consistent with statute)
- Appeal dismissed and Charter issues remitted back for further submissions

R v Milne, [1987] 2 S.C.R. 512
- Inmate challenging indeterminate sentence (convicted of gross indecency, which was later removed from list that would attract indeterminate sentences)
- But *Criminal Code* prevents habeas from being used to attack sentences
- Implicit that there is no deprivation as inmate has the same rights as any other convicted person to appeal and apply for parole
- Habeas corpus inappropriate as review by Board every two years, and sentence is valid if based on law in effect at the time
- Appeal dismissed

Ross v Kent Institution, 1987 CarswellBC 63 (CA)
- Challenging the granting of habeas corpus in response to a refusal to release an inmate on mandatory supervision
- Apprehension warranted here as procedural rules did not deny the inmate his right to know the case and respond per s. 7
- Cited *Truscott* and *Moore*
- Appeal allowed and warrant of apprehension granted

Fulton v Canada (SG), 1989 CarswellBC 916 (CA)
- Challenging failure to credit for time served in custody in the US
- Delay in transferring was due to US Federal Marshall's inattention, and so no infringement of ss. 7, 9, 12, etc. of the *Charter* by a Canadian government actor

- No merit to habeas corpus application as he really just wanted a declaration that CSC miscalculated warrant expiry
- Appeal dismissed

Latham v R, 1989 CarswellSask 463 (CA)
- Challenging denial of parole to a dangerous offender
- Applied *Dumas*, finding habeas corpus unavailable as appellant (no deprivation as not yet a parolee)
- Noted that he did not first exercise judicial review, barring s. 24(2) remedy
- Appeal dismissed

R v Pomfret, 1990 CarswellMan 192 (CA)
- Inmate challenging failure to apply for bail review under *Criminal Code*, s. 525 upon expiry of 90 days of detention
- Detention not arbitrary as held on valid warrant of committal, and issue correctable by ordering a review at the earliest opportunity
- Habeas corpus allowed prisoner to receive a bail hearing, as entitled by law, but it does not allow release
- Appeal dismissed and review hearing to take place at earliest possible date

Cunningham v Canada, [1993] 2 S.C.R. 143
- Challenging detention past expiry of sentence
- Board detaining an inmate until expiry of sentence does not warrant granting habeas corpus
- Applied s. 7 and deprivation of liberty as outlined in *Dumas*, finding no violation of the PFJs
- Appeal dismissed

Knockaert v Canada (National Parole Board), 1993 CarswellBC 2682 (CA)
- Challenging revocation of day parole based on a breathalyzer result obtained without giving rights to counsel
- Failure to give rights was not an infringement that made the detention unlawful
- Appeal dismissed

R v MacDonald, 1994 CarswellMan 568 (CA)
- Challenging authorities on including an unexpired portion of a particular prison term in their computation of the aggregate length of the sentence
- Failed to show unexpired portion cannot be included based on case law
- Even if the court has jurisdiction to determine the statutory release and the inmate is entitled to have it determined on habeas corpus application, not enough evidence to show that the date has been reached
- Appeal dismissed

Ewing v Mission Institution, 1994 CarswellBC 1110 (CA)
- Warden appealing the granting of habeas corpus in response to an inmate challenging detention based on lost earned remission on amended warrant

- Habeas corpus application dismissed as application judge was in substance just exercising certiorari by ordering a new hearing
- Application was to be properly brought before the Federal Court
- Appeal allowed and order quashing Board's decision set aside, but dismissal of habeas corpus upheld (errors in warrant of committal can be corrected)

S(M) v Canada (National Parole Board), 1995 CarswellBC 1302 (CA)
- Inmate challenging failure to hear day parole application in time set by statute
- Cited *Dumas* and found lacked parolee status to seek habeas corpus
- Appeal dismissed

R v Gillen, 1995 CarswellOnt 1268 (CA)
- Challenging detention, arguing that he should be released based on his remission time
- Based on *Penitentiary Act*, one-third of sentence most that could have been earned and judge right to dismiss habeas corpus application
- Appeal dismissed

R v Sarson, [1996] 2 S.C.R. 223
- Challenging life sentence without parole for 15 years based on constructive murder provision being declared unconstitutional
- Habeas corpus not available under common law as no Charter violation and it was a collateral attack on sentence
- Appeal dismissed

Sanchez v Ontario (Superintendent of Metropolitan Toronto West Detention Centre), 1996 CarswellOnt 45 (CA)
- Inmate challenging remand into custody pending trial
- Receiving same treatment as those already convicted does not mean improperly punished, and liberty restricted only after proper bail hearing
- Appeal dismissed

S(M) v Mountain Institution, 1997 CarswellBC 1330 (CA)
- Inmate challenging denial of day parole
- Habeas corpus not available for inmate on day parole to challenge denial of an unconditional release as not a parolee and therefore cannot be unlawfully deprived
- Appeal dismissed

R v Latham, 1997 CarswellOnt 150 (CA)
- Inmate challenging failure to hold year review in time
- Citing *Dumas*, found that there is no jurisdiction to challenge continued detention through habeas corpus as not a parolee and therefore not unlawfully deprived of liberty
- Appeal dismissed

Genereux v Canada (National Parole Board), 1999 BCCA 446
- Board challenging habeas corpus granted in response to revocation of day parole
- Habeas corpus should not have been granted

- Focused on jurisdiction of the Board, cited *Latham* to show jurisdiction even if inmate voluntarily remained in custody
- Appeal granted to the extent of declaring the Board had not gone beyond its mandate

R v Wu, 2001 BCCA 90
- Sought a transfer to a lower security facility than initial security classification would allow
- Unlikely to amount to a breach of natural justice amounting to unlawful imprisonment—remedy was in statutory appeal and possibly certiorari in the Federal Court
- Unlikely that this amounts to a breach of natural justice, no case law/test cited
- Appeal dismissed

Lopez v Canada (National Parole Board), 2001 BCCA 742
- Crown challenging granting of habeas corpus on basis that referring case to a hearing 31 days after recommitment deprived Board of jurisdiction
- Statutory interpretation case based on limit for suspension hearing under *CCRA* and whether it includes the day of recommitment
- Day of committal not to be counted, and so within 30-day limit
- Implicit that there is no deprivation where incarceration consistent with statute
- Appeal allowed

Hunt v Calgary Correctional Centre, 2003 ABCA 200
- Inmate challenging refusal to credit earned remission from imposition of original sentence to variation on appeal
- Habeas corpus unavailable, person serving sentence in community on conditional sentence not a prisoner for purposes of *Prisons and Reformatories Act*
- Appeal dismissed

R v Latham, 2004 SKCA 141
- Challenge to year review not being held in time
- Failure to hold a mandated hearing does not render the detention unlawful—surely not what Parliament intended
- Appeal dismissed

Griffith v Matasqui Institution, 2006 BCCA 121
- Challenging validity of *CCRR*, s. 163(3) as the 90-day period to hold a parole suspension hearing starts to run later for those in provincial institutions being returned to federal penitentiary
- Delay amounts to deprivation of residual liberty per *Miller*, but in accordance with PFJ and no breach of ss. 7 or 9
- Appeal dismissed

Cotterell v Grand Valley Penitentiary, 2007 ONCA 397
- Challenging refusal to allow inmate in Cuba to serve sentence in Canada
- Habeas corpus is unavailable where no indication the person is unlawfully detained
- Granting would amount to amendment of sentenced imposed in another country in breach of Canada's international obligations

- Appeal dismissed

Lepage c Canada (PG), 2007 QCCA 567
- Challenging denial of parole under APR
- Cited habeas corpus standard set in *May*
- Board's procedure did not violate procedural fairness
- Habeas corpus denied, and appeal dismissed

Finck v Canada (National Parole Board), 2008 NSCA 56
- Challenging Board's decision denying parole
- *CCRA* has complete review system and no extraordinary circumstances to warrant habeas corpus
- Cites *Dumas* and the deprivation of liberty, but case does not clearly suggest the facts amount to a deprivation of liberty
- Dismissed application for habeas corpus

R v Baldasaro, 2008 ONCA 798
- Challenging bail conditions
- No case law cited, and held no jurisdiction to grant habeas corpus in relation to bail condition
- Even if there was jurisdiction, it would not be appropriate in the circumstances given conditions reasonable and constitutional invalidity of legislation more properly addressed on an appeal
- Application dismissed

Dodd v Isabel McNeil House, 2008 ONCA 654
- Inmates challenging transfer from their facility that was very old
- No case law cited, merely considered whether there was a deprivation of liberty
- Held that differences between facilities did not amount to deprivation and may even better meet prisoner's day-to-day needs
- Appeals dismissed

Mennes v Canada (AG), 2008 CarswellOnt 572 (CA)
- Inmate challenging being housed in a double occupancy cell upon transfer (agreed to a voluntary transfer to single occupancy cell and put on a wait list)
- Citing *May* and *Miller*, found no deprivation of liberty
- Appeal dismissed, habeas corpus not available

Lord v Canada (Commissioner of Correctional Service), 2009 BCCA 62
- Inmate challenging life imprisonment without eligibility for parole for ten years
- Habeas corpus cannot be used to challenge legality of conviction, return of property to federal prisoner, visits to accused, access to computer, and denial of parole
- Does not constitute deprivation within meaning of *Dumas* and *Miller*
- Appeal dismissed

Savard c Duguay, 2010 QCCA 1304

- Inmate challenging decision to detain past statutory release date
- Cites *May* habeas corpus framework and found no deprivation of liberty within meaning of *Dumas*
- Appeal dismissed

John v Canada (National Parole Board), 2011 BCCA 188
- Challenging revocation of full parole
- Federal court is the appropriate forum and judicial review to be used in this case
- However, recognized that there may be circumstances where habeas corpus jurisdiction could be invoked in the parole context
- Appeal dismissed

Chaudhary v Frontenac Institution, 2012 ONCA 313
- Challenging revocation of full parole
- Habeas corpus only appropriate in limited circumstances per *May* and *Graham*, judicial review more appropriate
- Appeal dismissed

Mapara v Ferndale Institution, 2012 BCCA 127
- Challenging denial of ETAs
- Cited *May* and "residual liberty" test and *Dumas* exception
- Could not be said to be deprived of liberty, denying ETAs comparable to denial of transfer to less restrictive conditions—habeas corpus unavailable
- Appeal dismissed
- See also 2016 BCCA 73, dismissed on same grounds

Richer v Canada (AG), 2014 SKCA 51
- Inmate challenging CSC's refusal to let two inmates in a long-term, same-sex relationship live together (serving life sentences at a minimum security prison)
- Citing *Khela*, found the refusal was not a deprivation of liberty
- Appeal dismissed

Chambers v Canada (Senior Manager, International Transfer Unit, Correctional Service), 2015 BCCA 50
- Challenging Minister's refusal to allow transfer from US (sentenced to 15 years) to Canada (where maximum sentence is 10 years)
- Cites *May/Khela*, and found that habeas corpus is unavailable as the Minister's decisions did not affect the lawfulness of custodial conditions
- Appeal dismissed, and cross-appeal allowed

Haghparast-Rad v Canada (Commissioner of Corrections), 2015 ONCA 653
- Challenging failure to count time spent in a workhouse abroad prior to transfer from Japan to Canada to serve a sentence
- Respecting Japanese sentence not an error under treaty
- Lawfulness of the deprivation of liberty was demonstrated and held that habeas corpus is not appropriate in the circumstances

- Appeal dismissed

R.(L.V.) v. Mountain Institution, 2016 BCCA 467
- Inmate challenging initial security classification
- Initial classification following valid committal or denial of transfer not a deprivation for purposes of habeas corpus
- Applied the *May/Khela* test
- Appeal dismissed, and habeas corpus denied

Ogiamien v Ontario (Community Safety and Correctional Services), 2017 ONCA 667
- Inmate challenging detention in a facility with frequent lockdowns
- Habeas corpus not available
- Citing *Miller*, found not to be a deprivation of liberty as inmate's confinement not more restrictive than that of others
- Appeal dismissed

Ewanchuk v Canada (Parole Board), 2017 ABCA 145
- Challenging Board's decision to detain until warrant expiry date
- Habeas corpus not to be "whittled down"
- "*Habeas corpus* is a remedy at the heart of the rule of law. It is not to be whittled down by judicial parsimony, or thwarted by procedural formalism. It is not a static or narrow remedy"…but that seems to be exactly what the court did
- Absent a constitutional challenge to the *CCRA*, ss 127-130, detention does not amount to a deprivation of liberty
- Appeal dismissed

Perron v Tremblay, 2017 QCCA 1407
- Challenging revocation of full parole
- Habeas corpus is available, but inappropriate per *May* due to exhaustive and specialized review procedure
- Appeal dismissed

(b) Non-appellate cases (Note: these cases deal explicitly with the issue of habeas corpus being restricted to situations involving a loss of something an inmate once had)

- *Biever v Edmonton Remand Centre*, 2015 ABQB 609
- *Budreo v Canada (Attorney General)*, 1992 CarswellOnt931 (OCJ (Gen Div))
- *R v VanderElsen-Finck*, 2005 NSSC 71
- *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 237
- *Fisk v Canada (Correctional Service)*, 1996 Carswell BC 19 (SC)
- *Pargelen v Vallee (Correctional Services Canada)*, 2014 QCCS 3407
- *Dixon v Mountain Institution*, 2017 BCSC 183
- *R v Latham*, 2004 SKQB 292; 2002 SKQB 438
- *Ahmad v Canada (Attorney General)*, 2015 ONSC 7010

- *Gregory v Edmonton Institution*, 1995 CarswellAlta 536 (QB)
- *Irwin v Canada (SG)*, 1996 CarswellBC 1722 (SC)
- *R v Farrell*, 2011 ONSC 2160
- *Robinson v Canada (Attorney General)*, 2013 ONSC 7992
- *Egan v Quinte Detention Centre*, 2008 CarswellOnt 2417 (SCJ)
- *Hunter v Canada (Commissioner of Corrections)*, 1997 CarswellNat 1089 (FC (TD))
- *Moldovan v Canada (Attorney General)*, 2012 ONSC 2682
- *Palfrey v Mission Institution*, 2015 BCSC 1777
- *Purdy v Pacific Institution*, 2016 BCSC 1201
- *White v Canada (Attorney General)*, 2015 ONSC 6994
- *Wood v Atlantic Institution*, 2014 NBQB 135
- *Lao v Canada (Attorney General)*, 2016 ONSC 1273

Conclusion

As you can see, there are lots of cases at the appellate level, and lots more at the Superior Court level[3], that do seem to support a more restrictive interpretation of habeas corpus (in some cases, specifically to just situations where an inmate has lost something they once had), despite the fact that the Supreme Court said in *May*, and then again in *Khela*, that habeas corpus defies a narrow and formalistic interpretation of its nature and scope (*May*, at para 21; *Khela*, at paras 54-55).

However, there is certainly enough case law to support the argument that habeas corpus should not be limited so. Plus, we have common sense on our side with this argument. So I encourage all correctional lawyers to continue to bring habeas corpus applications in situations other than involuntary transfers or segregations, and to argue for a flexible application of the test in *May* and *Khela*–or come up with your own test…whichever you prefer.

[3] I didn't list them all because there are too many, and my associate's brain hurts from reading so many cases.