

# COMMENTARY

## The “Great Writ” Reinvigorated? *Habeas Corpus* in Contemporary Canada

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### I. INTRODUCTION

In his engaging essay delivered at the 2<sup>nd</sup> Annual DeLloyd J Guth Visiting Lecture in Legal History at Robson Hall in 2012, “*Habeas Corpus*, Legal History and Guantanamo Bay,”<sup>1</sup> Professor James Oldham provides insight into the contemporary debates in the United States about the scope and significance of the ancient writ of *habeas corpus*. In Canada, there has also been controversy in recent years about the availability of *habeas corpus* review and its relationship to other remedies and avenues for judicial review of imprisonment and other forms of detention. There are some significant similarities, as well as divergences, between Canadian, American, and British law with respect to the doctrine, procedure, and availability of *habeas corpus*. This short prelude to Professor Oldham’s article will not seek to canvass those substantial bodies of case law and commentary.<sup>2</sup> Rather, it will discuss some of the ways the

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<sup>2</sup> See generally, Judith Farbey, RJ Sharpe, & Simon Attrill, *The Law of Habeas Corpus*, 3d ed (Oxford: Oxford University Press, 2011); David Clarke & Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Oxford: Oxford

writ has played, and should continue to play, an important role in promoting access to justice and protecting basic liberty interests, particularly in these law and order times. The focus will be on developments in the law since the *Canadian Charter of Rights and Freedoms*<sup>3</sup> was enacted, touching on two important features of a modern doctrine of *habeas corpus* – namely flexibility and gap-filling, both of which Professor Oldham also develops in his essay.

## II. *HABEAS CORPUS* IN PRE-*CHARTER* CANADIAN LAW

The writ of *habeas corpus*, described by Blackstone as “the great and efficacious writ, in all manner of illegal confinement,”<sup>4</sup> functions as a vehicle to challenge the legality of detention. In the Canadian context, *habeas corpus* has been available to challenge a wide variety of detentions including those on mental health grounds, in connection with military service, and with respect to extradition.<sup>5</sup> There are also some high profile examples of its suspension – for example, during the 1970 “October Crisis” in which nearly 500 people were arrested and detained (87% ultimately without any charge being laid) when the federal government invoked the *War Measures Act*<sup>6</sup> in response to a hostage-taking by radical Quebec nationalists.<sup>7</sup>

*Habeas corpus* is a potentially powerful remedy in the sense that it is not discretionary. It is distinct from the prerogative writs such as those for *certiorari* and prohibition in that it issues as of right<sup>8</sup> (and the prisoner should be released) if the detention is determined to be unlawful,

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University Press, 2000); Cameron Harvey, *Habeas Corpus in Canada* (Toronto: Butterworths, 1974).

<sup>3</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11.

<sup>4</sup> William Blackstone, *Commentaries on the Laws of England* 1765, vol 3 at 131, cited in Allan Manson, “The Effect of *Steele* on *Habeas Corpus* and Indeterminate Confinement” (1991) 80 CR (3d) 282 at 285.

<sup>5</sup> Harvey, *supra* note 2 at ch 2.

<sup>6</sup> SC 1914 (2d session), c2, s1.

<sup>7</sup> Dominique Clément, “The October Crisis of 1970: Human Rights Abuses Under the *War Measures Act*” (2008) 42:2 J Can Stud 160.

<sup>8</sup> As discussed *infra*, this principle was recently affirmed in *May v Ferndale*, 2005 SCC 82 at para 33, [2005] 3 SCR 809 [*May v Ferndale*].

provided the applicant is not seeking to subvert or circumvent the normal processes of appeal from conviction.<sup>9</sup> However, as will be discussed further below, in the context of proliferating specialized statutory and administrative regimes throughout the 20th century, Canadian courts have sometimes declined to exercise jurisdiction to review the legality of detention. The extent to which courts were (and are) willing to use the writ of *habeas corpus* to fill gaps in rights protection left by these various statutory regimes continues to be an important question in Canadian law.

As a practical reality, for people imprisoned in Canadian penitentiaries and jails from the 19th century and most of the 20th century, *habeas corpus* offered little protection from rights abuses and other illegal treatment. Vestiges of the common law concept of "civil death" (the loss of civil and proprietary rights upon criminal conviction) led courts to adopt a deferential, "hands off" approach to correctional decision-making such that abuses and illegalities went unremedied. In his ground-breaking 1983 book, *Prisoners of Isolation: Solitary Confinement in Canada*,<sup>10</sup> Michael Jackson described the effect of this hands-off approach as "immuniz[ing] the prison from public scrutiny through the judicial process and ... plac[ing] prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions."<sup>11</sup> It was not until a series of riots and other violent incidents broke out in penitentiaries across Canada in the 1970s that courts began to move away from their "hands-off" doctrine.<sup>12</sup> In the landmark decision in *Martineau v Matsqui Institution Disciplinary Board*<sup>13</sup> the Supreme Court held that prisoners were entitled to procedural fairness and could seek judicial review of decisions by prison officials that deprived them of their "residual liberty" (i.e., through placement in segregation), stating that "[t]he rule of law must run within penitentiary walls."<sup>14</sup>

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<sup>9</sup> Manson, *supra* note 4 at 285, citing *Goldhar v R*, [1960] SCR 431, 25 DLR (2d) 401.

<sup>10</sup> Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983).

<sup>11</sup> *Ibid* at 82.

<sup>12</sup> Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre 2002) at ch 3 [Jackson, *Justice Behind the Walls*].

<sup>13</sup> [1980] 1 SCR 602, 106 DLR (3d) 385 [*Martineau* cited to SCR].

<sup>14</sup> *Ibid* at 622.

### III. HABEAS CORPUS AND THE CHARTER

For Canadian prisoners, the writ of *habeas corpus* took on new significance in the 1980s with its entrenchment in the *Charter* and, in practical terms, through the decisions of the Supreme Court in the *Miller* trilogy<sup>15</sup> which affirmed that the writ is available to prisoners notwithstanding the statutorily mandated jurisdiction of the Federal Court to grant prerogative remedies against federal decision-makers.<sup>16</sup> The court ruled that *habeas corpus* is available “to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution.”<sup>17</sup> As such, the writ, with *certiorari* in aid, was available to challenge the legality of placement in segregation (*Cardinal*) as well as transfers to a Special Handling Unit from a maximum security prison (*Morin* and *Miller*) since these actions involved deprivations of the prisoners’ residual liberty interests. Finally, the court emphasized that the remedy of *habeas corpus*, “as the traditional means of challenging deprivations of liberty” must remain open to prisoners despite the concurrent jurisdiction of the Federal Court to hear judicial review applications from prison decisions.<sup>18</sup>

At the same time as the *Miller* trilogy was winding its way to the Supreme Court, the *Canadian Charter of Rights and Freedoms* was enacted, with section 10 providing that “[e]veryone 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.” In applying section 10(c) in *R v Gamble*,<sup>19</sup> the Supreme Court emphasized the flexible nature of the *habeas corpus* remedy and warned against “plac[ing]

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<sup>15</sup> *R v Miller*, [1985] 2 SCR 613, 24 DLR (4th) 9 [*Miller* cited to SCR]; *Cardinal v Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44 [*Cardinal*]; and *Morin v Canada (National Special Handling Unit Review Committee)*, [1985] 2 SCR 662, 24 DLR (4th) 71 [*Morin*].

<sup>16</sup> In keeping with its status as a non-discretionary remedy, *habeas corpus* was not included in the list of possible orders that the Federal Court could grant.

<sup>17</sup> *Miller*, *supra* note 15 at 641.

<sup>18</sup> *Ibid.*

<sup>19</sup> [1988] 2 SCR 595, 45 CCC (3d) 204 [*Gamble* cited to SCR].

procedural roadblocks in the way of someone like the appellant who is seeking to vindicate one of the citizens' most fundamental rights in the traditional and appropriate forum."<sup>20</sup> Janise Gamble had been sentenced for murder under the wrong provision of the *Criminal Code* during the transitional time after capital punishment was abolished. Having assumed jurisdiction on the basis of *habeas corpus* (notwithstanding that a criminal appeal would have been the normal route) in this application brought over ten years into the sentence, the Supreme Court exercised its broad remedial powers pursuant to section 24(1) of the *Charter* and ordered Ms. Gamble eligible for parole forthwith.

In 1990, the Supreme Court decided another important case on the scope of *habeas corpus*, *Steele v Mountain Institution*,<sup>21</sup> the application of which led to a substantial narrowing of the availability of the remedy to federal prisoners for the next 15 years. Theodore Steele successfully applied for *habeas corpus* review of his indeterminate sentence as a "criminal sexual psychopath" which had been in effect for 37 years by the time the Supreme Court granted his application. Holding that his continued detention constituted cruel and unusual punishment contrary to section 12 of the *Charter*, the Supreme Court ordered him released with certain conditions. However, evidently out of concern that the courts not be flooded by applications for *habeas corpus* challenging the substantive merits of prisoners' continued detention, Cory J held that Mr. Steele should have proceeded by way of judicial review in Federal Court since the errors that had kept him detained so long were part of the parole decision-making process.

Justice Cory's recommendation against establishing an unwieldy parallel system of adjudication was transformed by subsequent provincial appellate decisions into a rule that superior courts should decline to exercise their *habeas corpus* review in the prison context. In decisions such as *Spindler v Millhaven Institution*<sup>22</sup> and *Hickey v Kent Institution*<sup>23</sup> provincial appellate courts declined to exercise their *habeas corpus* jurisdiction on the

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<sup>20</sup> *Ibid* at 635.

<sup>21</sup> [1990] 2 SCR 1385, 60 CCC (3d) 1.

<sup>22</sup> (2003) 15 CR (6th) 183, 110 CRR (2d) 173 (Ont CA)[*Spindler*].

<sup>23</sup> 2003 BCCA 23 (available on WL Can) [*Hickey*]. See also *Armaly v Canada (Correctional Service)*, 2001 ABCA 280, 299 AR 188; *St-Amand v Canada (Attorney General)* (2000), 147 CCC (3d) 48 (available on WL Can) (Qc CA).

basis that the prisoner applicants should have proceeded via judicial review in Federal Court. At issue in *Spindler* was a policy implemented by the Commissioner of Corrections requiring anyone convicted of murder to serve at least two years in a maximum security prison, even where the government's own security classification criteria pointed to a lower security classification. This policy change was prompted by much-publicized (and politicized) criticism from victim's rights groups to the effect that murderers who were classified as medium or minimum security were not being suitably punished. The decision at issue in *Hickey* was a transfer to the ultra-high security Special Handling Unit. In both cases, and in other decisions involving similar issues,<sup>24</sup> prisoners' residual liberty interests were implicated. Yet the appellate courts held that courts should decline to exercise their *habeas corpus* jurisdiction on the basis that the internal prison grievance system and/or judicial review in the Federal Court amounted to "a complete, comprehensive and expert procedure for review of a decision affecting the prisoner's confinement."<sup>25</sup> These courts were treating *habeas corpus* as a discretionary remedy,<sup>26</sup> and were assuming that the alternatives open to prisoners (particularly the internal grievance procedure, followed by judicial review proceedings in Federal Court) provided adequate and timely justice. These assumptions were challenged successfully in *May v Ferndale Institution*,<sup>27</sup> a case which provided the Supreme Court with an opportunity to clarify its comments in *Steele* and to affirm the importance of *habeas corpus* review in the prison context where, as I and others have argued elsewhere,<sup>28</sup> the potential for abuse and illegality is great and the need for judicial oversight is particularly acute.

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<sup>24</sup> *Ibid.*

<sup>25</sup> *Hickey*, *supra* note 23 at para 50.

<sup>26</sup> This characterization runs contrary to the nature of *habeas corpus* as a writ that issues if the legality of the detention is not proved: "unlike *certiorari* or *mandamus*, a writ of *habeas corpus* is of right to every man [sic] who is unlawfully detained. If a prima facie case is shown that a man is unlawfully detained, it is for the one who detains him to make a return justifying it," *R v Pentonville Prison Governor*, [1973] 2 All ER 741, [1973] 2 WLR 949 (Eng CA), cited in Charles B Davidson, "Whittling away at Greatness: The Narrowing of the Availability of *Habeas Corpus*" (2004) 15 CR (6th) 192 at 201-202.

<sup>27</sup> *May v Ferndale*, *supra* note 8.

<sup>28</sup> See e.g. Kim Pate & Debra Parkes, "Time for Accountability: Effective Oversight of Women's Prisons" (2006) 48 Can J Crim & Crim Just 251; Debra Parkes, "A

#### IV. REINVIGORATING THE WRIT FOR PRISONERS

Terry May and other prisoners were serving life sentences in a federal prison when they were automatically reclassified from minimum to medium security and involuntarily transferred to a higher security prison. Their reclassification was due to a change in policy whereby completion of a certain anti-violence program was required to maintain minimum security status. They applied to the British Columbia Supreme Court for *habeas corpus* review, with *certiorari* in aid, arguing that the reclassification decision was arbitrary and that they were denied procedural fairness since the Correctional Service had failed to disclose the scoring matrix used to reclassify them. The application for *habeas corpus* was dismissed at first instance on substantive grounds<sup>29</sup> but the British Columbia Court of Appeal held that the British Columbia Supreme Court ought to have declined to exercise its *habeas corpus* jurisdiction on the basis that the "specialized" Federal Court was the appropriate venue for prisoner litigation of this kind.<sup>30</sup>

After reviewing the history of the "hands-off" doctrine and the subsequent expansion of *habeas corpus* review in the *Miller* trilogy, the Supreme Court unanimously rejected the *Spindler* approach which had effectively turned the limited discretion to decline to exercise *habeas corpus* jurisdiction into a rule against the writ's availability in prison cases. The Court strongly affirmed the availability of *habeas corpus* review in provincial superior courts in these and other circumstances involving the residual liberty interests of prisoners:

Given the historical importance of *habeas corpus* in the protection of various liberty interests, jurisprudential developments limiting *habeas corpus* jurisdiction should be carefully evaluated and should not be allowed to expand unchecked.

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Prisoner's Charter? Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms" (2007) 40 UBC L Rev 629; Jackson, *Justice Behind the Walls*, *supra* note 12; The Hon. Louise Arbour, *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Canada: Public Works and Government Services, 1996).

<sup>29</sup> Bauman J relied on *Miller*, *supra* note 15 in finding that he had jurisdiction to hear the application, but went to conclude the reclassification was lawful: *May v Ferndale Institution*, 2001 BCSC 1335 (available on WL Can).

<sup>30</sup> *May v Ferndale Institution*, 2003 BCCA 536 at para 21 (available on WL Can) citing *Spindler*, *supra* note 22.

The exceptions to *habeas corpus* jurisdiction and the circumstances under which a superior court may decline jurisdiction should be well defined and limited. ... In principle, the governing rule is that provincial superior courts should exercise their jurisdiction. However, in accordance with this Court's decisions, provincial superior courts should decline *habeas corpus* jurisdiction only where (1) a statute such as the Criminal Code... confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be or (2) the legislator has put in place complete, comprehensive and expert procedure for review of an administrative decision.<sup>31</sup>

The Court rejected the argument that the internal prison grievance system was comparable to the independent adjudication of immigration appeals which had been found to be a “complete, comprehensive and expert” review procedure.<sup>32</sup> The Court bolstered the case for enhanced judicial oversight of prisons by describing the internal grievance procedure as suffering from “structural weaknesses”.<sup>33</sup> Speaking for the majority, Justices LeBel and Fish cited the following factors as weighing in favour of provincial superior courts exercising *habeas corpus* review in prison cases, concurrent with the availability of judicial review in the Federal Court: (1) the choice of remedies and forum (jurisdiction is concurrent, not conflicting); (2) the expertise of provincial superior courts (they are well-versed in *Charter* and criminal law which are highly relevant in the prison context); (3) the timeliness of the remedy (*habeas corpus* review can commence on 6 days notice compared to 160 days in Federal Court); (4) local access to the remedy (as emphasized in *Gamble*); and (5) the nature of the remedy and the burden of proof (*habeas corpus* issues as of right where the government has not discharged its burden of proving legality whereas the Federal Court can deny relief on discretionary grounds).<sup>34</sup>

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<sup>31</sup> *May v Ferndale*, *supra* note 8 at para. 50 [emphasis added].

<sup>32</sup> *Peiroo v Canada (Minister of Employment and Immigration)* (1989), 69 OR (2d) 253, 60 DLR (4th) 574 (Ont CA), leave to appeal refused, [1989] 2 SCR x. Post-*May*, Canadian courts continued to decline to exercise *habeas corpus* jurisdiction in relation to immigration detention (*Apaolaza-Sancho c Directeur of Établissement de détention de Rivière-des-Prairies*, 2008 QCCA 1542); involuntary detention pursuant to mental health law (*Capano v Centre for Addiction and Mental Health*, 2010 ONSC 1687); and extradition proceedings (*Thailand v Saxena*, 2009 BCCA 223) on the basis that the relevant legislation established a “complete, comprehensive and expert” review procedure.

<sup>33</sup> *May v Ferndale*, *supra* note 8 at para 64.

<sup>34</sup> *Ibid.*, at para 65-71.



The majority went on to find the instant decision – reclassifying Terry May and others from minimum to medium security – to be unlawful because the scoring matrix, used in the reclassification decision, was not disclosed to the prisoners.<sup>35</sup> This failure to disclose the scoring matrix on the basis that it was unavailable (when in fact it was available but it was the Correctional Service's practice not to disclose it) was characterized by Justices LeBel and Fish as "highly objectionable" and "misleading".<sup>36</sup> In so ruling, the majority seemed to grasp the difficulties faced by prisoner litigants in challenging the decisions of authorities who hold all the power and much of the relevant evidence. For prisoners' rights advocates, *May* was a most welcome decision.<sup>37</sup>

## V. CONTINUED RELEVANCE OF THE WRIT

Access to the courts to review the legality of detention is a critical check on government power in these times of political expediency in the name of law and order and national security. For example, the federal government has recently announced its intention to extend the time between reviews of detention under the mental disorder provisions of the *Criminal Code*. This proposed change, which is an apparent response to public outcry over a few high profile cases of violence involving mentally disordered accused,<sup>38</sup> may prompt an application for *habeas corpus* review if enacted.<sup>39</sup>

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<sup>35</sup> *Ibid*, at para 112.

<sup>36</sup> *Ibid*, at para 110-111.

<sup>37</sup> Of course, access to justice is crucial to ensuring that any remedy is actually enforceable. There is very limited legal aid funding available across the country to facilitate prison litigation, which makes the relevant rights and remedies illusory for many prisoners. See e.g. Debra Parkes et al, "Listening to Their Voices: Women Prisoners and Access to Justice in Manitoba" (2008) 26 Wind YB Access Just 85 at 116-118.

<sup>38</sup> Brian Morton, "Ottawa to address safety concerns about releasing mentally ill offenders", *The Vancouver Sun* (22 November 2012) online: Vancouver Sun <<http://www.vancouversun.com/news/Ottawa+introduce+bill+keep+more+mentally+offenders+behind+bars/7596636/story.html>>.

<sup>39</sup> *Habeas corpus* review is already playing a gap-filling function, providing a remedy to mentally disordered accused persons who are detained in jail rather than in forensic beds due to lack of resources and coordination. See Janet Leiper, "Cracks in the Façade of Liberty: The Resort to *Habeas Corpus* to Enforce Part XX.1 of the Criminal

Similarly, recent amendments to the *Immigration and Refugee Protection Act*<sup>40</sup> authorize the detention, without judicial review for one year and with limited access to the administrative tribunal, of individuals whom the Minister of Citizenship and Immigration designates as “irregular arrivals” (i.e., through an alleged human smuggling event).<sup>41</sup> This new regime may require a revisiting of the controversial ruling in *Peiroo* that immigration law provides a “complete, comprehensive and expert review procedure” which has meant that superior courts will generally decline to exercise *habeas corpus* jurisdiction in immigration cases. In *Charkaoui v Canada*, Chief Justice McLachlin made it clear that “foreign nationals, like others, have a right to prompt review to ensure that their detention complies with the law. This principle is affirmed in section 10(c) of the Charter.”<sup>42</sup> The provisions of the *Immigration and Refugee Protection Act* which failed to allow for review of the detention of foreign nationals until 120 days after a security certificate was confirmed were found to violate section 10(c).<sup>43</sup> In these and other contexts, it is hoped that the flexibility and gap-filling functions of the *habeas corpus* remedy will continue to develop in a manner deserving of the “great writ of liberty.”

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Code” (2009) 55 Crim LQ 134.

<sup>40</sup> Bill C-31, An Act to amend the *Immigration and Refugee Protection Act*, the *Balanced Refugee Reform Act*, the *Marine Transportation Security Act* and the *Department of Citizenship and Immigration Act*, 1st Sess, 41st Parl, 2012 (Assented to 28 June 2012), SC 2012, c 17.

<sup>41</sup> *Ibid* at s 20.1(1). For critical commentary on this legislation, see “Bill C-31” Canadian Association of Refugee Lawyers (9 July 2012), online: CARL, Bill C-31 <<http://www.refugee-lawyersgroup.ca/billc-31>>.

<sup>42</sup> *Charkaoui v Canada* (Citizenship and Immigration), 2007 SCC 9 at para 90, 276 DLR (4th) 594. She went on to note that this right is also recognized internationally, citing *Rasul v Bush*, 542 US 466 (2004) and some European cases.

<sup>43</sup> *Charkaoui*, *ibid*, at para 90.