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Ewanchuk Continues to Treat *Habeas Corpus* as an All-Purpose Remedy

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Case Commented On: *Ewanchuk v Canada (Parole Board)*, 2017 ABCA 145 (CanLII)

On May 16, 2017, the Alberta Court of Appeal (ABCA) released a decision dismissing a *habeas corpus* application with *certiorari* in aid from Stephen Brian Ewanchuk, who just this week was featured on ABlawg for being declared a vexatious litigant in the Alberta Court of Queen's Bench (ABQB) on a *different* application for *habeas corpus*. As Jonnette Watson Hamilton noted in that post, this is the same Ewanchuk whose sexual assault conviction was the subject of an oft-cited Supreme Court decision. He is now 68 years old and since 2007 has been serving his fifth sentence for sexual assault, this time on a minor. In the current *habeas corpus* application at the ABCA, he challenged the Parole Board of Canada's April 25, 2014 decision (and the subsequent Nov 12, 2015 ABQB decision) not to provide relief on his statutory release date, but instead to require him to serve out the remainder of his sentence. He will be released on February 21, 2018.

The key to a successful *habeas corpus* application is proving an unlawful deprivation of liberty. (For a more complete discussion of the nature of *habeas corpus*, see this week's earlier *Ewanchuk* post.) Justice Graesser explained in his ABQB decision, which Ewanchuk appealed to the ABCA, that when a prison inmate is transferred from a less restrictive setting to a more restrictive setting, he is deprived of liberty. However, when he is denied access to a less restrictive setting and required to remain in his current circumstances, he is not deprived of liberty (ABQB at para 39, citing *Mapara v Ferndale Institution (Warden)*, 2012 BCCA 127 (CanLII)). Such was Mr. Ewanchuk's situation: in his application, he argued that it was his right to be released on his statutory release date, and by refusing to release him, the Parole Board violated his right to residual liberty. Or, in other words, the Parole Board refused to release him from a more to a less restrictive setting. The only context in which such a denial can be the subject of a (successful) *habeas corpus* application is when it becomes unlawful (ABQB at para 39).

Unfortunately for Mr. Ewanchuk, his continued detention was clearly lawful under the *Corrections and Conditional Release Act*, SC 1992, c 20. As Justice Graesser also explained, sections 127-131 of the *Act* govern statutory release (ABQB at paras 42-45). The *Act* provides that an offender is entitled to be released on his statutory release date, which would have been June 23, 2014 for Mr. Ewanchuk, unless that offender is serving jail time for some specific types of serious offence. Among these are sexual offences involving children, and Mr. Ewanchuk is currently serving jail time for sexual assault against an 8-9 year old girl. As a result, he had no unconditional right under the *Act* to be released on his statutory release date. The Parole Board had the discretion to decide that Mr. Ewanchuk was likely to commit another sexual offence against a child before his warrant expiry date, February 21, 2018, and to therefore hold him until

that date, requiring him to serve "every actual day of the sentence imposed" (ABQB at para 47, ABCA at paras 7-8).

Mr. Ewanchuk disputed these findings by arguing that because the Parole Board breached its duty of procedural fairness to him, it lost jurisdiction over him, its order that he serve out the remainder of his sentence was moot, and he was entitled to statutory release (ABQB at paras 58, 73). In particular, Mr. Ewanchuk argued that the Parole Board did not disclose sufficient evidence to prove that he was a high risk offender who was likely to commit another sexual offence against a minor before his warrant expiry date (ABQB at para 11). Justice Graesser treated these procedural arguments with skepticism, noting, "I am doubtful that the Parole Board ever loses jurisdiction over an inmate whose warrant has not expired" (ABQB at para 72). He further concluded that Mr. Ewanchuk had failed to demonstrate any specific procedural errors on the part of the Parole Board, including any errors with respect to evidence of his likelihood to reoffend or his status as a high risk offender (ABQB at para 78). On this basis, Justice Graesser dismissed Mr. Ewanchuk's *habeas corpus* application, also citing as his reasons that this was not a case where a provincial superior court remedy was required and that a remedy was available from the Appeal Division of the Parole Board (ABQB at para 96).

On appeal to the ABCA, Mr. Ewanchuk elaborated on his allegation that the Parole Board did not have sufficient proof that he was likely to reoffend if released. He argued that the Parole Board relied on reports of questionable authorship to justify its conclusion that he would present a danger to the community if released (ABCA at para 5). Mr. Ewanchuk discussed the reasoning of Sanderman J, the judge who originally classified Mr. Ewanchuk as a long-term offender. In the opinion of Sanderman J, Mr. Ewanchuk was now of advanced enough years that he should be manageable in the community (ABCA at para 23). The ABCA largely declined to express an opinion on this point, noting that Mr. Ewanchuk's arguments were not questions of law. However, the ABCA did say that the Parole Board should not summarily dismiss "evidence which supported the finding and the conclusion of Sanderman J": it should consider Mr. Ewanchuk's case "holistically" (ABCA at para 23).

Further, the ABCA made reference to the pending *Canada v Ewert* appeal at the Supreme Court of Canada, scheduled for October 12, 2017 (ABCA at para 24). *Ewert*, a case I discussed on ABlawg last summer, involved a Métis offender (Mr. Ewert) who argued that the psychological tests used to predict his likelihood of recidivism were culturally biased against Aboriginal people. Mr. Ewert was unsuccessful at the Federal Court of Appeal, but he identified some legitimate problems with Correctional Service Canada's (CSC's) approach to assessing recidivism in non-white offenders. As I noted last summer, CSC has claimed to be assessing its recidivism tests for cultural sensitivity since 2003, but no results are forthcoming. Therefore, inmates challenging the validity of these tests are in the awkward position of requiring evidence to prove their claims that only CSC can provide. Hopefully the Supreme Court of Canada addresses CSC's indifference to the situations of inmates like Mr. Ewert.

The ABCA noted that in situations involving tests for recidivism such as Mr. Ewert's or even Mr. Ewanchuk's, legitimate questions of law or fundamental justice may arise about "the qualities of evidence used in predicting dangerousness." However, it concluded that it is not in a position to "test that notion to elimination" (ABCA at para 24). It did not specify why it was not in a position to evaluate the legitimacy of the evidence used to assess Mr. Ewanchuk's likelihood

of reoffending, but such an assessment is presumably outside the scope of a *habeas corpus* application, especially such a tenuous one as Mr. Ewanchuk's.

Indeed, the ABCA noted that although it considered Mr. Ewanchuk's allegations of procedural unfairness, they are "not the type of objections to a Parole Board disposition which fit within the legal and jurisdictional limitations necessary to a motion for *habeas corpus*" (ABCA at para 17). Mr. Ewanchuk had access to a more appropriate appeal mechanism through the Parole Board's Appeal Division. However, the advantage of bringing a *habeas corpus* application, as Jonnette Watson Hamilton noted in this week's earlier post on Justice Thomas' ABQB decision, is that courts will rearrange their schedules to hear such applications expeditiously due to the importance of ensuring that no one is illegally held prisoner. Justice Thomas explicitly declared Mr. Ewanchuk a vexatious litigant for forcing the court to consider his civil allegations disguised as a *habeas corpus* application. Although the ABCA made no similar declaration, this appears to be another situation in which Mr. Ewanchuk did not use a *habeas corpus* application for its intended purpose.

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