July 24, 2017

"Beyond This Court's Capacity": *Habeas Corpus* Hearings Restricted to Liberty Remedies Only

By: Amy Matychuk

Case Commented On: *McCargar v Canada*, 2017 ABQB 416 (CanLII)

On May 5, 2017, Mr. McCargar, currently a federal prison inmate, filed a joint *habeas corpus* application in the Court of Queen's Bench on behalf of himself and three other inmates. *Habeas corpus* is a constitutional and common law remedy for unlawful detention; however, it is usually invoked as an individual remedy because it assesses individual circumstances, so a joint application is unorthodox. Mr. McCargar also undertook to represent his fellow inmates (at their request) in court on the joint application. Justice John T. Henderson quickly disabused Mr. McCargar of the notion that he could act in the role of a lawyer, and in his judgment, described the narrow circumstances in which joint *habeas corpus* applications are appropriate, clarified the kinds of state treatment that merit the remedy of *habeas corpus* at all, declined to take jurisdiction of the application, and proposed new restrictions on *habeas corpus* hearings. He also ordered $1000 in costs against Mr. McCargar, found Mr. McCargar in *prima facie* contempt of court, and restricted his court filing activities pending a hearing on whether he should be declared a vexatious litigant.

Justice Henderson's response seems extreme, considering the limited legal and financial resources Mr. McCargar, as a prison inmate, has at his disposal when it comes to making court submissions. However, it comes as a reaction to "the increasingly frequent frivolous, vexatious, and abusive *habeas corpus* applications that have been received by the Alberta Court of Queen's Bench from incarcerated persons in Alberta" (at para 5). Presumably, Justice Henderson imposed these severe repercussions on Mr. McCargar as part of an effort to curb "[t]his pattern of abusive litigation and its powerfully deleterious effect on court functionality" (at para 5). His proposed restrictions on *habeas corpus* may help to prevent its misuse in a province already struggling to effectively use scant judicial resources. His judgment reflects the difficulties with striking a balance between effective use of court time on the one hand and protecting the rights of prison inmates on the other. Clearly enough, prison inmates are seeking any way possible of protesting adverse conditions; while *habeas corpus* is an inappropriate forum for these concerns, it remains incumbent on the government to remedy breaches of inmates' rights.

The Remedy of *Habeas Corpus*

A brief overview of *habeas corpus* will help to clarify why Mr. McCargar's application was improper. The constitutional right to *habeas corpus* is enshrined in s 10(c) of the *Charter* (*McCargar* at para 11). The superior courts of the provinces have jurisdiction to issue a *habeas corpus* order. When invoked, it obliges the state to promptly determine whether a detention is legal and, if not, order "release from detention or relief from a restriction on . . . liberty" (*DG v*

Bowden Institution, 2016 ABCA 52 (CanLII) at para 110; *McCargar* at para 41). The purpose of *habeas corpus* is targeted and specific: it provides a prompt mechanism for challenging a state decision unlawfully depriving an individual of liberty. The remedy is release, either from detention entirely or from whatever more limited form of detention was at issue on the application (such as segregation). Indeed, as Justice Henderson stressed, no other remedy is available: "[n]ot a declaration, or a finding of law or fact, or damages" (*McCargar* at paras 41, 46). Examples of liberty deprivation include revocation of parole (as in *DG v Bowden*), involuntary transfer from general population to segregation (as in *Cardinal v Director of Kent Institution*, 1985 CanLII 23 (SCC), [1985] 2 SCR 643 and *Mission Institution v Khela*, 2014 SCC 24 (CanLII) at para 34), and involuntary transfer from a lower- to a higher-security institution (as in *Khela* and *Voisey v Canada (Attorney General)*, 2016 ABQB 316 (CanLII)). Unfortunately for Mr. McCargar and many other unsuccessful *habeas corpus* applicants in Alberta (see my previous post on *Ewanchuk v Canada (Parole Board)*, 2017 ABCA 145 (CanLII) for an additional example of a meritless *habeas corpus* application), adverse prison conditions do not constitute liberty deprivation for the purpose of *habeas corpus*.

Abuse of *Habeas Corpus*

Nevertheless, in the last several years, inmates in Alberta have frequently used *habeas corpus* as a means of bringing complaints unrelated to liberty before the court (as noted by Justice D.R.G. Thomas in another vexatious *habeas corpus* case, *Ewanchuk v Canada (Attorney General)*, 2017 ABQB 237 (CanLII) at paras 174-175). One reason this strategy has gained popularity is the court's responsibility to hear *habeas corpus* applications as promptly as possible. Indeed, in *Ewanchuk*, Justice Thomas went into detail about the way *habeas corpus* applications are scheduled at Alberta Court of Queen's Bench (Edmonton):

> *Habeas corpus* applications take priority over other possible judicial assignments. Adding a *habeas corpus* application will usually mean a judge is shifted from another proceeding. A *habeas corpus* application therefore means delaying or cancelling a civil or criminal trial, commercial matters, family law special chambers applications, or case management hearings, and so on. (at para 172)

In the view of Justices Thomas and Henderson, inmates use *habeas corpus* as a means of airing their complaints because it allows them to jump ahead in the judicial queue. By doing so, they force applicants with legitimate actions to wait even longer to be heard, exacerbating existing problems with access to justice in Alberta, as discussed by Professor Jonnette Watson Hamilton. In Alberta, litigants seeking merely a one hour hearing are already waiting five months or more, not to mention wait times for longer and more complicated proceedings (*Ewanchuk* at para 178). By using *habeas corpus* to air non-liberty grievances, inmates take improper advantage of the court's responsibility to hear *habeas corpus* applications promptly.

Mr. McCargar's Application

As Justice Henderson explained, Mr. McCargar's application was, for the most part, no exception to this trend. His submissions were lengthy (over 800 pages, at para 35) and inexact, problems endemic to submissions from self-represented inmates. Except for one complaint (discussed below), he could not identify a specific decision that deprived him of liberty (at para 80), instead protesting generally about the treatment he experienced in segregation. As Justice

Henderson noted, a decision to move an inmate from general population to administrative segregation can certainly qualify as a deprivation of liberty. However, he provided a list of types of complaint that are not deprivations of liberty, as established by case law such as the recent *Ewanchuk* decision (at para 54). Many of Mr. McCargar's complaints, a representative sample of which Justice Henderson provided (at paras 55-79), fell exactly into these categories. Mr. McCargar complained of a loss of personal dignity, breaches of trust by a public official, lockdowns, restrictions on access to programming and privileges, seizure of inmate property, cell conditions, deficiency in provision of legal and research resources, limited communications, inadequate food and clothing, and ineffective grievance processes. None of these are problems that *habeas corpus* is capable of addressing.

Justice Henderson did provide further comments on one of Mr. McCargar's allegations: that the use of "Population Profiles" restricted his liberty. Population Profiles are "a tool used by Correctional Services Canada to identify compatible and incompatible groups of inmates, so that inmate populations may be housed safely" (at para 81). Mr. McCargar alleged that he was kept in administrative segregation during his time at the Edmonton Institution (where he stayed in order to make in-person appearances defending himself from criminal charges in Alberta Provincial Court) because he was incompatible with all nine Population Profiles in use there (at para 83). He argued that the Edmonton Institution ought to restructure its Population Profiles to allow him to be housed with the general population (at para 84). Interestingly, Justice Henderson acknowledged that Mr. McCargar may not be wrong to assert that the use of Population Profiles to confine him to segregation is a breach of his rights (at para 87). However, Justice Henderson held that *habeas corpus* was not intended to be used to challenge a voluntary liberty restriction, a denial of release, or prison policies. Mr. McCargar was voluntarily transferred to the Edmonton Institution because he insisted on representing himself in person at Alberta Provincial Court; before his transfer, he was at Stony Mountain Institution (where, it should be noted, he was also kept in administrative segregation, though the judgment (at para 82) does not say why). Therefore, being in administrative segregation at Edmonton Institution was not challengeable using *habeas corpus* because Mr. McCargar chose to be there. Justice Henderson identified a very narrow exception to this rule where *habeas corpus* can be used to challenge a denial of release that has *become* unlawful (at paras 88-100), but declined to place Mr. McCargar's situation in that category. Finally, he held that "evaluation of prison conditions in a facility such as the Edmonton Institution involves evidence and countervailing policy considerations that are beyond this Court's capacity to review in the present context" (at para 96). He explained that Mr. McCargar has other ways of bringing these potential breaches of his rights before the court that do not involve misusing *habeas corpus*.

Other Avenues for Justice?

Justice Henderson acknowledged that not all of Mr. McCargar's complaints were totally baseless, just that they were ill-suited for resolution via *habeas corpus*. He identified several other ways for Mr. McCargar to legitimately challenge the circumstances of his detention or conditions he considers "cruel and unusual" (at para 100): Mr. McCargar could seek a declaration that his *Charter* rights were breached (paras 47, 70); he could file grievances and appeals using the mechanisms in the *Corrections and Conditional Release Act*, SC 1992, c 20 (CCRA) (para 47); he could seek judicial review of those grievances and appeals at Federal Court (para 47); or he could sue Correctional Manager of Segregration Chris Saint, or Correctional Services Canada as Mr. Saint's employer (para 60). However, the practical

accessibility of any of these more appropriate procedures, for a prison inmate with limited financial and legal resources, is probably quite low. Both a *Charter* challenge and judicial review of a grievance under the CCRA require substantial monetary funds and legal expertise, both in short supply for prison inmates, who according to the 2015-2016 Annual Report of the Office of the Correctional Investigator, are likely to experience low socioeconomic status, low educational achievement, and mental health/substance abuse disorders. In addition, Mr. McCargar indicated that he considered the grievance process "ineffective and unfair" (at para 78). While the misuse of *habeas corpus* is no doubt frustrating for the under-resourced Alberta judiciary, it may indicate that prison inmates lack an effective, timely, and accessible way of resolving their complaints, and are desperate enough to pursue any avenue that indicates even the slightest chance of success. Justice Henderson is correct to identify these other mechanisms for resolution, but their availability to inmates like Mr. McCargar may be functionally nonexistent. Inmates' insistence on using *habeas corpus* to protest prison conditions, however futile, may be less an attempt to waste the court's time than a symptom of a larger problem: they feel their rights are being violated, and they have no functional way of challenging these perceived violations.

Restrictions on Further Court Access

While prison inmates generally face significant barriers in access to justice, Mr. McCargar in particular seems likely to be even further restricted from access to the Alberta courts. The combination of Mr. McCargar's "persistent history in this action of filing frivolous and vexatious, and abuse of process applications" (at para 8) and "chronic backlogs" in the Alberta courts (*Ewanchuk* para 177) seems to have led Justice Henderson to, like Justice Thomas in *Ewanchuk*, seek a prohibition against any further applications to court by Mr. McCargar that do not relate to specific Provincial Court actions, contempt of court/vexatious litigant hearings, or an appeal of Justice Henderson's decision (at para 117).

While it would be difficult to disagree that Mr. McCargar should be restricted from making further applications that have no chance of success, it is unfortunate that the Alberta courts (through no fault of their own) must resort to finding inmates in contempt of court and declaring them vexatious litigants when the rights violations these inmates protest, if legitimate, are within the federal government's capacity to remedy. If prison inmates had access to affordable legal representation and faced less objectionable conditions of incarceration, perhaps the courts would not be forced to deal with the overwhelming volume of their baseless complaints via restrictions such as vexatious litigant orders. As Justice Henderson rightly notes, "evaluation of prison conditions . . . involves evidence and countervailing policy considerations that are beyond this Court's capacity to review in the present context" (at para 96). However, just because the Court does not have the capacity to review prison conditions does not mean that the federal government escapes the responsibility to ensure that inmates do not experience treatment that breaches their *Charter* rights (as discussed in my earlier post on *R v Blanchard*, 2017 ABQB 369 (CanLII)).

Mr. McCargar also emerged from this spate of litigation with $1000 in costs awarded against him. As I argued in a previous post on *R v Voisey*, a case on which Justice Henderson relied in the section of his judgment on costs, discouraging vexatious litigation through costs should be exercised carefully in relation to prison inmates, given their severely reduced ability to pay. In *Voisey*, a $1000 costs award reduced a (likely indigent) inmate's already negligible income and forced him to pay the remainder of his debt immediately upon release, potentially making him

less likely to successfully reintegrate into society and increasing his chances of reoffending. According to Justice Henderson, "Mr. McCargar has seized on the *habeas corpus* process as a basis to, without cost to himself, inflict unnecessary and inappropriate litigation demands on this Court" (at para 5). While Justice Henderson correctly characterizes Mr. McCargar's behaviour, any litigation undertaken by inmates must almost necessarily be without cost to themselves, given their inability to pay for legal counsel. Awarding costs against Mr. McCargar seems unnecessary here, given the likelihood that he will already be restricted from further vexatious litigation via an order.

Finally, in addition to clearly setting out the very limited circumstances in which joint *habeas corpus* applications are appropriate (at paras 9-25), Justice Henderson proposed a new set of restrictions on all *habeas corpus* applications going forward. He relied on *Hryniak*, *Jordan*, and the recent Supreme Court decision in *R v Cody*, 2017 SCC 31 (CanLII) (see here for a discussion of that case) to establish the court's responsibility to improve its own efficiency (at para 43), suggesting that the court should strike or refuse to accept *habeas corpus* applications that only seek "a declaration or other remedies that do not potentially implicate a person's liberty" (at para 48). As the logic seems to go, if only *habeas corpus* applicants with legitimate arguments are able to jump the judicial queue, vexatious applications from inmates will no longer exacerbate the court's chronic backlog.

If Justice Henderson's proposition for this new method of screening *habeas corpus* applications is adopted, the court will hopefully see less vexatious litigation. Certainly Mr. McCargar, given his pending hearings on being found in contempt of court and declared a vexatious litigant, as well as his substantial costs order, will need to restrain himself from further allegations of liberty deprivation. However, in the meantime, it seems likely that prison inmates will continue to experience adverse conditions of incarceration with few legitimate avenues to protest their treatment.

This post may be cited as: Amy Matychuk "'Beyond This Court's Capacity': *Habeas Corpus* Hearings Restricted to Liberty Remedies Only" (24 July, 2017), online: ABlawg, http://ablawg.ca/wp-content/uploads/2017/07/Blog_AM_McCargar.pdf

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**

Follow us on Twitter **@ABlawg**

CC BY NC ND