February 9, 2018

Alberta Court of Queen's Bench Introduces the Accelerated *Habeas Corpus* Review Procedure

By: Amy Matychuk

Case Commented On: *Latham v Her Majesty the Queen*, 2018 ABQB 69 (CanLII)

In an attempt to address the proliferation of *habeas corpus* applications from inmates in Alberta institutions, the Alberta Court of Queen's Bench (Edmonton) has introduced a new procedure to prevent vexatious *habeas corpus* applications from wasting court resources. *Habeas corpus* is a constitutional remedy for an unlawful loss of liberty (see s 10(c) of the *Charter*, which provides for the right "to have the validity of … detention determined by way of *habeas corpus* and to be released if the detention is not lawful.") Since 2014, Alberta inmates have attempted to use *habeas corpus* to air an increasing number of grievances about their conditions of detention. Because the only remedy available on a *habeas corpus* application is release from detention, it applies narrowly to deprivations of liberty within an institution (such as transfers from lower to higher security) and is useless as a means of addressing complaints about prison conditions. Nevertheless, Alberta inmates appear either to have misunderstood this limitation or to have ignored it, and the Court of Queen's Bench has introduced a procedure designed to keep the most senseless of these applications from reaching the hearing stage and thus wasting judicial time.

This increase in *habeas corpus* applications occurred following the 2014 release of *Mission Institution v Khela*, 2014 SCC 24 (CanLII), in which a federal inmate successfully established via *habeas corpus* that his involuntary transfer from a medium to a maximum security institution was unlawful. In that decision, the Supreme Court of Canada held that the transfer was procedurally irregular due to a lack of reliable, relevant evidence. It also held that in involuntary transfer situations, reasons for the transfer must be provided to the inmate (with some exceptions if the release of that information would jeopardize safety, security, or a lawful investigation, per s 29 of the *Corrections and Conditional Release Act*, SC 1992, c 20). Alberta inmates from the Bowden and Edmonton institutions, apparently emboldened by the ruling in *Khela*, made 10 *habeas corpus* applications in 2016 and 35 in 2017. A single application was successful in 2017 (as noted by Justice Shelley in *Lee v Canada (Attorney General)*, 2018 ABQB 40 (CanLII)).

According to Justice Henderson in *Latham*, the overwhelming majority of these post-2014 applications have been made by self-represented inmate litigants and brought for illegitimate purposes (paras 5-6). Their applications have contained an astonishingly broad range of allegations, from comparatively more reasonable complaints about rude staff and lack of access to lawyers to truly outlandish claims. Indeed, one inmate argued that it violated his rights that he was *not* handcuffed when transferred between institutions (*Loughlin v Her Majesty the Queen*, 2017 ABQB 677 (CanLII) at para 19). Another, a notorious and serial sexual assault offender, complained that he could smell bacon but was not allowed to eat it (*Ewanchuk v Canada*

(Attorney General), 2017 ABQB 237 (CanLII)). In some cases, inmates have taken it upon themselves to act as quasi-legal-counsel and write applications that other inmates then use in court (at para 6; see, for example, *Lee*). These applications must be heard promptly because of the status of *habeas corpus* as a constitutional remedy, and so these obviously nonsensical allegations have jumped the judicial queue and have been heard ahead of legitimate claims, much to the chagrin of the courts. The courts have responded to these meritless applications, in many cases, by attempting to discourage further abuse via vexatious litigant orders and costs awards, with mixed success. The new Accelerated Procedure represents the latest attempt of the Court of Queen's Bench, in the face of Supreme Court decisions on court delays (see *R v Jordan* and *R v Cody*) as well as the reality of its own over-taxed judges, to ensure that inmates are no longer able to waste court time and thereby prolong delays for more reasonable litigants.

As Justice Henderson explains, the new Accelerated Procedure is a document-only "show cause" process that will take effect when the government actor responding to a *habeas corpus* application makes an application to strike under Rule 3.68 of the *Alberta Rules of Court*, Alta Reg 124/2010 (*Latham* at paras 14-15). A government actor can apply to strike a *habeas corpus* application if the court has no jurisdiction to hear it, it has no reasonable basis, it is frivolous, or it is irregular enough to be prejudicial. If the government actor has made a Rule 3.68 application, the court will evaluate both sides' positions (based on the pleadings filed by the applicant and any responses) and issue a written Preliminary Assessment identifying and explaining potential issues (at para 20). Both parties will then have an opportunity to make a written reply (at paras 22-24). After reviewing both sides' replies, the court will issue a Final Assessment either confirming the validity (in whole or in part) of the *habeas corpus* application or striking it (at para 25). The matter will only proceed to a hearing if the court confirms its validity using the Accelerated Procedure. This procedure is based on a similar Ontario strategy for dealing with vexatious litigants (at para 26). Both the Ontario procedure and the new Alberta procedure are designed to identify clear cases of abusive litigation and prevent them from reaching the hearing stage, thereby ensuring that court time is used effectively.

Having laid out this new procedure, Justice Henderson proceeded to apply it to Mr. Latham, the applicant, who was convicted in 1987 of sexually assaulting his 15-year-old stepdaughter with a knife and declared a dangerous offender (*R v L (BR)*, [1987] MJ No 263, 2 WCB (2d) 152). Mr. Latham alleged that he was incorrectly convicted and sentenced in 1987, that his parole was incorrectly suspended in 2016 and 2017, that he had been subjected to cruel and unusual punishment under s 12 of the *Charter*, and that he should be released (at para 33-34). *Habeas corpus* cannot be used to reevaluate a criminal conviction (per *May v Ferndale Institution*, 2005 SCC 82 (CanLII) at para 36), to challenge a Parole Board decision where appeals have not been exhausted (*Armaly v Canada (Parole Service)*, 2001 ABCA 280 (CanLII); *DG v Bowden*, 2016 ABCA 52 (CanLII) in conjunction with *R v Ewanchuk*, 2017 ABCA 145 (CanLII) at para 22), or to argue for the breach of a *Charter* right other than unlawful detention (*Steele v Mountain Institution*, 1990 CanLII 50 (SCC), [1990] 2 SCR 1385 at para 83). Therefore, Justice Henderson concluded on a *prima facie* basis that Mr. Latham's application could not succeed (at para 45).

In keeping with the Accelerated Procedure, Justice Henderson gave Mr. Latham until February 28 to explain (in no more than 10 pages of written submissions) why he should be allowed to use *habeas corpus* for apparently prohibited purposes. If he chooses not to respond, his application

will be dismissed without a hearing. If his response does not adequately address the Court's concerns, his application will be struck pursuant to Rule 3.68. The 10-page limit represents an attempt to force inmates to be succinct in their submissions in order to ensure court time is not wasted reviewing meritless applications. Previous applications from self-represented inmates have involved hundreds of pages of submissions (as in *McCargar v Canada*, 2017 ABQB 416 (CanLII), which I discussed in an earlier post), so the Court of Queen's Bench is understandably reluctant to allow more long-winded pleadings.

As I have noted in more detail in previous posts discussing the Alberta courts' ongoing struggle with vexatious *habeas corpus* applications (see here, here, and here), inmates often identify very real problems with prison conditions and possible breaches of *Charter* rights. However, the Alberta courts have repeatedly responded to their allegations by noting that *habeas corpus* is an inappropriate means of addressing these problems. Understandably, the Court's patience has worn thin. Presumably, it hopes that this new procedure will finally deter *Khela*-inspired inmates from dumping a kitchen sink's worth of grievances into a *habeas corpus* application and hoping that one sticks.

This post may be cited as: Amy Matychuk "Alberta Court of Queen's Bench Introduces the Accelerated *Habeas Corpus* Review Procedure" (9 February, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/02/Blog_AM_Habeas_Corpus.pdf