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R v Shoemaker: Alberta Court of Appeal Tells Corrections Canada to Follow Its Own Rules

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Case Commented On: *R v Shoemaker*, 2019 ABCA 266 (Can LII)

In *R v Shoemaker*, Justices Marina Paperny, Frans Slatter, and Kevin Feehan for the Alberta Court of Appeal (ABCA) overturned Alberta Court of Queen's Bench (ABQB) Justice K. D. Yamauchi's decision dismissing Mr Shoemaker's application for *habeas corpus*. Mr Shoemaker applied for *habeas corpus* after he was involuntarily transferred from the medium and minimum security Drumheller Institution to the maximum security Edmonton Institution. The ABCA held that Mr Shoemaker did not have a reasonable opportunity to prepare and provide representations responding to the reasons for his transfer or to seek the assistance of legal counsel. He was denied these opportunities because Correctional Service Canada (CSC) did not follow the procedural safeguards for inmates as set out in the *Corrections and Conditional Release Act*, SC 1992, c 20 (CCRA), the *Corrections and Conditional Release Regulations*, SOR/92-620 (CCRR), and CSC's internal directives. This post is part of my ongoing series on *habeas corpus* litigation in Alberta. For more background, see my previous posts from May 2017, July 2017, and February 2018.

Facts

Mr Shoemaker is 44. He has been serving a life sentence for first-degree murder since 2001. Early in his sentence, he was injured so severely at the Edmonton Institution that he was declared dead before being resuscitated. He was transferred to Drumheller Institution in October 2015, where he stayed until he was transferred back to the Edmonton Institution on March 19, 2018. His transfer back to Edmonton occurred after an 11-day period in February 2018 when there were two inmate deaths and six overdoses at Drumheller Institution as a result of smuggled fentanyl. An internal investigation implicated Mr. Shoemaker as part of the institutional drug subculture and as an individual suspected of facilitating the fentanyl smuggling (though the RCMP never interviewed Mr Shoemaker and no disciplinary proceedings were ever brought against him). He was placed in administrative segregation until his transfer.

During his time in administrative segregation, Mr. Shoemaker received official documents setting out the reasons that CSC was considering raising his security classification to maximum and involuntarily transferring him to the Edmonton Institution. No more than an hour after Mr Shoemaker received these documents, the Acting Warden met with him to give him an opportunity to provide an in-person rebuttal to the proposed transfer and underlying drug trafficking allegations. According to Mr Shoemaker, "We had a very brief discussion, and I told her I was innocent." He did not consider this a rebuttal. The next day, he asked for an extension to provide a rebuttal because he had obtained counsel. The Acting Warden took the position that Mr

Shoemaker had already provided a rebuttal. Mr Shoemaker was subsequently transferred to Edmonton. Since that transfer, he suffered a laceration to his head, broken ribs, and serious retinal damage affecting his sight after an attack by three Edmonton inmates. (See paras 5-28 of *Shoemaker v Canada (Drumheller Institution)*, 2018 ABQB 851 ("ABQB decision") and paras 4-17 of Mr Shoemaker's appeal factum for these facts.)

Habeas Corpus and Prison Law

Justice Yamauchi provided an overview of the law of *habeas corpus* in the ABQB decision (at paras 29-44). Briefly, *habeas corpus* is a common law right that directs a state actor who is detaining a person to bring the detained person before the court to determine the legality of the detained person's detention. It applies only to reductions of personal liberty. It is a constitutional requirement that *habeas corpus* applications be heard promptly (see *DG v Bowden Institution*, 2016 ABCA 52 at para 121). Where a person is already subject to detention, such as an incarcerated person like Mr Shoemaker, then *habeas corpus* is only available where there is a loss of "residual liberty": i.e., a further reduction on already limited liberty. In Mr Shoemaker's case, the loss of residual liberty was a security reclassification and transfer from a medium to maximum security institution, where his freedoms would be more severely curtailed.

Habeas corpus applications are often centered on involuntary transfers of inmates. CSC's authority to transfer inmates between institutions comes from s 29 of the CCRA. That authority must be exercised "in accordance with the regulations and taking into account the criteria for the selection of a penitentiary set out in section 28" (ABCA decision at para 11). Those criteria deal with the type of supervision the offender requires, the compatibility of the institution with the offender's community and cultural needs, and the availability of programs and services. Sections 27 and 12 of the CCRR elaborate on the procedural rights to which inmates are entitled before a transfer can lawfully occur. In particular, the institutional head is to give the inmate written notice of the proposed transfer and the reasons for it within a reasonable period before the decision is to be taken (s 27). Further, "after giving the inmate a reasonable opportunity to prepare representations, [the institutional head shall] meet with the inmate to explain the reasons... and give the inmate an opportunity to make representations" (s 12(b)).

The legislation does not define "a reasonable opportunity", but CSC's internal policy provides further and more explicit guidance. Specifically, Correctional Service Canada's Commissioner's Directive No 710-2-3 addresses "Inmate Transfer Processes". Paragraph 27 of that Directive, under "Involuntary Transfer" (made pursuant to s 12 of the CCRR), says that the inmate will have two working days to respond in person or in writing to the written notice of a transfer. Paragraph 28 provides for an extension to that period of up to 10 working days. Both the ABQB and the ABCA decisions dealt with these legislative provisions and their significance on the question of whether Mr Shoemaker was afforded procedural fairness.

Alberta Accelerated *Habeas Corpus* Review Procedure and Civil Practice Note No. 7

The law of *habeas corpus* has been the topic of several decisions from the ABQB in the last few years because of a sudden increase in the number of *habeas corpus* applications from Alberta inmates (a phenomenon I discuss here). After the Supreme Court of Canada's decision in *Mission*

Institution v Khela, 2014 SCC 24, which was favourable to the appellant inmate, Alberta inmates made 10 *habeas corpus* applications in 2016 and 35 in 2017. The overwhelming majority of these post-2014 applications were made by self-represented inmate litigants and were unsuccessful. The content of their applications often demonstrated a lack of awareness about the limitations of *habeas corpus* as a remedy, alleging many harms *habeas corpus* is not designed to address. In some cases, inmates have also taken it upon themselves to act as jailhouse lawyers and write applications that other inmates then use in court.

Early in 2018, the ABQB responded to this influx in *habeas corpus* applications by introducing a new procedure – the Accelerated *Habeas Corpus* Review Procedure – to prevent vexatious *habeas corpus* applications from wasting court resources (see *Latham v Her Majesty the Queen*, 2018 ABQB 69, which I commented on here). This procedure added a new stage to the process. If the respondent, usually the Attorney General, applies to strike a *habeas corpus* application, the court evaluates the application for potential issues in a preliminary review. The court then issues a written Preliminary Assessment identifying and explaining potential issues to the applicant inmate. The inmate has an opportunity to respond in writing and clarify his initial submissions; for example, the court might ask an inmate to explain why he should be allowed to use habeas corpus for apparently prohibited purposes, as in *Latham* (at para 45). The matter will only proceed to a hearing if the inmate adequately addresses the court's concerns. If the inmate cannot satisfactorily resolve the issues the court identified, the *habeas corpus* application never proceeds to an oral hearing.

The ABQB noted in *Wilcox v Alberta*, 2019 ABQB 60 (*Wilcox* #1) and *Wilcox v Alberta*, 2019 ABQB 201 (*Wilcox* #2), relying on *Unrau v National Dental Examining Board*, 2018 ABQB 874, "All *habeas corpus* applications received by this Court are immediately reviewed to evaluate their substance. This process was formerly conducted via the Accelerated *Habeas Corpus* Review Procedure [citations omitted], and now under Civil Practice Note No. 7" (*Wilcox* #2 at para 5). Civil Practice Note No. 7, like the Accelerated *Habeas Corpus* Review Procedure, is "a document-based 'show cause' procedure" (*Wilcox* #2 at para 6). The primary relevance of this change seems to be that instead of waiting for the Attorney General to make an application to strike a *habeas corpus* application under Rule 3.68 of the *Alberta Rules of Court*, the court may now immediately review any *habeas corpus* filing "to evaluate whether that filing constitutes an 'Apparently Vexatious Application or Proceeding' (AVAP)" (*Wilcox* #1 at para 7; see also *Wilcox* #2 at paras 12-21). From the perspective of the Alberta courts, these new procedures are necessary to stop *habeas corpus* applications containing nonsensical allegations from jumping the judicial queue and being heard ahead of legitimate claims.

However, from an inmate perspective, the applications may be examples of something less purposely vexatious and more systemic: inmates' rights are so severely curtailed and the conditions they experience so unpleasant that they may grasp at any opportunity, no matter how far-fetched, to be heard by a court. Further, inmates may be identifying legitimate breaches of their rights, but without access to counsel, legal information, or other research resources for help with drafting, those legitimate breaches are buried in rambling submissions that do little except aggravate the courts adjudicating them.

Fortunately for Mr Shoemaker, he had counsel on his application, giving him an advantage over many other inmates. Unfortunately for Mr Shoemaker, the many *habeas corpus* applications that went before his may have intensified court scrutiny of his application.

The ABQB Decision

Given this context, it is perhaps not surprising that ABQB Justice Yamauchi did not find Mr Shoemaker's *habeas corpus* application particularly compelling. Justice Yamauchi also appeared to find it significant (and perhaps an aggravating factor) that Mr Shoemaker was suspected of involvement in prison drug trafficking that led to two fatal fentanyl overdoses. Indeed, he concluded:

> … this Court has no difficulty in concluding that the Acting Warden's decisions were not only reasonable, but correct on a balance of probabilities. Multiple sources, including informants who were rated as "Completely Reliable" implicated Mr. Shoemaker in the institutional drug subculture, which included drug trafficking in the Drumheller Institution. The serious consequences of his involvement and the resulting abuse of fentanyl in that institution are deathly obvious. (ABQB decision at para 87)

Justice Yamauchi's assessment of Mr Shoemaker's arguments about his opportunity to respond and his opportunity to retain counsel is brief and somewhat vague, spanning a total of only nine paragraphs (paras 76-84). He noted that Mr Shoemaker was given opportunities to orally rebut the reasons for the transfer. He also dismissed arguments that the Acting Warden had not followed the procedural requirements for giving inmates notice of transfer in a single sentence: "Despite arguments about whether the procedure that the Acting Warden followed conformed strictly to the [requirements], what really matters is whether, functionally, Mr. Shoemaker knew the basis for his possible transfer, and had an opportunity to say his piece in response" (ABQB decision at para 79). Justice Yamauchi held that he did.

Oddly, Justice Yamauchi did not discuss the requirement in CSC policy that inmates be given two days to respond to written notice of a transfer. He merely concluded, "the process followed by the Acting Warden and other Drumheller Institution staff was compliant with the CCRA and CCRR" (ABQB decision at para 78) without considering compliance with the policy.

Justice Yamauchi also concluded that Mr Shoemaker had a reasonable opportunity to retain and instruct counsel—a right recognized in s 97(2) of the CCRR—because he was given the opportunity to contact Legal Aid and lawyers after being placed in administrative segregation. However, these reasons do not mention Mr Shoemaker's unsuccessful application for an extension (under paragraph 28 of the Directive) in order for his retained counsel to assist him.

Costs

Justice Yamauchi ordered Mr Shoemaker to pay $1,000 in court costs due to irregular pleadings and claims he made about the inaccuracy of internal CSC documents. While Justice Yamauchi's comments about Mr Shoemaker's "overly broad, vague, or unsubstantiated pleadings" (at para 92) are nonspecific, they come as a surprise given that most *habeas corpus* applicants are self-

represented, but Mr Shoemaker was represented by legal counsel. While an assessment of the quality of pleadings is a subjective endeavor, surely pleadings drafted by legal counsel are generally of better quality than pleadings drafted by a self-represented inmate. In addition, the court has a responsibility to "hearken to a plea for relief from behind the bars of a prison, whether or not it is in scrupulously proper form" (*Mennes v Canada*, [1988] FCJ No 706, 23 FTR 181 at para 10, as cited in Mr Shoemaker's appeal factum).

The ABQB has ordered $1000 in costs against an inmate on a *habeas corpus* application on three other recent occasions: *MacKinnon v Bowden Institution*, 2017 ABQB 574; *Gogan v Attorney General of Canada*, 2017 ABQB 609; and *McCargar v Canada*, 2017 ABQB 416 (which I commented on here). Only one of those cases involved a represented litigant (*MacKinnon*). The other two involved self-represented litigants. Those two applications failed because the court refused to take jurisdiction on the basis that a separate complete, comprehensive, and expert process existed to address the inmate's claim (*Gogan* at para 23) and there was no deprivation of liberty (*Gogan* at para 23; *McCargar* at para 79). In *MacKinnon*, where the applicant was represented in part by an articling student, the court awarded $1000 in costs against the applicant because "he sought a number of remedies that not only were denied, but could never be made available via *habeas corpus*"; he attempted to obtain "results unrelated to his [involuntary] transfer"; and he "filed voluminous documents, most of which were irrelevant" (at paras 81-82). While the first of these is also a fair criticism of Mr Shoemaker's Originating Application according to Justice Yamauchi's judgment, the other two do not seem applicable to Mr Shoemaker. In addition, the court did not refuse to take jurisdiction of Mr Shoemaker's application as it did in *Gogan* and *McCargar*.

Justice Yamauchi explained why the remedies sought were not appropriate: "Mr. Shoemaker advanced (but abandoned) impossible remedies that are not available through *habeas corpus*" (ABQB decision at para 93). As discussed above, the only remedy available via *habeas corpus* is release from unlawful detention. Because this remedy is so narrow, the ABQB has indicated that the "basket clauses" or boilerplate remedies included in many pleadings, i.e. remedies beginning with "such further and other relief", are not appropriate on *habeas corpus* applications. The ABQB confirmed this more recently than *Shoemaker* in *Amer v Canada (Grande Cache Institution)*, 2019 ABQB 546, an interim decision reviewing a *habeas corpus* application. In that decision, Justice John T. Henderson (the same judge who wrote the decision creating the Accelerated *Habeas Corpus* Review Procedure, *Latham*) struck a paragraph containing a general request for "such further and other relief in the nature of *habeas corpus*" entirely (at paras 5-6). Counsel in Alberta who represent *habeas corpus* applicants may want to take note that "basket clauses" in *habeas corpus* applications will attract this kind of judicial attention.

The last reason Justice Yamauchi gave for the costs award was based on a question Mr Shoemaker's counsel raised about the veracity of an internal CSC document, the Notice of Involuntary Transfer, which Mr Shoemaker signed. Counsel pointed out that according to the time stamp on the document, it must have been signed by the warden before it was even printed, suggesting it might have been falsified (at page 48 of the transcript). However, Mr Shoemaker's counsel submitted, "we made it clear in our affidavit that we weren't making any allegations. It could merely be an oversight. But given the importance of the document, we just ask that the circumstances surrounding the time log and the time on that statement be considered" (at page 49

of the transcript). In his decision, Justice Yamauchi characterized these claims as allegations that CSC's "materials were intentionally designed to mislead the court" (at para 93).

The ABCA did not comment on the costs portion of the decision. Instead, it overturned Justice Yamauchi's judgment based on the procedural fairness requirements attached to Mr Shoemaker's reclassification and transfer.

The ABCA Decision

The ABCA considered Mr Shoemaker's arguments about his inadequate opportunities to respond to CSC's reasons for transfer and to instruct counsel in much more detail than Justice Yamauchi. The panel also explicitly laid out the procedural requirements for lawfully transferring inmates as prescribed in the applicable legislation: the CCRA, CCRR, and Commissioner's Directives made under the authority of the CCRA and the CCRR. The ABCA's conclusion regarding these procedural requirements linked lawfulness with procedural fairness:

> To be lawful, a transfer decision must be procedurally fair. To ensure procedural fairness, the correctional authorities must meet the statutory requirements. The process followed here did not meet those requirements. This was not a mere technical breach of the legislation. The procedural errors rendered the decision making process unfair and the decision, and resulting detention, are therefore unlawful. (at para 34)

This paragraph, as well as the ABCA's more detailed reasons, contrasts sharply with Justice Yamauchi's conclusions both that the transfer process used was compliant with the legislation and that the Acting Warden's transfer procedure did not need to conform strictly to the legislated requirements. The ABCA identified this ruling as an error, holding: "Given the significant impact of this decision on the appellant's liberty interest, five minutes, or even one hour, to review the written documentation provided and prepare a rebuttal to it cannot be considered a reasonable opportunity to respond" (at para 32). While noncompliance with the CCRR and the Directive is not necessarily fatal to CSC's case, "Compliance with those requirements, or a lack of such compliance, is an essential consideration in assessing whether the decision-making process was procedurally fair" (at para 31). The question before the ABCA was whether the breach of the legislation rendered the decision procedurally unfair (at para 16). Justice Yamauchi concluded that it did not; the ABCA concluded that it did, ordering that Mr Shoemaker be "returned to his previous state of liberty" (ABCA decision at para 36).

Analysis

The significance of a security reclassification and transfer is easily lost on those unfamiliar with the prison context. In Mr Shoemaker's situation, the ramifications of a reclassification and transfer are severe. He is an inmate serving a life sentence with the possibility of parole after 25 years. Before the events at issue here, he had made substantial rehabilitative progress, and he was anticipating being recommended for minimum security classification, which would involve the possibility of escorted temporary absences from prison. Inmates in his situation also eventually have the opportunity to apply for "faint hope parole", a hearing where a jury considers "changes which have occurred in the applicant's situation and which might justify imposing a less harsh

penalty upon the applicant" (Chief Justice Lamer, as he then was, in *R v Swietlinski*, 1994 CanLII 71 (SCC), [1994] 3 SCR 481). To be reclassified as maximum security removes those possibilities in the near future, a significant setback for an inmate who has worked to complete numerous prison programs, including occupational training, attaining a GED, and gaining employment in the institution. (See Appellant's Factum at paras 8-9) In addition, maximum security facilities can present a greater risk of inmate-on-inmate violence, as Mr Shoemaker experienced subsequent to his 2018 transfer.

As noted in Mr Shoemaker's appeal factum, the Supreme Court held in *Baker v Canada*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) that "the more important a decision is to the lives of those affected and the greater its impact of that person or those persons, the more stringent the procedural protections that will be mandated" (at para 25). The ABCA acknowledged the importance of Mr Shoemaker's procedural rights, noting the liberty interest at stake in the reclassification and transfer decision (at para 32). Given the impact of a reclassification and transfer decision on Mr Shoemaker, surely he deserved at least the procedural protections that CSC has chosen to impose on itself via Commissioner's Directive. The Directive mandates that Mr Shoemaker was owed two days to consider the reasons for transfer before having an opportunity to provide a rebuttal. He received an hour at most. Although Commissioner's Directives are not subordinate legislation and therefore not legally binding, they provide specific content for the general rights inmates have under the CCRA and CCRR. The Commissioner, under the direction of the Minister of Public Safety and Emergency Preparedness, has the authority to set the rules in the Directives. Accordingly, the ABCA's decision amounts to an order that CSC follow its own rules.

The ABCA's decision protecting Mr Shoemaker's procedural rights is a rare example of successful *habeas corpus* litigation in Alberta. However, such examples might be more common if *habeas corpus* litigation did not present such a frustrating intersection of impecunious and legally inexperienced clients, unavailable counsel, and hostile courts. Inmates rarely have the resources to hire a lawyer to represent them on *habeas corpus* applications, and while Legal Aid funding is available, it can be a challenge for inmates to find lawyers willing to take on these applications. Therefore, the only recourse inmates have is often to represent themselves. These difficulties may contribute to creating what the courts consider a "vexatious" litigant. As Drew Yewchuk and Christine Laing have commented on ABlawg, "Vexatious litigants are often thought of as a cause of delays and inefficiencies in legal dispute resolution mechanisms; however, in our view, those delays and inefficiencies can also cause vexatious litigants." It is not surprising that a group without access to representation and with disproportionately low rates of educational attainment (approximately 75% of offenders admitted to federal custody reported that they did not have a high school diploma or equivalent) drafts pleadings that are lengthy, inexact, and nonspecific.

Despite the difficulties inmates already face with bringing *habeas corpus* applications, the Alberta courts have made it easier than ever to strike them before they reach an oral hearing using first the Accelerated *Habeas Corpus* Review Procedure and now Civil Practice Note No. 7. This new procedure requires more time from judges and court staff, and more written submissions from inmates. Given that reviewing *habeas corpus* applications for vexatious indicia already requires extra resources from the justice system, perhaps a more effective way of spending those resources to reduce meritless *habeas corpus* applications would be to ensure inmates have access to counsel. The new document review procedure keeps frustrated inmates out of courts for reasons they

struggle to understand, further marginalizing them and reducing their belief in the fairness of the legal system. In contrast, using those resources to hire *habeas corpus* duty counsel should result in better drafted applications as well as inmates perhaps feeling as though their voices are heard and respected. Further, an improved *habeas corpus* application system might increase CSC's accountability and transparency, encouraging more careful adhesion to guidelines, fewer obvious procedural breaches, and perhaps eventually a decrease in the number of misguided *habeas corpus* applications.

While Mr Shoemaker's application was granted at the ABCA, his situation reflects the current difficulty inmates face even on meritorious *habeas corpus* applications in Alberta. Mr Shoemaker had a legitimate complaint and the resources not only to bring it but to appeal it. Despite the expedited nature of the application, 15 months—all of which he spent in a maximum security facility–elapsed between his unlawful transfer and the ABCA decision. Considering many inmates are unable to access similar resources, their chance of success seems slim to vanishing. The Accelerated *Habeas Corpus* Review Procedure will bar such applicants from the courts without giving them the benefit of a conversation with a lawyer who could tell them whether or not their claim has merit. Had Mr Shoemaker been self-represented, he might not have had the benefit of a favourable judgment from the ABCA. Hopefully, this decision encourages a more measured approach to inmate litigants that takes their concerns seriously, rather than focusing on keeping them out of the courts entirely.

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