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Alberta Court of Appeal Restores Access to *Habeas Corpus*

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Case Commented On: *Wilcox v Alberta*, 2020 ABCA 104 (CanLII) (*Wilcox* CA)

This Court of Appeal decision is significant for a number of reasons. Most importantly, the decision means that accused individuals in pre-trial solitary confinement in Alberta now have access to *habeas corpus*, the fastest way to challenge the legality of that confinement. So too do prisoners held in solitary confinement from the very beginning of their sentence. It is also significant because it criticizes the approach taken by the Court of Queen's Bench to recent *habeas corpus* applications, including that of Mr. Wilcox. The appellate court found that the lower courts misunderstood precedents, cited cases for rules those cases did not support, ignored a 1985 Supreme Court of Canada decision, relied upon a case that had been overturned, found that an issue was not pled when it was, came to unreasonable conclusions, and made an unwarranted threat of personal costs against Mr. Wilcox's counsel. In addition, the Court of Appeal clarified which *habeas corpus* pleadings are vexatious and abusive and which are not. It also vindicated the work of the Alberta Prison Justice Society and many of the individual prisoners' rights lawyers in that group.

Habeas Corpus

The writ of *habeas corpus* is an ancient common law right. Individuals who are detained by the state have the right to go to court and demand that the state prove that their detention is lawful. In Canada, that right is also now enshrined in section 10(c) of the *Canadian Charter of Rights and Freedoms*, which provides that "[e]veryone has the right on arrest or detention ... to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

A recent unanimous Supreme Court of Canada decision, *Mission Institution v Khela,* 2014 SCC 24 (CanLII), summarized what prisoners must do in order to succeed on a *habeas corpus* application (at para 30). They must first establish that they have been deprived of liberty. Once they have done that, they must raise a legitimate ground upon which to question the legality of that deprivation of liberty. If they do both of those things, the onus shifts and the government must show the deprivation of liberty was lawful.

There are three types of deprivations of liberty: an initial deprivation of liberty, a substantial change in conditions that amounts to a further deprivation of liberty, and a continuation of the deprivation of liberty: *Dumas v Leclerc Institute*, 1986 CanLII 38 (SCC). A deprivation of liberty or loss of residual liberty "will be unlawful where the decision-maker acted without jurisdiction, made a decision lacking in procedural fairness, or made a decision that was unreasonable or

otherwise arbitrary or lacking in evidentiary foundation" (*Wilcox* CA at para 32, citing *Khela* at para 67).

Habeas corpus applications must be heard quickly and therefore take priority over other court proceedings (*Khela* at para 3).

Facts

The facts of the case are quite simple. When Mr. Wilcox was incarcerated at the Edmonton Remand Centre (ERC) in December 2017, he was placed directly into administrative segregation under the provisions of the *Corrections Act*, RSA 2000, c C-29 and *Correctional Institution Regulation*, Alta Reg 205/2001. He remained in administrative segregation for sixteen months, until April 2019, when he was released into the general population. His *habeas corpus* application was brought in January 2019, after thirteen months in administrative segregation.

Mr. Wilcox's administrative segregation was characterized by the Court of Appeal as "solitary confinement" as defined in Rule 44 of the United Nations Nelson Mandela Rules (*Wilcox* CA at para 21). He was housed alone in a seven foot by eight foot cell equipped with a bed and a desk and only released from his cell for one hour a day to a small room with a window and one exercise bike. He was allowed books and a four-channel radio to help pass the time. He was not allowed access to the yard, or to educational or other programs. He had minimal face-to-face contact with other people (*Wilcox* CA at para 10). The Court of Appeal also noted the potential for solitary confinement to cause serious, potentially permanent, harm (*Wilcox* CA at para 23, quoting *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243 (CanLII), leave to appeal to the Supreme Court of Canada granted, 2020 CanLII 10506 (SCC)).

Mr. Wilcox's *habeas corpus* application was never heard on its merits, despite the fact it was the subject of five different judgments.

Procedural History

Since 2018, all *habeas corpus* applications received by the Court of Queen's Bench are immediately reviewed to evaluate their substance, initially under a process called the Accelerated *Habeas Corpus* Review Procedure, and now under Civil Practice Note No 7 (CPN7). This review initiates a documents-only, show cause procedure for "Apparently Vexatious Applications and Proceedings."

Mr. Wilcox's application was initially dealt with by Justice John T. Henderson under CPN7. *Wilcox v Alberta*, 2019 ABQB 60 (CanLII) (*Wilcox* QB#1) is an example of the first step in the CPN7 procedure. Justice Henderson identified five apparent defects in the pleadings which suggested the *habeas corpus* application was vexatious and an abuse of the court's process. It also gave Mr. Wilcox, as the party who filed the apparently vexatious application, an opportunity to make a written argument that the proceedings were legitimate and should be allowed to continue (*Wilcox* QB#1 at para 7-9).

Wilcox v Alberta, 2019 ABQB 110 (CanLII) (*Wilcox* QB#2) is the decision of Justice Henderson on the second step in the CPN7 procedure, responding to the written submissions made on behalf of Mr. Wilcox. Because there were unspecified "unusual circumstances" in this case, Justice Henderson terminated the CPN7 procedure, ordered the parties to proceed with an oral hearing under Rule 3.68 of the *Alberta Rules of Court*, Alta Reg 124/2010 to determine if the *habeas corpus* application should be struck out, and ordered that a different judge be assigned to deal with the matter (*Wilcox* QB#2 at paras 7-8).

That oral hearing was held before Justice D.R.G. Thomas: *Wilcox v Alberta*, 2019 ABQB 201 (CanLII) (*Wilcox* QB#3). It was heard on the basis of the written submissions made to Justice Henderson in the CPN7 proceedings, as well as oral submissions (*Wilcox* QB#3 at para 59). Justice Thomas concluded the *habeas corpus* application was "an abusive, vexatious proceeding" for four of the five reasons previously identified by Justice Henderson, struck Mr. Wilcox's pleadings, and awarded $1,500 in costs against Mr. Wilcox (*Wilcox* QB#3 at paras 80-81). He held that Mr. Wilcox had not identified a deprivation of liberty or loss of residual liberty, had filed defective pleadings, had inappropriately combined judicial review and *Charter* proceedings with the *habeas corpus* application, and had sought impossible relief that included an open-ended remedy request.

After Justice Thomas' decision and before the Court of Appeal hearing, there was one more decision. Justice Kevin Feehan allowed the Alberta Prison Justice Society (APJS) to intervene in the appeal (*Wilcox v Her Majesty the Queen in right of Alberta*, 2019 ABCA 385 (CanLII). APJS is a not-for-profit society that was incorporated by lawyers, articling students and law students in 2018 for the purpose of addressing justice issues affecting incarcerated individuals in Alberta.

Mr. Wilcox had been released from custody by the time the Court of Appeal heard his appeal in October 2019. Although the appeal was moot because of Mr. Wilcox's release, the Court of Appeal – with a bench composed of Justices Barbara Lea Veldhuis, Sheila Greckol, and Jo'Anne Strekaf – held that the issues his grounds of appeal raised were "of sufficient importance that they should nonetheless be decided" (at para 8; see also paras 25-28).

First Ground of Appeal: No Deprivation of Liberty

As already noted, the first thing an applicant must do on a *habeas corpus* application is prove a deprivation of liberty (*Khela* at paras 30, 39). The question of whether or not an initial placement into administrative segregation is subject to review by *habeas corpus* was the most important issue and the primary reason the Court of Appeal heard the appeal (*Wilcox* CA at para 8).

Court of Queen's Bench Decisions

The first reason Justice Thomas gave for dismissing the *habeas corpus* application was because Mr. Wilcox "has not identified any deprivation of liberty that is subject to potential review by *habeas corpus*" (*Wilcox* QB#3 at para 38).

This was also the first apparent defect identified by Justice Henderson in his initial CPN7 decision (*Wilcox* QB#1 at para 11), where he held that, because Mr. Wilcox had been in administrative segregation since he first arrived, he had not experienced a deprivation of liberty or a loss of

residual liberty. Without a deprivation of liberty or loss of residual liberty, the *habeas corpus* application was a “hopeless proceeding” (*Wilcox* QB#1 at para 12).

Justice Henderson identified six cases as authorities for the idea that there is no deprivation of residual liberty when a prisoner has been subject to the complained-of condition from the start of his incarceration (*Wilcox* QB#1 at para 11). Justice Thomas relied upon the same six cases to conclude that *habeas corpus* did not apply when the issue was the initial conditions in which a prisoner was placed after their detention was ordered. Neither Justice Henderson nor Justice Thomas discussed any of these six cases. They were presented as a string of bare citations.

Alberta Court of Appeal Decision

The first point the Court of Appeal made in its analysis is the distinction between a “security classification” – either minimum, medium or maximum – under section 30 of the *CCRA* and “administrative segregation” under sections 29.01 and 34 (*Wilcox* CA at para 19). They noted that every prisoner receives a security classification which determines which facility they are placed in. Once in a facility, a decision to place an inmate into administrative segregation, no matter when it is made, is “necessarily distinct from their security classification and is described as a ‘transfer’” (*Wilcox* CA at para 19). Transfers – whether to a hospital or to administrative segregation (now “structured intervention”) or to another penitentiary – are for individuals who are “sentenced, transferred or committed to a penitentiary”: section 29 *CCRA*.

The Court of Appeal conceded that originally, under English common law, “*habeas corpus* was not available to review the decision to subject a prisoner to a particular form of incarceration” (*Wilcox* CA at para 33). The old understanding of the writ’s scope required that a prisoner be able to be released from prison if their application was successful. That view was questioned in Canada in the first modern book on the ancient writ. In *The Law of Habeas Corpus* (Oxford: Clarendon Press, 1976), Robert J. Sharpe, argued (at 148-49) that solitary confinement could be seen as a “prison within a prison” and there was therefore no reason why a prisoner should not be able to use *habeas corpus* to be released from the inner prison while still held within the outer one (*Wilcox* CA at para 33).

The “prison within a prison” idea has become widely adopted. In 1985, the Supreme Court of Canada held that prisoners placed in solitary confinement lose a significant amount of their “residual liberty” and such a placement is a “new detention of the inmate, purporting to rest on its own foundation of legal authority” (*Wilcox* CA at para 34, quoting *R v Miller*, 1985 CanLII 22 (SCC), [1985] 2 SCR 613 at 641). This “new detention” was reaffirmed by the Supreme Court in *May v Ferndale Institution*, 2005 SCC 82 (at paras 27-28), and by the Alberta Court of Appeal in *R v Shoemaker*, 2019 ABCA 266 (at para 7).

Although the Court of Queen’s Bench cases had taken the view that Mr. Wilcox had no residual liberty to lose because he was placed directly into administrative segregation, the precedents both Justice Henderson and Justice Thomas relied upon did not support that conclusion.

The Court of Appeal noted that the six cases cited by the Court of Queen’s Bench illustrated the very basic principle that the individual applying for *habeas corpus* must establish a deprivation of

liberty (*Wilcox* CA at para 31). They are authority for the idea that *habeas corpus* does not apply when the challenge is to the initial security classifications. However, none of these six cases included a challenge to the legality of a prisoner's administrative detention. As a result, "they do not stand for the proposition that *habeas corpus* is unavailable to a prisoner seeking review of his detention in solitary confinement, whether he was so confined at inception or at some later point in his term of imprisonment" (*Wilcox* CA at para 31).

Indeed, two of the six cases the Court of Queen's Bench relied upon suggest the opposite of what that court relied on them for (*Marcil c Établissement du centre régional de réception (Directeur)*, 2017 QCCS 1833 (CanLII) at para 14; *Gogan v Attorney General of Canada*, 2017 ABQB 609 (CanLII) at para 75). The location of the initial placement in facilities outside Quebec was challenged in *Marcil*. The out-of-province geographic location was characterized as a decision which was disadvantageous to the inmates but not involving a reduction of liberty (*Marcil* at para 11). The court explicitly distinguished the initial placement out of province from restrictive measures such as administrative segregation (*Marcil* at para 14). *Gogan* included a challenge to a temporary placement in solitary confinement that was abandoned and characterized as "moot" (*Gogan* at para 74). Nevertheless, Justice Gill briefly addressed the challenge, holding that:

> being placed in "a prison within a prison" is clearly "a distinct form of confinement or detention" that is a "substantial change" and a deprivation of residual liberty: *R v Miller*, [1985 CanLII 22 (SCC), [1985] 2 SCR 613] at 637. The decision that forms the "foundation of legal authority" for that deprivation of residual liberty may then potentially be challenged by *habeas corpus*. (*Gogan* at para 75)

As a result, the Court of Appeal held that "*habeas corpus* will always be available to challenge placement in solitary confinement pursuant to the *CCRA"* (*Wilcox* CA at para 44). But what about placements under the relevant provincial legislation? While noting that the case law concerning the *CCRA* cannot be applied mechanically, the basic point stood: placing an inmate into solitary confinement, even from the very first moment, is a further deprivation of liberty, a deprivation of the residual liberty he would have had if held in the general population (*Wilcox* CA at paras 45-46). Solitary confinement is a distinct form of detention that requires separate legal authority for its imposition.

In the end, the Court of Appeal held that both a challenge to the initial decision that placed Mr. Wilcox in administrative detention and a challenge to the decisions that kept him there – which, contrary to Justice Thomas's finding that "a good detention gone bad" had not been pled, was pled – were properly part of a *habeas corpus* application (*Wilcox* CA at paras 50-51). Thus, there was nothing abusive or vexatious about either aspect of the *habeas corpus* application.

Second Ground of Appeal: Impossible Relief Sought

Court of Queen's Bench Decisions

In his general prayer for relief, Mr. Wilcox included a request for such "…further and other relief in the nature of *habeas corpus* or judicial review, or otherwise, as this Honorable Court may

determine to be appropriate, or as the circumstances of this matter may require, including release on judicial interim release." Justice Henderson found that this relief clause was seeking "impossible relief" because the only remedy available as a result of a *habeas corpus* application is release to the pre-unlawful detention condition (*Wilcox* QB#1 at para 23).

Impossible relief was also the second reason discussed by Justice Thomas. Mr. Wilcox could not, as requested, be transferred out of solitary confinement and into the general population via a *habeas corpus* application because he was never in the general population (*Wilcox* QB#3 at paras 39-40). Neither could he be released on judicial interim release via *habeas corpus* because that would be a collateral attack on the judge's order imposing the initial detention (*Wilcox* QB#3 at para 44). Justice Thomas went on to note that asking for an impossible remedy and collaterally attacking judgments were indicia of vexatious litigation (*Wilcox* QB#3 at paras 43, 46).

In support of the "impossible relief" conclusion, Justice Thomas noted that *habeas corpus* is a "limited remedy" (*Wilcox* QB#3 at paras 41-42, 60, quoting *R v Latham*, 2018 ABCA 308 (CanLII) at para 7), and not the "flexible and generous writ" Mr. Wilcox had argued it to be (*Wilcox* QB#3 at para 41).

Alberta Court of Appeal Decision

The Court of Appeal held the relief requested was not impossible and allowed this second ground of appeal in a few brief paragraphs. The Crown had conceded that Mr. Wilcox could have been moved into the general population, acknowledging that had been made clear by the Supreme Court of Canada in *May*. The Court of Appeal also held there was no collateral attack on the earlier bail decision (*Wilcox* CA at para 58).

More broadly and importantly, the Court of Appeal held that the lower courts had misinterpreted what Justice Franz Slatter meant in *Latham* when he said *habeas corpus* was a "limited remedy." It is limited in the sense that it is only for wrongful detentions and losses of liberty, and not for other types of grievances (*Wilcox* CA at para 57). In all other ways, Mr. Wilcox was correct that the Supreme Court had "repeatedly described *habeas corpus* as a flexible and generous writ" (*Wilcox* CA at para 57).

This second ground of appeal was also allowed (*Wilcox* CA at para 58).

Third Ground of Appeal: Defective Pleadings

Court of Queen's Bench Decisions

The third reason given by Justice Henderson in the CPN7 proceedings played a greater role in the Court of Appeal decision. Justice Henderson had held the pleadings, with their "basket clause" seeking release "based on as of yet unidentified '… further and other grounds…'" was incompatible with expedited *habeas corpus* applications (*Wilcox* QB#1 at para 19).

Justice Thomas reached the same conclusion about the open-ended nature of the pleadings (*Wilcox* QB#3 at para 48). In doing so he relied upon *Shoemaker v Canada (Drumheller Institution),* 2018

ABQB 851 (CanLII) at para 19, where Justice Keith Yamauchi held that open-ended pleadings which permitted applicants to develop their allegations were improper. The Court of Appeal overturned Justice Yamauchi, but not on this particular point (*R v Shoemaker,* 2019 ABCA 266 (CanLII) at para 10).

Justice Henderson had also found that the pleadings did not provide enough details to allow the Crown to respond; they were defective and devoid of substance and therefore vexatious and abusive (*Wilcox* QB#1 at paras 16-18). Justice Thomas agreed that the pleadings were "so devoid of substance" that the court and opposing party were left unable to defend (*Wilcox* QB#3 at para 56).

Alberta Court of Appeal Decision

The Court of Appeal acknowledged that Mr. Wilcox's affidavit, filed ten days after the application, should have been filed with the pleadings in order to avoid the risk of rejection under CPN7 (*Wilcox* CA at paras 62-63).

In other respects, however, the Court of Appeal found the pleadings "unobjectionable" and "sufficiently intelligible and precise to permit a fair opportunity for response" (*Wilcox* CA at paras 63, 64). Speaking specifically to the inclusion of the basket clause that referred to "further and other grounds as may appear" from the evidence, the Court of Appeal held that it was not improper to include such a clause for the purpose of enlarging the argument once the record was received (*Wilcox* CA at para 64).

As a result, this ground of appeal was allowed on the basis that the lower courts had erred in finding the pleadings defective, abusive and vexatious.

Fourth Ground of Appeal: Judicial Review and *Charter* Proceedings

Court of Queen's Bench Decisions

The mention of judicial review in the basket clause discussed in the third ground of appeal, as well as the pleading of sections 7, 8, 9, 12, and 24(1) of the *Charter,* led to Justice Henderson finding the *habeas corpus* application defective because it was combined with incompatible rights and remedies (*Wilcox* QB#1 at para 20-22, 24). Justice Thomas agreed and found the inclusion of incompatible proceedings another reason to strike out the application (*Wilcox* QB#3 at paras 61-62).

Alberta Court of Appeal Decision

The Court of Appeal noted that the relief sought by Mr. Wilcox included an "Order for Judicial Review in the nature of *habeas corpus* with or without *certiorari* in aid quashing the decision of the Respondent…". The parties were agreed that *certiorari* in aid of *habeas corpus* was judicial review (*Wilcox* CA at para 68). What the lower courts had objected to, and the Crown continued to object to, was the claim for judicial review as an alternative in the relief requested: "Such further and other relief in the nature of *habeas corpus* or judicial review."

The Court of Appeal agreed that the relief requested clause was poorly worded, but said there was "little room for confusion" about the remedy sought or the appropriate procedure. Based on the title of the pleadings – *Habeas corpus Ad Subjiciendum* – and the facts pled, there was "no doubt" that the application was a *habeas corpus* application (*Wilcox* CA at para 69).

In addition, the pleading of *Charter* provisions was held to be appropriate (*Wilcox* CA at para 73, quoting *Canada (Public Safety and Emergency Preparedness) v Chhina*, 2019 SCC 29 (CanLII) at para 21).

As a result, it was not reasonable for the lower courts to conclude that the mention of judicial review and the pleading of *Charter* provisions were defects that were serious enough, by themselves, to justify striking the *habeas corpus* application (*Wilcox* CA at paras 70-71, 75).

Costs

Mr. Wilcox had been ordered to pay the large sum of $1,500 in costs by Justice Thomas. That was remedied by the Court of Appeal, which set aside that costs award.

The conduct of the lawyer who filed the original *habeas corpus* application was not a ground of appeal. But it was the subject of important comment in both Justice Thomas' opinion and in the Court of Appeal judgment.

Court of Queen's Bench Decision

Justice Thomas criticized the *habeas corpus* pleadings for being defective on points on which the Queen's Bench jurisprudence was detailed and consistent (*Wilcox* QB#3 at para 67). He suggested that lawyers, who are responsible for the steps they take in litigation, are even more responsible in *habeas corpus* applications because they are "a unique, special, and privileged category of legal proceedings [whose abuse] causes disproportionate injury to the Court's processes" (*Wilcox* QB#3 at para 70).

Costs were awarded against Mr. Wilcox in the elevated amount of $1,500 "to be paid forthwith" as punishment for what Justice Thomas found to be the abusive and vexatious character of his application (*Wilcox* QB#3 at para 76).

Justice Thomas also discussed whether elevated costs were justified in this case because the lawyer filing the *habeas corpus* application had filed similarly worded applications in two earlier cases – *Prystay v Alberta*, Edmonton 1703 23981 (Alta QB) and *R v MacPherson*, 2013 ABQB 672 – and had been told by Justice Hillier in *Prystay* and Justice Crighton in *MacPherson* that judicial review and *habeas corpus* were incompatible proceedings (*Wilcox* QB#3 at paras 73, 78). Justice Thomas held that ignoring courts' instructions was very relevant to costs, but it was not part of the elevated costs he awarded because the blame fell more on the lawyer than on the litigant (*Wilcox* QB#3 at para 77). Justice Thomas then cautioned the lawyer about future *habeas corpus* applications, and noted that lawyers who abused *habeas corpus* proceedings could be sanctioned with elevated costs and court access restrictions (*Wilcox* QB#3 at para 79).

Justice Thomas' remarks on costs did not go unnoticed. Associate Chief Justice of the Court of Queen's Bench John D. Rooke mentioned the Court of Queen's Bench decisions concerning Mr. Wilcox in *Unrau v National Dental Examining Board*, 2019 ABQB 283 (CanLII), his summary of the law of vexatious litigants. While discussing "Spurious *Habeas Corpus* Applications" as a type of "Abusive Litigation for Profit and Advantage", Justice Rooke stated it was unfortunate that "lawyers are now filing *habeas corpus* applications which have no possible merit (*Unrau* at para 222, citing *Wilcox* QB#1 and *Wilcox* QB#3). He also noted that the lawyer who had filed a vexatious and abusive *habeas corpus* application had been "strongly criticized" (*Unrau* at para 969, citing *Wilcox* QB#3).

Alberta Court of Appeal Decision

Although it was not part of a ground of appeal, the Court of Appeal addressed the threat of personal costs raised by Justice Thomas's remarks, even though the threat was not carried out. They held that the "threat of personal costs against counsel was unwarranted" (*Wilcox* CA at para 76). The threat was unwarranted in part because the authority that Justice Thomas relied upon was his earlier decision in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 (CanLII) at paras 97-109, which was overturned on this point by the Court of Appeal: 2019 ABCA 243 (CanLII) (*Wilcox* CA at para 76).

More importantly, the Court of Appeal recognized that threats of personal costs against counsel could have a chilling effect on counsels' willingness to take on prisoners' rights cases – an access to justice concern (*Wilcox* CA at para 76). Counsel quoted, and the Court of Appeal approved as appropriate, the recent avowal by the Supreme Court of Canada that lawyers are required to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case" (*Wilcox* CA at para 76, quoting *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 73).

Broader Harms of the Court of Queen's Bench Decisions

The Court of Appeal's conclusion on the first ground of appeal – that a transfer to administrative segregation can be challenged even if it was made at the beginning of a detention – is an important substantive point. It is not new law; the 1985 Supreme Court of Canada *Miller* decision makes this point. However, it is important to restate the law in *Miller*, given the recent decisions of the Court of Queen's Bench. And it is especially important to correct the Court of Queen's Bench's misstatements of the law on this point – particularly now, with prisons being a site of concern for the spread of COVID-19, which may lead to more administrative segregation. Justice Thomas may have been correct when he stated that the "jurisprudence of this court is very clear on the scope and operation of *habeas corpus* proceedings" (*Wilcox* QB#3 at para 79). But that very clear jurisprudence did not follow Supreme Court of Canada precedent.

I am not going to speculate on why or how the Court of Queen's Bench was found to have erred in so many different ways in this case. That is work the Court itself should undertake. However, to borrow a criticism of *habeas corpus* applications that Justice Rooke made in *Unrau* (at para 214), even if the Court's use of "carbon copy" responses to *habeas corpus* applications and their "surge of boilerplate" (*Unrau* at para 219) is not to blame, repeating the same points using the

same words and citing the same cases in decision after decision enabled the easy replication of points of law that the Court of Appeal has now found to be in error.

I also want to note that the Court of Appeal judgment is an endorsement of the work of the small group of Alberta lawyers who take on unpopular prisoners' rights cases, and their association, the Alberta Prison Justice Society. Despite the castigation they encountered in the Court of Queen's Bench, they knew they were right in their understanding of the law and they carried on and were vindicated.

In particular, the individual lawyer who had been threatened with personal costs and criticized by no fewer than four Queen's Bench judges in four separate actions was almost completely vindicated. The affidavit in *Wilcox* perhaps could have been filed earlier and the pleadings could have been better drafted. In a perfect world they would have been. But these are minor faults compared to all the ways in which that lawyer's arguments and pleadings were right. Unfortunately, the comments of Justice Thomas (*Wilcox* QB#3 at para 79) and Associate Chief Justice Rooke (*Unrau* at para 969) are on the record, even if the Court of Appeal has found those comments have no basis in law.

Wilcox was not the only or the last of the Queen's Bench *habeas corpus* cases to reach conclusions the Court of Appeal has found to be erroneous. There are at least three more cases with written judgments available on CanLII: *Casavant v Bowden Institution*, 2019 ABQB 369 (CanLII), *Amer v Canada (Grande Cache Institution),* 2019 ABQB 546 (CanLII), and *Blackmer v Drumheller Institution*, 2019 ABQB 685 (CanLII). Perhaps there are more in unwritten or unposted judgments.

In each of these three cases, the basket clause about "further and other grounds" and the relief clause about "further and other relief in the nature of *habeas corpus* or judicial review" were struck for reasons which used either the very same or very similar words as each other and the *Wilcox* decisions. They were struck with a warning that the cost implications of the perceived need to strike those clauses would be evaluated at the full hearing. There is no reported decision of the full hearings in *Casavant* or *Amer*, and in Justice Henderson's decision dismissing Mr. Blackmer's application after a hearing, there is no mention of costs: *Blackmer v Drumheller Institution*, 2019 ABQB 771 (CanLII).

Justice Henderson's initial decision in *Wilcox* was released on January 24, 2019. The Court of Appeal decision was rendered on March 12, 2020. In those intervening almost fourteen months, were costs awarded against the inmates in cases that relied upon *Wilcox* at the Queen's Bench level to find some paragraphs vexatious and abusive? Were any *habeas corpus* proceedings declared to be vexatious and abusive and dismissed simply because they relied on what the *Wilcox* decisions wrongly found to be defects? Were any prisoners declared to be vexatious litigants on the basis that they brought what was wrongly seen as vexatious and abusive *habeas corpus* proceedings?

It seems wrong that all we can do is hope that costs were not wrongfully awarded against these three *habeas corpus* applicants, and possibly others, and that their applications were not wrongly found vexatious and / or dismissed. What is the institutional remedy for wrongs done and harm created by these errors in law?

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