November 3, 2022

The Right to Your Day in Court

By: Kaye Booth

Case commented on: *Heiser v Bowden Institution*, 2022 ABCA 300 (CanLII)

Courts have the responsibility to listen to the applications brought before them, especially when an individual's liberty is at issue. On the other hand, courts have the inherent power to prevent the misuse of their procedures and to control proceedings. These two roles of the court may conflict with each other – if the court has the inherent power to label litigants as vexatious and prevent them from making further applications, how is this squared with the litigant's right to access the court and the court's duty to hear them?

The Honourable then Chief Justice McLachlin, writing for the majority of the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 (CanLII), held that access to justice and to the courts are fundamental to the proper functioning of the rule of law of a democracy (at para 38). Given this, it follows that the power to label a litigant vexatious should be used by the court sparingly. Indeed, the Court of Appeal in *Jonsson v Lymer*, 2020 ABCA 167 (CanLII) held that such a declaration should be the exception, not the routine.

In *Heiser v Bowden Institution*, 2022 ABQB 51 (CanLII), however, the court declined to hear any submissions from an individual applying for a writ of *habeas corpus*, on the basis that he was a vexatious litigant, because he had made previous *habeas corpus* applications, and because his application seemed unlikely to succeed.

Chancey Brent Heiser was convicted and incarcerated for sexual assault and other offences. In 2020, he was released on parole, but that parole was suspended after 5 months as a result of new domestic violence charges. Mr. Heiser brought a *habeas corpus* application to the then Court of Queen's Bench to challenge that decision and secure his release. The Honourable Justice John Henderson denied his application on the basis that he had not yet exhausted the administrative appeals available to him. Then, in February 2021, after the time had passed to appeal the Parole Board's decision revoking Mr. Heiser's parole through administrative means, the domestic violence charges that had triggered the original suspension were stayed. The Parole Board of Canada denied Mr. Heiser's new application for day parole, and his appeal to the Parole Board of Canada Appeal Division was dismissed. He did not apply for judicial review. Mr. Heiser then made another *habeas corpus* application in December 2021 to the Court of King's Bench.

Section 10(c) of the *Canadian Charter of Rights and Freedoms* gives imprisoned individuals the right to challenge their imprisonment as unlawful through a *habeas corpus* application, and the right to be released if their detention is found by a court to be unlawful.

At the chambers level, Justice Henderson of the Court of King's Bench held that he had no jurisdiction to conduct a *habeas corpus* review of the decision of the Parole Board of Canada, and went further to strike Mr. Heiser's application, denying him an oral hearing on the basis that he was a vexatious litigant and had abused process, stating: "the appellant had brought an 'expanding record of persistent, repeated, abusive and hopeless *habeas corpus* applications'" (at para 14). In short, because the application was unlikely to succeed, because he had not exhausted administrative remedies, and because he had made previous *habeas corpus* applications, the Court labelled him a vexatious litigant, and declined to hear his application at all.

Mr. Heiser appealed this decision to the Alberta Court of Appeal, and while ultimately dismissing the appellant's appeal, the panel, which consisted of the Honourable Justices Jack Watson, Frans Slatter, and Frederica Schutz, made unequivocal statements regarding the right of an individual to bring an application for a writ of *habeas corpus,* regardless of its chances of success or any previous applications made by the imprisoned individual.

The Court of Appeal found that the chambers justice had erred in law by finding that he did not have jurisdiction to review the decision of the Parole Board of Canada, even though the appellant had not exhausted the administrative procedures available to him:

> The courts have found that the remedies available under the *Corrections and Conditional Release Act*, including appeals to the Parole Board of Canada Appeal Division, and potentially thereafter judicial review by the Federal Court, are generally an equally effective comprehensive remedy that precludes a habeas corpus remedy in most cases. However, as stated in *Chhina* at para. 40 … there may be issues that are not adequately dealt with by that internal procedure**…** (at para 21, emphasis added).

The Court of Appeal added that the reviewing court must consider the factual circumstances of an applicant's detention before determining that administrative remedies were adequate (at para 21).

The central argument of the appellant, however, was that he should not have been denied an oral hearing on the basis that he was a vexatious litigant, or because of an abuse of process. The Court of Appeal agreed that the appellant should not have been denied the right to have his application heard. Even if the appellant was not likely to have been successful in his application, "a remedy does not have to guarantee the desired outcome to be 'effective'" (at para 32). The Court recognized that detained persons have a constitutional right under section 10(c) of the *Charter* to have their detention reviewed by *habeas corpus*, and whether or not the applicant has a strong case for their application does not impact this right. Furthermore, the appellant had the right to file fresh applications for each new restraint on his liberty, and doing so was not an abuse of process regardless of the effectiveness or success of those applications (at para 32).

The Court of Appeal ultimately held that the chambers justice's decision to not hear oral argument could be characterized as a summary dismissal of the *habeas corpus* application, based on the written record, and the appeal was dismissed. However, and of significance to future *habeas corpus* applicants, the panel provided important guidance limiting the dismissal of applications as an abuse of process and clarifying the court's jurisdiction to review Parole Board decisions.

It is difficult enough for imprisoned individuals to navigate the administrative parole board system, let alone the court system. Section 10(c) of the *Charter* gives individuals the right to have their *habeas corpus* applications heard and considered by the court. Denying an applicant the right to have their application heard on the basis that their claim may not be successful or that they have made similar claims in the past is an unconstitutional exercise of the court's power, and detrimental to the individual's right to access justice. The Court of Appeal has loudly and clearly defined the rights of imprisoned individuals to have their day in court.

This post may be cited as: Kaye Booth, "The Right to Your Day in Court" (November 3, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/11/Blog_KB_Heiser_v_Bowden.pdf