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Dorsey v Canada: A Rare and Necessary Advancement for Prisoners' Rights

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Case Commented On: *Dorsey v Canada (Attorney General)*, 2025 SCC 38 (CanLII)

The decision in *Dorsey v Canada*, issued by the Supreme Court of Canada (SCC) on November 21, 2025, represents the first major jurisprudential development in the law of *habeas corpus* for several years. It expands the availability of *habeas corpus* to inmates whose applications to transfer to a lower security level have been denied. Prior to *Dorsey*, *habeas corpus* was only available in the context of institutional transfers if an inmate's security level had been involuntarily raised. Writing for the majority in *Dorsey*, Justice Mary T. Moreau found that a decision denying an inmate transfer to a lower security level qualifies as a deprivation of liberty for which *habeas corpus* can offer a remedy.

Facts

There are two applications which gave rise to the decision in *Dorsey*: one from Mr. Frank Dorsey and the other from Mr. Ghassan Salah. Both men were serving lengthy sentences in Ontario federal institutions at the time of their applications to be transferred from medium security to minimum security. Both men were denied their requested transfers in 2019. They filed applications for *habeas corpus* which were denied at first instance and on appeal. By the time the SCC issued its decision in *Dorsey*, both applications were moot, as Mr. Dorsey and Mr. Salah were successful on later applications to transfer to minimum security. However, the SCC heard the matter and issued a decision, nonetheless, given the important legal issue raised by the applications.

Law

The writ of *habeas corpus* occupies a unique position as a constitutional remedy which must be heard urgently. Enshrined in s 10(c) of the *Charter*, *habeas corpus* obligates the party detaining an inmate to immediately establish the legality of that inmate's detention. Applications for *habeas corpus* are routinely heard by provincial superior courts within a few weeks of filing, a quality which makes them unlike nearly every other legal process currently in use in Canada.

Habeas Corpus in Alberta

As a result of the obligation upon courts to hear *habeas corpus* applications promptly, self-represented inmates in Alberta have a somewhat colorful history of attempts to use the writ for purposes which fall outside its ambit. It is intended to address liberty deprivations only. It cannot

be used to address other problems with the delivery of correctional services (though various inmates have made many attempts).

The Alberta Court of King's Bench (ABKB) has issued an evolving series of policies intended to address this misuse, all of which suffer from an arguably draconian attitude toward inmates' court access. I covered those policies in previous entries on ABlawg in 2016, 2017, and 2018. The current policy under which the ABKB has previously struck out *habeas corpus* applications is Civil Practice Note 7. The Alberta Court of Appeal has expressed disapproval for the use of this policy as against *habeas corpus* applications on a few occasions (see *Wilcox v Alberta*, 2020 ABCA 104 and *Heiser v Bowden Institution*, 2022 ABCA 300). This policy remains in use, most recently in *MD v Alberta*, 2025 ABKB 453 (CanLII).

Given the controversy over *habeas corpus* in the Alberta context, clarification from the SCC as to the availability of the writ is both welcome and long overdue.

The Elements of *Habeas Corpus*

To further understand the significance of the decision in *Dorsey*, a brief discussion of the framework for *habeas corpus* is useful.

An application for *habeas corpus* proceeds in three stages (*Dorsey* at para 37).

The First Stage

At the first stage, the inmate must identify a deprivation of liberty. There are three possible categories for this liberty deprivation, per the SCC's 1986 judgment in *Dumas v Leclerc Institute*, 1986 CanLII 38 (SCC), [1986] 2 SCR 459. The first is an initial liberty deprivation involving a movement from outside to inside a correctional institution. The second is a substantial change to conditions within an institution, that is to say, a change that impacts an inmate's "residual liberty". The second category encompasses situations where an inmate's security level is increased, an inmate is moved into a form of segregation, or an inmate's parole is revoked. The third category, and the one at issue in *Dorsey*, involves a continuation of a detention that began legally but has become illegal. The issue in *Dorsey* was whether an inmate whose transfer request has been denied can argue that because their transfer was illegal, they come under the third *Dumas* category and may apply for *habeas corpus* as a remedy.

The Second Stage

At the second stage, the inmate must raise a legitimate ground on which to question the legality of the liberty deprivation identified in the first stage. For a detention to be lawful, the decision maker must have jurisdictional authority to order the detention, the decision-making process must be procedurally fair, and the decision to detain must be both reasonable and *Charter*-compliant. A detention will be unreasonable if it is arbitrary or lacking an evidentiary foundation (*Dorsey* at para 45). The inmate must be able to identify a basis for unlawfulness in any of these areas. A common basis for *habeas corpus* applications is an institutional transfer to a higher security level where the inmate did not receive all applicable procedural fairness protections; see, for example,

the Alberta Court of Appeal's decision in *R v Shoemaker*, 2019 ABCA 266, which I commented on in 2019.

The Third Stage

If the inmate can meet the requirements of the first and second stages by identifying some basis on which to assert the unlawfulness of the detention, then the matter must proceed to a hearing. At the hearing, the state has the onus to prove the legality of the detention at issue. If the inmate succeeds at the hearing, then the remedy which must issue is an order that the inmate be afforded the level of liberty to which they are entitled. Generally, this is an order that an inmate be transferred to a lower security level prison, though it can also be an order that an inmate be released on parole or released from administrative segregation.

The Majority Decision

The significance of the SCC's decision in *Dorsey* is principally that it expands the third category of liberty deprivation first identified in *Dumas*: an initially legal detention that has become illegal, or in Justice Moreau's words, "a continuation of a deprivation of liberty that has become unlawful" (*Dorsey* at para 23). The third *Dumas* category does not often arise in *habeas corpus* jurisprudence, but one example is found in *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 (which I discussed on ABlawg here).

In *Chhina*, an immigration detainee filed for *habeas corpus* on the grounds that his detention, which began upon the loss of his refugee status and issuance of a deportation order, had stretched for 13 months with no end in sight. He argued that while initially legal, the detention had become lengthy and indeterminate. The SCC dismissed his appeal but found that he was not barred from making a *habeas corpus* application by virtue of being an immigration detainee subject to the *Immigration and Refugee Protection Act*, SC 2001, c 27 rather than a federally sentenced inmate subject to the *Corrections and Conditional Release Act*, SC 1992, c 20.

The similarity between *Chhina* and *Dorsey* is that nothing about the appellants' detentions had materially changed. They were simply arguing that the passage of time had rendered their initially legal detentions unlawful. In *Dorsey*, the event rendering the initially legal detention unlawful was an allegedly procedurally unfair denial of a transfer application.

In *Dorsey*, the SCC endorsed the appellants' position that a transfer denial can bring an inmate into the third *Dumas* category and entitle them to make an argument under *habeas corpus* that their detention has become unlawful. Following *Dorsey*, an inmate may now make an application for *habeas corpus* following an unsuccessful application to transfer to a lower security level. *Dorsey* confirms that, if prison authorities did not carry out the transfer denial lawfully, the detention may have become illegal even though the inmate did not experience a heightened degree of liberty deprivation. Types of unlawfulness that might render a transfer decision vulnerable to challenge via *habeas corpus* are likely to be largely procedural: for example, failure to review and discuss the transfer application with the inmate, consult with the proposed receiving institution, provide a detailed rationale of the reasons for the decision, or otherwise comply with Guidelines 710-2-3: Inmate transfer processes.

The practical outcome of *Dorsey* is that inmates now have a fast and effective way to challenge decisions denying their applications to transfer to a lower security level. Prior to *Dorsey*, the only way to challenge such a decision was to proceed through the grievance process set out in the *Corrections and Conditional Release Act*, and following receipt of a decision on the grievance, to bring an application for judicial review in Federal Court.

The grievance process has been subject to sustained criticism over the years. As Justice Arbour wrote in 1996, "disposition of grievances is often given to people with neither the knowledge nor the means of acquiring it and, worse, with no real authority to remedy the problem should they be prepared to acknowledge its existence" (at 162). In 2024, the Office of the Correctional Investigator stated (among other criticisms), "current operation of the complaint and grievance process does not seem designed in a way to support or deliver outcomes that are timely or responsive" (at 20).

Further, judicial review in Federal Court is a much more limited way to challenge a decision than *habeas corpus*. A Federal Court judge, in this context, is performing reasonableness review, where the onus lies heavily on the applicant to establish unreasonableness. In contrast, *habeas corpus* offers a process where, if the inmate can meet the two threshold requirements for the writ, the onus is on the state to establish the lawfulness of the detention at issue. If the two threshold requirements are met, the inmate usually receives a decision within weeks of making the *habeas corpus* application.

Why Dorsey Matters to Prison Inmates

It is hard to overstate the significance of *Dorsey* for prison inmates. Broadly speaking, the injustices inherent in the prison system – and there are many of them -- are extremely difficult to address via court processes. In the Office of the Correctional Investigator's 2024-2025 report, issued on June 30, 2025, Dr. Ivan Zinger wrote, "CSC is in urgent need of deep structural reform" (at 3). He continued, "Canadians are not well served by a correctional system that is exceptionally costly and well-resourced by international standards, yet persistently fails to deliver on key correctional outcomes—particularly for Indigenous individuals in custody" (at 3). Unfortunately, the report says, the work of the Correctional Investigator has informed court decisions, human rights complaints, class actions, and pre-trial settlements—all legal processes which might have been avoided if CSC and the Canadian government addressed long-standing issues more proactively.

It is clear, and has been for many years, that the federal correctional system in Canada is extremely resistant to change that is not imposed by way of court order. Therefore, decisions like *Dorsey* are extremely significant for prison inmates because they add one more tool to a barren toolbox. Conditions of confinement, the most frequent type of complaint to the Correctional Investigator, will likely continue to be abysmal in Canadian federal prisons. However, the SCC in *Dorsey* just gave Canadian inmates one more way to invite court oversight of their unfair conditions and perhaps move slowly toward a correctional system where decision-makers are accountable to the population they serve.

The Minority Decision

The minority in *Dorsey* (Côté, Rowe and Jamal JJ) would have dismissed the appeal. The minority argues forcefully, among its other objections, that this expansion of *habeas corpus* by the majority will fling open the floodgates to a deluge of meritless court applications. The minority references, as an example, the "surge" of applications by self-represented inmates which allegedly fell upon the Alberta courts following the last major development expanding the law of *habeas corpus* in the correctional setting, the SCC's decision in *Mission Institution v Khela*, 2014 SCC 24 in 2014. A review of all Alberta decisions containing the phrase "*habeas corpus*" between 2014 and the present is beyond the scope of this article. Suffice it to say that the term "surge" is contextual. Courts exist for the purpose of hearing court applications, and an increase in applications alone is not necessarily evidence of a problem.

Further, I question whether the solution to a "surge" of a certain kind of meritless court application, if indeed such a "surge" did occur, is to remove access to the remedy sought in that application. It seems equally possible that the solution could lie in an initiative to ensure that inmates have access to legal advice. Broadly speaking, prisoners are significantly less educated and employed than the general population. Per the Office of the Correctional Investigator in 2020, 54% of the incarcerated Canadian population has less than a grade 10 education, and 62% of federally sentenced men were unemployed at the time of their arrest (at 68).

In addition to this undereducation and underemployment, inmates' access to financial resources is extremely limited. Employment legislation does not apply to federal inmates, and the highest wage available in custody is $6.90 a day, which is subject to a 30% deduction for food, accommodation, and phone services. Per the Correctional Investigator, this wage has not increased since 1981; if it had kept pace with inflation, it would now be $22.28. It should not surprise anyone that most members of this population cannot hire a lawyer privately to bring a *habeas corpus* application and instead chose to muddle along themselves. How might the "surge" discussed by the minority have been mitigated if legal advice had been readily available to inmates following the release of *Khela* in 2014?

Conclusion

It remains to be seen whether *Dorsey* will give rise to the kind of problematic litigation the minority discusses. In any event, there can be no doubt that Moreau J, writing for the majority, is intimately familiar with exactly the situation the minority describes: indeed, immediately prior to her appointment to the SCC in 2023, she was (the first female) Chief Justice of the Court of King's Bench of Alberta. Despite her certain knowledge of the conflict between Alberta prison inmates and the Alberta courts over *habeas corpus* during the last decade, she nonetheless penned a resounding endorsement of the expansion of *habeas corpus* as a remedy for prison inmates. Her clear and definitive decision will, one can only hope, benefit prison inmates in Alberta and across Canada by expanding their access to court oversight of their incarceration. Unlike the justices in the minority in *Dorsey*, I believe that such an expansion can only be a good thing.

Disclaimer: Amy Matychuk was counsel in *Dorsey v Canada* for the intervenor the Alberta Prison Justice Society. She was also counsel for the applicant/appellant in *Heiser v Bowden Institution*, 2022 ABCA 300, cited above.

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