The Right to Maximum Prison Liberty?

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In the 1985 *Miller* trilogy of cases, the Supreme Court of Canada ushered in the modern era of prison law by holding that certain significant decisions of prison officials should be subject to judicial review in the form of the expedient and flexible writ of *habeas corpus*.[1] Ever since, Canadian law has been clear that, notwithstanding the fact of incarceration, prison inmates retain some level of residual liberty. Where the decisions of prison administrators have the effect of reducing that residual liberty, such as by placing an inmate in segregation or making a transfer to a higher security institution, sections 7 and 9 of the *Charter* are engaged and the prisoner is entitled to seek judicial review in the form of *habeas corpus*.[2]

The decision in *A-G of Canada v. White* [3]addresses whether a refusal to transfer an inmate to a lower security institution engages the constitutionally protected liberty interests of inmates, such that review in the form of *habeas corpus* should follow. The question is whether a deprivation can be established where the applicant complains that he is not being transferred to an environment with the fewest restrictions on his liberty that are necessary (in accordance with section 28 of the *Corrections and Con-*

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[1] *R. v. Miller*, [1985] 2 S.C.R. 613, 49 C.R. (3d) 1 (S.C.C.) [cited to S.C.R.] [*Miller*]; *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, 49 C.R. (3d) 35 (S.C.C.); and *Morin v. Canada (National Special Handling Unit Review Committee)*, [1985] 2 S.C.R. 662, 49 C.R. (3d) 26 (S.C.C.). See *Miller* at pp. 640-41: "habeas corpus should lie to determine the validity of a particular form of confinement in a penitentiary notwithstanding that the same issue may be determined upon certiorari in the Federal Court."

[2] *May v. Ferndale Institution*, 2005 SCC 82, 34 C.R. (6th) 228 (S.C.C.) at paras. 22–25; *Khela v. Mission Institution*, 2014 SCC 24, 9 C.R. (7th) 1 (S.C.C.) at para. 29 [*Khela*]

[3] *Canada (Attorney General) v. White*, 2015 ONSC 6994 (Ont. S.C.J.) [*White*] [reported at p. 235].

ditional Release Act[4]). The legal issue, which has implications well beyond this case, is whether an applicant seeking a greater level of liberty could ever meet the onus of establishing a deprivation of liberty, such that the burden shifts to the detaining authority to show that the deprivation is lawful.[5]

The issue is a significant one for incarcerated people. Where *habeas corpus* is not available, inmates seeking review of prison matters are largely left to the internal prisoner grievance system (with its lack of independence and absence of enforceable remedies) and judicial review in the Federal Court (with its slower timelines and procedural hurdles). Indeed, for a great many of the important incidents of prison life, *habeas corpus* is not available and inmates are left to these more inaccessible and limited remedies.[6]

In her reasons, Vallee J. notes conflicting authority on the point, but ultimately decides that liberty is not engaged where an inmate is seeking a better form of it, rather than complaining about its reduction. In the event she is wrong on that issue, Vallee J. goes on to hold that the Warden's decision was in any event a reasonable one and should not be disturbed.

On the deprivation question, Vallee J. cites two decisions, *Mapara v. Ferndale Institution*[7] and *Fisk v. Canada (Correctional Service)*,[8] for the proposition that a decision to refuse to confer a better classification on an

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[4] S.C. 1992, c. 20. Section 28 sets out that inmates are to be held in the least restrictive environment possible, taking into account the degree and kind of custody and control necessary for the safety of the public, the safety of that person and other persons in the penitentiary, and the security of the penitentiary.

[5] See *May v. Ferndale* at para. 74 for the two-step analysis: "The onus of making out a deprivation of liberty rests on the applicant. The onus of establishing the lawfulness of that deprivation rests on the detaining authority."

[6] Again, see *Miller* at pp. 640-41: "I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution."

[7] 2012 BCCA 127 (B.C. C.A.) [*Mapara*].

[8] 1996 CarswellBC 19 (B.C. S.C. [In Chambers]) [*Fisk*].

inmate is not the same as subjecting an inmate to a more stringent classification. Vallee J. concludes: "Mr. White has never enjoyed a less restrictive form of detention. Accordingly, I find that Mr. White has not suffered a deprivation of liberty."[9]

To critique the conclusions drawn from *Mapara* and *Fisk*, we must return to the foundational case of *Dumas c. Centre de détention Leclerc de Laval*.[10] *Dumas* concerned an application for *habeas corpus* to review a decision of the National Parole Board to deny day parole. Crucially, the Court first rejected the idea that *habeas corpus* can only avail where what is sought is the "complete liberty" of the applicant. Rather than such an "all or nothing approach", the Court held that *habeas corpus* was available to release a person from a particular aggravated form of detention, although the person will lawfully remain under some other restraint of liberty. Then, in the critical passage for the issue here, the Court identified three categories that permit intervention:

> In the context of correctional law, there are three different deprivations of liberty: the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty.[11]

The *Dumas* scenario concerned the third category, as the situation was one of a potentially unlawful "continuation" of a deprivation. The Court continued:

> . . . In this case, as was pointed out in the lower courts, there was no challenge to the validity of the initial deprivation of liberty. In addition, there was no substantial change in the conditions of detention, because the appellant was never actually released on parole. If the appellant had been released on parole and then reincarcerated pursuant to a decision of the NPB, there would have been a substantial change which could have been challenged by way of habeas corpus. What is being challenged in this case is the continuation of the deprivation of liberty.[12]

Dumas makes clear that the continuation of an initially valid deprivation of liberty can be challenged by way of *habeas corpus*. The Court rea-

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[9] *Canada (Attorney General) v. White*, *supra* note 3, at para. 21.

[10] [1986] 2 S.C.R. 459, 55 C.R. (3d) 83 (S.C.C.) [*Dumas*].

[11] *Ibid*, at para. 11.

[12] *Ibid*, at para. 11.

soned that, for example, in the context of parole, the continued detention of an inmate could become unlawful if he has acquired the status of a parolee. The status of parolee is acquired when parole is granted. If parole is granted and if, for some reason, the detention continues, the parolee may then have access to *habeas corpus*. If parole is refused, it is obvious that the inmate has not become a parolee and cannot have recourse to *habeas corpus* to challenge his ongoing confinement.

To analogize from the *Dumas* discussion of parole, the key question for those inmates seeking transfer to lower security institutions is the question of when their deprivation claim would crystallize. The question is at what stage does their ongoing placement in a higher security institution become a deprivation of the continuing type, so as to meet the onus of showing a deprivation of liberty in the first stage of *habeas corpus*? Note that the issue is more subtle than the "substantial change" scenario. Where an inmate is transferred to higher security, the right crystallizes when a decision to transfer is made or effected. For the parolee who is experiencing a "continuation", *Dumas* indicates that the right crystallizes when he has acquired the status of a parolee. In the scenario of an inmate seeking transfer to lower security, it is clearly the case that such an inmate does not have an ever-present right to seek *habeas corpus* review, just like the incarcerated inmate who has not been granted parole has no claim to it, at least under the auspices of *habeas corpus*. How then does the right of the inmate who is experiencing a "continuation" of custody at a higher security institution crystallize?

One sensible view would be for courts to hold that the right crystallizes when a Case Management Team makes a recommendation for transfer to lower security, as it did for Mr. White in the present case, given that he was a model inmate. Just as the parolee acquires an interest in release when parole is granted, so too does the inmate acquire an interest in a transfer when the relevant administrative decision is made by the Case Management Team. The fact that the decisions of a Case Management Team follow a less formal process than a Parole Board decision should not serve to deny the legal significance of the decision. Relative informality should not impair the inmate's right to seek review of the continuation of a particular level of liberty deprivation. The fact that the Warden is able to override the Case Management Team is similarly no answer: it is the Warden's override that the inmate seeks to have reviewed under the second stage of the *habeas corpus* analysis.

There is little doubt that this issue would benefit from appellate direction. A number of lower Ontario courts have held that *habeas corpus* is properly available in this context, but not clearly for the reasons outlined above. For example, in *Musitano v. Canada (Attorney General)*, Justice Howden simply asserts that the law is clear that a transfer to a more restrictive institutional setting constitutes a deprivation of residual liberty, and then concludes that there is "no issue in this case with the reverse proposition . . . a refusal to transfer an inmate to a less restrictive setting constitutes a deprivation of residual liberty rights."[13] In contrast, British Columbia courts have consistently rejected the idea that *habeas corpus* should be available in this context, but for varying reasons. Most cases that have addressed the issue of whether *habeas corpus* is available on a refusal to transfer have characterized the issue as concerning the second category from *Dumas* ("substantial change in conditions") rather than the third one (a "continuation" in the deprivation of liberty).[14] That approach makes it easy to then deny inmate claims, as inmates confined at the same institution have clearly suffered no "substantial change."

Appellate attention could resolve these conflicting approaches and decide whether the third category from *Dumas* is triggered when inmates can point to an administrative decision that suggests their eligibility for placement in a lower security institution. To be clear, that approach would not mean that inmates would invariably succeed on the merits of *habeas corpus* review. Rather, this approach would mean only that courts could proceed to assess whether a decision like a Warden override was made lawfully. The *Khela* decision makes clear that this means checking that decisions made about security and placement are reasonable.

Vallee J. performs the second more case-specific stage of review in the event she is wrong with respect to stage one. As noted above, the law governing the Warden's decision is section 28 of the *Corrections and Conditional Release Act*, which grounds the legal rule that inmates are to be held in the least restrictive environment possible. In addition, section 18 of the *Corrections and Conditional Release Regulations* sets out what risk ratings constitute the various security levels. While *Khela* is clear that reasonableness is the standard of review, application of the standard

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[13] 2006 CarswellOnt 1750 (Ont. S.C.J.).

[14] See *Mapara*, *supra* note 7, at paras. 15 and 16; *Fisk*, *supra* note 8, at para. 37. As noted, these cases were relied upon in *White*.

remains difficult in light of the largely abstract criteria set out in the governing law. Vallee J. reasons that the Warden ought to receive deference because Mr. White maintains his innocence, essentially agreeing with the Warden that this fact is related to the public safety analysis that precedes placement in a minimum-security institution.

While reasonableness review entails some measure of deference, it bears emphasis that the issue of maintaining innocence does not appear in Commissioner's Directive 710-6, which is the correctional policy that governs the Review of Inmate Security Classification. There is, moreover, no mention of this factor found in the governing legislation, raising a serious question about the propriety of relying on it so as to impair liberty. Finally, Vallee J. accepts the view posited by CSC that Mr. White's refusal to accept responsibility for his offence means that "there was never a theory put forward in regard to why he committed the index offence" and that this makes him more dangerous. This is, in effect, a psychological theory and an empirical claim, the basis of which does not appear in the text of this decision. Claiming innocence may have a more obvious or direct link to the ability of the CSC to manage an offender at a lower security level where it is paired with a refusal to enrol in correctional treatment and programs. That link does not appear in this case, where all evidence indicated that Mr. White's participation in prison life was at the ideal end of the spectrum.

In sum, the degree of deference offered to the Warden's decision in this second stage of the analysis does not seem warranted by either the governing law or the full evidentiary record. It may be that the *Khela* standard of reasonableness is serving to erode what has traditionally been a commitment to review the "legality" of decisions under *habeas corpus*.[15] That issue aside, it is clear that uncertainty with respect to the first stage of the analysis — where an inmate points to a reason that they may be entitled to reside in a lower security setting — must be resolved before *habeas corpus* review can properly perform its weighty role of protecting the liberty that even incarcerated people retain.

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[15] For critique of the *Khela* decision and the notion that a "lawful" decision is a "reasonable" one, see Lisa Kerr, "Easy Prisoner Cases" (2015) 71 S.C.L.R. (2d) at 235–261.