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HARVEY: *The Law of Habeas Corpus in Canada*

The Law of Habeas Corpus in Canada

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To my father,
Dr. Miln C. Harvey,
who is, quite simply,
one of my three personal heroes.

(d) Detention of Incompetents[77]

It ought to be trite to point out that the mentally ill too have their rights and that they cannot be deprived of their freedom illegally. Thus, they must not only be committed to custody, for whatever purpose, properly, but the continuation of their detention in custody must be based upon the precise fulfilment of any stipulated procedures. The illegal detention of a mentally ill person can be redressed by way of habeas corpus.[78]

Discharge is possible through habeas corpus where an accused is improperly remanded into custody for observation or mental examination.[79] Discharge has also been ordered where a person known to be insane was nonetheless tried and convicted of a criminal offence.[80] However, it has been held in several cases that a proper warrant of commitment by the Lieutenant-Governor of a province pursuant to s. 546[81] of the Criminal Code of Canada cannot be questioned.[82]

Notwithstanding the availability in general of habeas corpus to incompetents alleging illegal detention, it must be understood that, similar to the situation where the custody of children is raised by way of habeas corpus, the court, aside from determining the question of the legality of the detention involved, will be most concerned with deciding upon the issue of the sanity of the applicant. Therefore the court will, regardless of its determination upon the apparent legality of the detention, on the strength of examining the truth of the facts returned, actually or in effect, order a trial of the issue of sanity before finally determining whether the applicant ought to be discharged. As Montgomery J. put it in *Dame L. v. Larue*:[83]

> ". . . one principle of which we must not lose sight; that the liberty of the individual is to be preserved to the fullest possible extent reasonably consistent with his own safety and the public welfare. The confinement of a person, who is not a convicted criminal, in a mental institution, or any other form of institution can be justified only if it is necessary for his own protection or the protection of society. While we must hesitate in a case such as this to overrule the opinion of the superintendent, especially when supported by a trial judge, we must nevertheless do so if we are reasonably satisfied that a person is being kept confined without a real necessity."[84]

In *Re Gibson*[85] the applicant alleged informalities of a "sufficiently grave and important" nature in the certificates under which he was detained in the Mimico Asylum as to possibly invalidate them. But at the same time the "Superintendent and others, under whose observation and charge" the applicant had been, submitted affidavits to the effect that the applicant's state of mind rendered it "utterly unsafe to trust him outside the asylum even in the care of the best qualified and most experienced nurses". The court refused to restore to the applicant his liberty, but rather, the court ordered the application to stand over pending a trial of the issue of the applicant's sanity.[86]

(e) Custody of Children

Habeas corpus is unquestionably a means by which a child can be wrested from an illegal custody - be it, for example, in the situation where one parent has unlawfully dispossessed the other parent of the custody of a child[87] or in the situation where the authorities pursuant to the relevant provincial child welfare legislation have for one reason or another had a child committed to the care and custody of a children's aid society or the like.[88] It will be particularly useful if the whereabouts of the child in question are not known. The fact that habeas corpus is not the means most frequently used by persons seeking to regain the custody of a child of which they have been unlawfully deprived, is due probably to several reasons, such as the existence of other statutory remedies and simple ignorance of the availability of the writ.

There are two remarkable features about habeas corpus proceedings involving the custody of children. Firstly, the courts are not so insistent upon the requisite of actual detention for it is considered that a child cannot have a liberty which is contrary to the wish of his or her legal guardian. That is to say, in the case of a child who has been wrongfully taken from the custody of his or her legal guardian, the courts will on habeas corpus consider there to be a sufficient deprivation of liberty even though the child in fact has freedom of movement and is not being restrained by actual physical force. Secondly, the courts have always exercised a somewhat "larger jurisdiction" in regard to

habeas corpus proceedings involving the custody of children. In addition to merely setting the infant free from illegal restraint, the courts actually decide between conflicting claims as in whom legal custody rests and to whom custody ought to be awarded. These features of habeas corpus proceedings involving the custody of children were outlined by Rinfret J. in the leading case of *Stevenson v. Florant*.[89]

In regard to the "larger jurisdiction" which the courts exercise, if a return is good in law and its truth established, the court can only change the custody of a child involved according to its general powers, being those of the old common law courts and the Court of Chancery[90] as developed by the subsequent case and statute law. Suffice it to say, that the courts currently are most concerned with the welfare, physical well-being and happiness of such children.[91]

On the return to a writ of habeas corpus, involving the custody of a child, the applicant should make application for the custody of the child or the delivery of the child into the custody of the applicant.[92] In *Re McKee*,[93] a writ of habeas corpus was issued at the instance of a mother, requiring her husband to produce their child. Upon the return to the writ, Smily J. was of the opinion "that formal proceedings should have been filed with the Court, returnable at the time of the return of the writ of habeas corpus, making application on behalf of the [mother]. . . for custody of the infant, or for the delivery of the infant into her custody".[94] Smily J. allowed the mother to make this application, after referring to *Re Ethel Davis*[95] and *Re Kenna*,[96] cases where such an application was and was not made, respectively, in addition to habeas corpus. The learned judge also directed that he should not deal with the matter in a summary way, and that the issue was to be therefore tried at the next court sitting. The issue was tried and an order made for custody, in the manner provided under the then Infants Act of Ontario independent of and without further reference to the habeas corpus proceedings.[97] On an appeal[98] from that decision the question was raised as to whether the procedure followed was proper. Hogg J.A. of the Ontario Court of Appeal, cited *Smart v. Smart*,[99] in which case it was "arranged during the course of the proceedings [a habeas corpus by husband to recover children from wife] that [the applicant] . . . should also present an application for the custody of the children and that the question in both proceedings

be tried simultaneously." The learned judge also referred to a New Zealand case in which it was decided that the court in such a case "is not confined to granting or refusing the writ, but can give effect to the provisions of The Infants Act . . . although no application under that statute has been made. . .", and he also cited *Re Harding*[100] wherein "Orde J.A. said that relief under the Infants Act 'while in a sense an alternative to that available by way of habeas corpus, is neither dependent upon nor co-incident with that form of relief'".[101] Hogg J.A. then concluded by referring to the decision of the Judicial Committee in *Stevenson v. Florant*,[102] where it was held that an objection to the form of proceedings should not be allowed to prevail, after it had been concluded that one of the parties to such proceedings should have custody of the child, on the merits. The holding of the Court of Appeal was reversed in the Supreme Court of Canada,[103] but Cartwright J. speaking for the majority, agreed with Hogg J.A. on the question of procedure.[104] On further appeal to the Judicial Committee,[105] the decisions of Wells J. and Hogg J.A. were restored, and the Judicial Committee agreed that the technical correctness of procedure at trial is not an issue once it has been decided on the merits that one or other party is entitled to custody.[106]

There is some dispute concerning the effect on a habeas corpus application of a valid and subsisting agreement made by the applicant concerning the custody of the child in question. Chancellor Boyd, in *Re Hutchinson*,[107] upheld by the Court of Appeal[108] which did not comment on the effect of the agreement, decided that, by virtue of s.3 of the then Infants Act,[109] the "signed and sealed agreement . . . while it stands, appears to be a bar to any such application as the present".[110]

It is submitted that it is not so much the bindingness of parental agreements in law[111] which is the important question, but rather just the plain fact that a parent has made an agreement for the custody of his child. This is evidence of there being no illegal detention, thus making habeas corpus proceedings improper. The parent must take other proceedings to have such an agreement set aside.[112]

Although generally speaking only the court of the province of the alleged illegal detention has jurisdiction in habeas corpus proceedings,[113] it was indicated in *Re Hilker*,[114] that a writ of habeas corpus could be

issued by courts of a different province, if it was thought that the child had been removed contumaciously, and with a view to defeating proceedings taken or to be taken in the courts of one province, or if it was in doubt as to whether or not the child had in fact been removed from the province.

Finally, in regard to the use of habeas corpus in connection with the custody of children, reference ought to be made to two other cases of a miscellaneous nature. In *Re Shaughnessy*[115] an application was made to set aside two writs of habeas corpus on a number of technical grounds, one of which was that the writs were not marked by the judge as issued under the Statute of Charles II (the English Habeas Corpus Act, 1679). It was pointed out that since the custody in question was one regarding children and that the statute had only to do with criminal habeas corpus, it was not applicable. In *Re Shand Infants*[116] a judge of the Juvenile Court set aside two orders giving the custody of two children to the Winnipeg Children's Aid Society, and restored the children to their mother's "care and custody". The children had been placed out by the Society with foster parents, and adoption arrangements were being undertaken. The Society appealed the second order and obtained a stay of proceedings, pending the outcome of the appeal, which was to be a hearing *de novo*.

Before the hearing, the mother applied for a writ of habeas corpus with certiorari in aid against the Society. The court refused the mother on a number of grounds, amongst them, the desire to allow the appeal to take its course. There could be no assurance that the mother, if given custody, would not remove the children from the province to thwart the judicial process. The court also did not consider the second order as final until the right of appeal had been exhausted, and to grant the writ would be tantamount to recognizing it as final.

It might be noted in passing that habeas corpus cannot be used in connection with children to determine for instance the validity of an enlistment contract or the legal authority of a parent over a child, if there is no illegal detention involved.[117]

(f) Proceedings Relating to the Exclusion and Expulsion of Individuals from Canada

(i) Generally

The writ of habeas corpus has been a very commonly

used process in connection with aliens being held pending an examination, or an inquiry, or the execution of a deportation order under the Immigration Act[118] and the Narcotic Control Act.[119] While it can be said, as the late Rt. Hon. W.L.M. King is reported to have done when he was the Prime Minister of Canada,[120] that it is a privilege and not a right for an alien to enter Canada and that no one has an inherent right to enter or remain in Canada unless he or she is born in Canada, it can also be said, as Lamont J. did in *Vaaro v. The King*, that "broadly speaking every alien, who has been admitted into and actually is in Canada and who has been taken into custody on a charge for which he may be deported, is entitled to the benefit of a writ of habeas corpus to test in court if his detention is according to law".[121] However, the recent enactment of the Immigration Appeal Board Act[122] may have reduced substantially the usefulness of writs of habeas corpus in connection with deportation proceedings.

(ii) Immigration Act[123]

Prior to the enactment of the Immigration Appeal Board Act, generally speaking the writ of habeas corpus was used, despite the presence of former s. 39,[124] alone and with certiorari in aid to obtain a determination as to whether the Minister or any Board of Inquiry had acted without or in excess of jurisdiction in taking any proceeding or in making any decision or order. Certainly s. 39 placed qualifications upon the availability of habeas corpus and the judicial interpretation of s. 39 built up a sizeable body of case law which now, with its repeal,[125] has passed into oblivion. Through the enactment of the Immigration Appeal Board Act, the Immigration Appeal Board has been given "sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation or the making of an application for admission to Canada of a relative . . . .",[126] and a procedure of appeal has been provided.[127] It would seem that the availability and usefulness of habeas corpus have been cut back to questioning simply the facial legality of the document on which an applicant is being held, whether it be for examination or for deportation.[128]

Apropos the limited use to which habeas corpus

comment contains an interesting general discussion concerning the use of habeas corpus in this area); J.C. Filippini, "Use of Habeas Corpus to Challenge the Degree of Security of a Person Civilly Committed to a Mental Institution" (1970), 21 Sy. L.Rev. 1295; and "Habeas Corpus as a Method of Release from Mental Institutions" (1952), 38 Va. L.Rev. 91.

78. It is no impediment to an application for the issuance of a writ of habeas corpus that the applicant is not mentally "capable" - see *H. v. Soeurs de Charité de Québec*, [1947] Que. S.C. 88.

79. See *Re Sarault* (1905), 9 C.C.C. 448 (Que.). The Criminal Code of Canada contains three sections authorizing the remand of an accused to custody for observation: (i) on a preliminary inquiry, s. 465(c); (ii) on a trial of an indictable offence, s. 543(2) - see *Fawcett v. A.G. Canada*, [1964] S.C.R. 625, 45 D.L.R. (2d) 579; (iii) on a trial of a summary conviction offence, s. 738(5). It was held in *Re Sommer* (1958), 27 C.R. 243 (Que.), at p. 246, that the provisions of s. 465 (c) must be "strictly and rigidly adhered to for the remand to be valid and enforceable". Note also *R. v. Bouchard* (1912), 20 C.C.C. 95 (Que.) and *Ex parte Branco*, [1971] 3 O.R. 575.

80. See *R. v. Leys* (1910), 1 O.W.N. 958.

81. Formerly s. 527 and before that s. 970.

82. See *Delorme v. Sisters of Charity* (1922), 40 C.C.C. 218, 24 Que. P.R. 435; *Champagne v. Plouffe* (1940), 79 Que. S.C. 310; *Larochelle v. Plouffe* (1941), 79 Que. S.C. 248; and *Re Brooke's Detention* (1961), 38 W.W.R. 51 (Alta.). But see *Trenholm v. A.G. Ont.*, [1940] S.C.R. 301. See also *R. v. Martin* (1868), 4 U.C.L.J. (N.S.) 198; *Re Duclos* (1907), 12 C.C.C. 278 (Que.); *R. v. Coleman* (1935), 43 Man. R. 380, 64 C.C.C. 251; *Re Kleiny's Habeas Corpus Application* (1965), 51 W.W.R. 597 (B.C.).

83. [1959] Que. Q.B. 549.

84. *Ibid.*, at p. 554. Montgomery J. had to decide the court's right to intervene and review on a habeas corpus, after a superintendent had refused a petition to release a patient, pursuant to the Mental Patients Institutions Act, R.S.Q. 1941, c. 188, especially ss. 15-16 (as replaced by S.Q. 1950, c. 31). The patient's interdiction had been set aside,

but a subsequent habeas corpus application had been dismissed, from which this appeal arose. See also *Morel v. Larue*, [1968] Que. Q.B. 560.

85. (1908), 15 O.L.R. 245.

86. See also *Re Dack* (1914), 5 O.W.N. 774; *Re O'Donnell* (1914-15), 7 O.W.N. 605; *Re Davidson* (1915), 8 O.W.N. 481 and *Landry v. Legrand*, [1949] Que. K.B. 723, wherein the returns to the writ of an asylum inmate were held sufficient, but the applicants were discharged, nonetheless, on the ground that they were in fact sane; *Re King*, [1917] 1 W.W.R. 132 (Man.); *Re Minehan* (1925), 28 O.W.N. 263; *Re Bowyer* (1930), 66 O.L.R. 378; *Re Carnochan*, [1941] S.C.R. 470, wherein the applicant claimed his discharge on the ground that he was not a "properly certified patient", the Court of Appeal of Ontario adjourned the appeal *sine die* while the applicant was examined by two doctors - when these doctors reported the applicant mentally ill, the Court of Appeal dismissed the applicant's appeal from a refusal to discharge him - and the Supreme Court of Canada dismissed a further appeal, holding that the Court of Appeal had acted properly under s. 8 of The Habeas Corpus Act of Ontario; *Re Reid* (1953), 10 W.W.R. 383 (B.C.), wherein the court would not issue a writ to an applicant, for there was a good and subsisting order of commitment in existence (nor would the court order a trial of the issue of sanity, distinguishing *Re Gibson* and *Re King* on the ground that in those cases there was at least some irregularity in the proceedings for commitment); *Morel v. Larue, supra*, note 84; *Vallee v. De La Bossiere*, [1969] Que. S.C. 426. There may also be legislation, such as s. 15 of the Mental Hospitals Act, R.S.O. 1970, c. 197, which will stand in the way of a discharge which, due to irregularities in the commitment, may otherwise be warranted.

87. See, for example, *Re Campbell* (1933), 41 Man. R. 145, 60 C.C.C. 170; *Groat v. Ibbotson* (1957), 12 D.L.R. (2d) 361 (B.C.); *Bronfman v. Moore*, [1965] Que. Q.B. 181.

88. See *Re Perepolkin* (1956), 8 D.L.R. (2d) 297, 117 C.C.C. 25 (B.C.) - for the reverse see *Re Hallas* (1960), 33 W.W.R. 507 (Man.). See also

Re Mairs (1961), 35 C.R. 265 (B.C.); *Ex parte Worlds* (1968), 65 D.L.R. (2d) 252 (Alta.); *R. v. Gladu*, [1966] Que. S.C. 167; *Re Best* (1971), 5 N.S.R. (2d) 162.

89. [1925] S.C.R. 532, [1925] 4 D.L.R. 530.

90. See *Re G.*, [1951] 3 D.L.R. 138, 2 W.W.R. 271, at pp. 146 and 280, respectively (B.C.).

91. There is no dearth of cases and decisions which describe or illustrate the features of habeas corpus involving the custody of children: see *N. v. A.*, [1957] Que. S.C. 327, Que. P.R. 289, *Rodrigue v. Baillargeon*, [1955] Que. P.R. 50, *Taillon and Donaldson v. Donaldson*, [1953] 2 S.C.R. 257, *per* Fauteux J., at p. 268, and *Laurier v. Villeneuve*, [1942] Que. S.C. 397, 48 R. de Jur. 78, regarding the unessentiality of actual detention; *Re McKee*, [1948] O.R. 658, at p. 688, citing *Bailey on Jurisdiction* regarding the peculiarity in general of such habeas corpus proceedings; and, regarding the exercise of the "larger jurisdiction", *Re Coram* (1886), 25 N.B.R. 404, *Smart v. Smart*, [1892] A.C. 425 (P.C.), *Re Foulds* (1893), 9 Man. R. 23, *Re Ah Gway* (1893), 2 B.C.R. 343, *R. v. Redner* (1898), 6 B.C.R. 73, *Re Quai Shing* (1898), 6 B.C.R. 86, *Re Soy King* (1900), 7 B.C.R. 291, *Re Slater* (1903), 14 Man. R. 523, *Re Gray* (1907), 6 W.L.R. 374 (N.W.T.), *Re Bestwick and Auston* (1909), 1 W.L.R. 73 (Sask.), *Re Porter* (1910), 15 W.L.R. 228, *Re Pilkington* (1910), 15 B.C.R. 456, 15 W.L.R. 144, *Re Tomlinson* (1911), 19 W.L.R. 522 (Man.), *Re Mott* (1912), 1 W.W.R. 833 (Alta.), *Re Chisholm* (1913), 13 D.L.R. 811, *Re Kenna* (1913), 29 O.L.R. 590, *Smith v. Reid* (1914), 7 Sask. L.R. 143, 6 W.W.R. 486, *Re Davies* (1915), 9 Alta. L.R. 222, 25 D.L.R. 96, *Re Bergman and Waldron* (1923), 17 Sask. L.R. 497, [1923] 3 W.W.R. 70, *R. v. Sharp* (1923), 55 D.L.R. 626 (see also (1923) 1 Can. Bar Rev. 551), *Marshall v. Fournelle*, [1927] S.C.R. 48, *Kivenko v. Yagod*, [1928] S.C.R. 421, *Re Mombroquette* (1929), 60 N.S.R. 520, 51 C.C.C. 218, *Re Campbell*, *supra*, note 87, *Re Bland* (1933), 48 B.C.R. 45, *Dugal v. Lefebvre*, [1934] S.C.R. 501, *Bourassa v. Bourassa* (1940), 47 R. de Jur. 24, *Laurier v. Villeneuve*, *supra*, *Re McKee*, [1951] A.C. 352, [1951] 2 D.L.R. 657 (P.C.), *McAvena v. Minister of Social Welfare* (1952-53), 7 W.W.R. 287 (Sask.),

Re Agar, [1956] O.W.N. 290, *Perepolkin v. Supt. of Child Welfare (No. 2)* (1957), 23 W.W.R. 592, 11 D.L.R. (2d) 417 (B.C.), *Voghell v. Voghell and Pratt* (1962), 38 W.W.R. 368, 35 D.L.R. (2d) 592 (Man.), *Hynes v. Hynes* (1963), Nfld. (unreported) (in which reference is made to, *inter alia*, *Re McGiar*, [1891] N.L.R. 562, *Re Congdon*, [1891] N.L.R. 572 and *Walsh v. Walsh*, [1929] N.L.R. 240), *Menasce v. Menasce* (1963), 40 D.L.R. (2d) 114 (P.E.I.), *Bronfman v. Moore*, [1964] Que. Q.B. 675 and [1965] Que. Q.B. 181, *Hubert v. Gelinas*, [1965] Que. S.C. 35, and *Re Crossman* (1970), 2 N.B.R. (2d) 574, aff'd (1970) 2 N.B.R. (2d) 806; see also The Habeas Corpus Act, R.S.N.B. 1952, c. 101, s. 13 and the Liberty of the Subject Act, R.S.N.S. 1967, c. 164, s. 2.

92. For a precedent of an order for the delivery of a child on the return to a writ of habeas corpus, see W.B. Williston, *Precedents in Practice* (1965), Forms 751-753.

93. [1947] O.R. 819, at p. 820.

94. See also *Re Agar*, [1956] O.W.N. 290.

95. (1894), 25 O.R. 579.

96. (1913), 29 O.L.R. 590.

97. [1947] O.R. 819, at p. 822, [1947] 4 D.L.R. 579.

98. [1948] O.R. 658, [1948] 4 D.L.R. 339.

99. [1892] A.C. 425 (P.C.).

100. (1929), 63 O.L.R. 518.

101. Orde J.A. in effect overruled *Re Shand* (1928), 60 O.L.R. 145, wherein the court had held that habeas corpus and proceedings under The Infants Act were alternatives with the result that proceedings under The Infants Act could only be maintained if habeas corpus proceedings could be maintained as well, thus ruling out cases where the infant was outside the territorial jurisdiction of the court.

102. [1927] A.C. 211, [1926] 4 D.L.R. 897 (P.C.).

103. [1950] S.C.R. 700, [1950] 3 D.L.R. 577.

104. *Ibid.*, at pp. 704 and 581, respectively.

105. [1951] A.C. 352, [1951] 2 D.L.R. 657.

106. *Ibid.*, at pp. 360 and 661, respectively.

107. (1912), 26 O.L.R. 113.

108. (1913), 28 O.L.R. 114.

109. 1 Geo. 5, c. 35 (Ont.). This section was repealed and dropped by 13-14 Geo. 5 (1923), c. 33, s. 3. There is no comparable section today.

110. Boyd C. relied also upon *Roberts v. Hall* (1882), 1 O.R. 388 and *Chisholm v. Chisholm* (1908), 40

S.C.R. 115 which are a trifle off the point, but of some value. But see the Divisional Court reversal of Boyd C. (1912), 26 O.L.R. 601, especially Riddell J., at pp. 605-608, who cited a number of cases, including *Roberts v. Hall*, to reach the conclusion that the agreement was no bar to the habeas corpus proceedings, but of some weight, and Britton J. at p. 615. On the further appeal, *supra*, note 108, Meredith J.A. in dissent, agreed with Riddell and Britton JJ.

111. Which was the concern of *Re Hutchinson*, *supra*, note 107, *Fidelity Trust Company v. Buchner* (1912), 26 O.L.R. 367, *Re Clarke* (1916), 36 O.L.R. 498, *Re Taggart* (1917), 41 O.L.R. 85, *Re Steacy* (1922), 23 O.W.N. 417 and *Re Bigras* (1923), 25 O.W.N. 353.

112. Note *Ruskin v. Ruskin* (1954), 13 W.W.R. 237 (B.C.).

113 See Chapter 3, and, for example, *Re Dalgleish* (1968), N.S. (unreported), in connection with a child who had been transported out of the province.

114. (1914), 6 O.W.N. 82.

115. (1881), 21 N.B.R. 182.

116. [1943] 1 W.W.R. 269 (Man.).

117. See *Stoppellben v. Hull* (1876), 2 Que. L.R. 255, aff'd (1876) 3 Que. L.R. 136; *Riley v. Grenier* (1888), 33 L.C.J. 1; *Fournier v. Price* (1916), 50 Que. S.C. 489, 26 C.C.C. 405.

118. R.S.C. 1970, c. I-2 (formerly R.S.C. 1952, cc. 145 and 325 and R.S.C. 1927, c. 93). Concerning legislative authority in regard to immigration, see *Union Colliery Co. v. Bryden*, [1899] A.C. 580 (P.C.); *A.G. of Canada v. Cain*, [1906] A.C. 542, at p. 546 (P.C.); *Brooks-Bidlake and Whittal v. A.G. of B.C.*, [1923] A.C. 450 (P.C.); *Re Janoczka* (1932), 40 Man. R. 494, 58 C.C.C. 328, at pp. 497 and 331, respectively; *Vaaro v. The King*, [1933] S.C.R. 36, at p. 40; Jean Mercier, "Immigration and Provincial Rights" (1944), 22 Can. Bar Rev. 856.

119. R.S.C. 1970, c. N-1 (formerly the Opium and Narcotic Drug Act, R.S.C. 1952, c. 201).

120. *Re Hanna* (1957), 21 W.W.R. 400, at p. 405 (B.C.).

121. [1933] S.C.R. 36, at p. 39. In making this statement, Lamont J. was indicating that s. 20 of the Immigration Act, R.S.C. 1927, c. 93 (s. 21 of the Immigration Act, R.S.C. 1952, c. 145), which read:

"Notice of appeal shall act as a stay of all proceedings until a final decision is rendered by the Minister", was not as all embracing as it appeared, i.e., habeas corpus was (and still is) available pending the outcome of an appeal of a deportation order. The current Immigration Act in s. 31(1) simply says that an appeal stays the execution of a deportation order. Although habeas corpus is available, it may not be of much help. In the former Immigration Acts of 1927 and 1952 ss. 21 and 22, respectively, read: "Pending the decision of the Minister, the appellant and those dependent upon him shall be kept in custody at an immigration station, unless released under bond as hereinafter provided." Lamont J. in *Vaaro v. The King* held that this was sufficient authority to refuse to discharge applicants. See also *R. v. Lee Moon Koo* (1931), 43 B.C.R. 458, 55 C.C.C. 188, a case in regard to a similar section in the now repealed Chinese Immigration Act, R.S.C. 1927, c. 95. The court there went further and held that such a section was a virtual stay of habeas corpus proceedings. There is no such positive section in the present Immigration Act - but see s. 16.

122. R.S.C. 1970, c. I-3.

123. See, in regard to the administration of the Act generally, M. Kronby, "The Administration of the Immigration Act" (1959), 1 (No. 1) O.H.L.J. 1, which must be read, of course, in the light of subsequent amendments to the Act. See also an article, some of which despite subsequent amendments to the Act continues to be relevant and the existence of which has been taken into account in the interest of avoiding duplication of effort, by M. Hancock, "Discharge of Deportees on Habeas Corpus" (1936), 14 Can. Bar Rev. 116. With respect to the use of habeas corpus in immigration cases in the United States, see A. Orlow, "Habeas Corpus in Immigration Cases" (1949), 10 Ohio St. L.J. 319.

124. R.S.C. 1952, c. 325, formerly s. 24 and before that s. 23.

125. S.C. 1966-67, c. 90, s. 30.

126. *Supra*, note 122, s. 22. Regarding "exclusive jurisdiction" provisions see W.H. Angus (1963), 28

33. R.S.C. 1970, c. S-19, s. 57(1).
34. S.C. 1970, c. 44, s. 4. The repeal of this jurisdiction renders obsolete, at least to some extent, decisions such as *Re Richard* (1907), 38 S.C.R. 394, *Re Gray* (1918), 57 S.C.R. 150, *Re Roberts*, [1928] S.C.R. 559, *Re Singer*, [1929] S.C.R. 614, and *Re Goldhar*, [1958] S.C.R. 692, esp. at p. 694, which in turn had rendered obsolete *Re Dean* (1913), 48 S.C.R. 235 and *Smith & Blackman v. The King*, [1931] S.C.R. 578.

CHAPTER 4

PRACTICE AND PROCEDURE

1. IN GENERAL[1]

It has been said that "l'habeas corpus n'est pas une instance ordinaire et on ne peut lui appliquer les règles strictes de la procédure . . . . Il résulte aussi des principes qui gouvernent en matière d'habeas corpus, que le devoir du juge, devant qui un bref d'habeas corpus est rapporté, c'est de s'enquérir immédiatement des causes de la détention du requérant sans s'égarer dans le maquis de la procédure et de la formalité."[2]

The question of legislative authority is discussed in chapter 1 and all that is said there applies with regard to legislative competence in connection with habeas corpus practice and procedure.[3] In addition to the English Acts of 1679 and 1816 and the established common law, relevant to the practice and procedure governing habeas corpus proceedings are, depending upon the nature of the proceedings, the provincial rules of court affecting civil practice and procedure,[4] the rules created pursuant to s. 438 (2)(c) of the Criminal Code,[5] and the habeas corpus legislation of Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island, both current and pre-Confederation.

Some precedents of the documents involved in habeas corpus proceedings have been included in this work in Appendix G; these precedents were taken from court files.[6]

Habeas corpus proceedings historically consisted of two stages.[7] First of all, an *ex parte* application[8] was made for an order issuing the writ. If this was obtained, the writ was issued and served upon the detainor who was thereby ordered to make a return. On the return the court considered the detainor's return in conjunction with the applicant's motion for discharge. It has become possible, and the practice in some provinces, to telescope the proceedings on consent, so that the whole matter is completed at one hearing, and possibly in the absence of the prisoner.[9] The format of the remainder of this chapter

follows the two-stage habeas corpus proceeding.

2. APPLICATION FOR THE WRIT

Note:- There is some question as to whether habeas corpus applications ought to be styled in the names of the applicant (prisoner) and detainor, in the form "*Ex parte*" the applicant (prisoner), or "*R. v.*" the detainor. Martin J., in *R. v. McAdam*, was particularly against the last of the three mentioned styles.[10]

Theoretically, the application initiating a habeas corpus proceeding can request either an order that a writ be issued directly, in which case the application could be *ex parte*, or it can request the detainor to show cause why a writ should not be issued, in which case the application should be on an *inter partes* basis; the practice varies from province to province.[11] Regardless of the form of the application, the practice has developed, especially in connection with criminal habeas corpus proceedings, of giving notice to the Attorney General of the province.[12] In Ontario the current Habeas Corpus Act requires "notice in writing of every application" to be given to the Attorney General; a similar provision is contained in the current Nova Scotia statute.[13] In Alberta the Crown Practice Rules provided for service "upon the Attorney General".[14] An indication of how service upon the Attorney General can be effected might be taken from *R. v. Swett*.[15] Probably, when there has been a private prosecution, the private prosecutor in addition to the Attorney General ought to be served with notice;[16] however, neither the convicting tribunal nor the Crown prosecutor need to be served.[17]

A habeas corpus proceeding can be initiated by the prisoner, regardless of the fact that the prisoner may be a minor or a mental incompetent,[18] or by anyone else with or without the express authority of the prisoner; the strange case of Harry K. Thaw shows that no legal relationship needs to exist between the applicant and the prisoner.[19]

In *Durocher v. The Queen*[20] Brooke J. of the High Court of Ontario had before him an application "in writing" by a convict. In denying a request by the convict that he be able to present his application in person, as opposed to the right of the prisoner simply to be present,[21] the learned judge referred to two English decisions, *Re Greene*[22] and *Wring v. Cooke*.[23]

The learned judge pointed out that there were no rules in existence in Ontario dealing with the matter; he held that a convict is not entitled to make an oral presentation of an application for a writ of habeas corpus. In fact, the allowance of applications "in writing" is considered a concession by the courts.[24] Further, the learned judge said that if an application is not supported by the proper material, "the court may dismiss the application or deal with it as appears to be just in the circumstances". There was no supporting affidavit in the case before the learned judge.

In *Re Greene*, Humpreys J. after referring to Short and Mellor on *The Practice of the Crown*[25] for the proposition that a motion for habeas corpus should be made by counsel, said:

> "We think that no applicant for a writ of habeas corpus should be heard in person unless sufficient ground is shown for a departure from established practice; and the mere fact that the applicant wishes to act as his own advocate should not be regarded as a good ground."

3. AFFIDAVIT IN SUPPORT OF THE APPLICATION

A writ of habeas corpus is not issued as a matter of course, but only for cause shown, and therefore usually an application must be grounded upon an affidavit, which normally should be made by the prisoner, duly sworn at the place of confinement; for sufficient cause shown, the accompanying affidavit may be made and sworn by someone other than the prisoner.[26]

The affidavit(s) in support of the application must set out that:

(a) the applicant is in actual custody;
(b) the applicant believes the detention to be unlawful;
(c) the applicant is detained for no other cause or reason than that contained in the exhibited document, if any, pursuant to which the applicant is detained. This should be substantiated by an affidavit of the gaoler or detainor proving or verifying a copy of the warrant of commitment.[27] A certified copy of the conviction can be introduced if it is verified by affidavit, in an application by a convicted person.[28]

In indicating that the applicant believes the detention in question to be illegal the grounds upon which this belief is based must be set out in the affidavit(s) in support of the application and they should be included in the first place in any notice which is given; the grounds must be stated at least in clear, general terms.[29] Apropos the grounds necessary to support an application, Brassard J. in *De Bernoville v. Langlais*[30] indicated that there is a distinction between matters raised to determine initially if a writ should be issued and matters to be considered on the return to a writ to determine if discharge should be ordered; quite obviously, the reasonable and probable grounds necessary to support an application for the issuance of a writ of habeas corpus need only establish a *prima facie* case for discharge.

With respect to prisoners who do not speak either English or French, *Re Ah Gway*[31] and *Re Fong Yuk*[32] dealt with the proper manner for a Chinese person who understands no English to swear the affidavit.

4. THE WRIT

If a writ of habeas corpus is to be issued, it issues in the name of the court to which application is made.[33] In connection with criminal habeas corpus, in those provinces in which the Habeas Corpus Act of 1679 is applicable, it should be noted that s. 3 of that Act stipulates: "and to the intent that no sheriff, gaoler or other officer may pretend ignorance of the import of any such writ . . . all such writs shall be marked in this manner, *Per Statutum tricesimo primo Caroli Secundi Regis*, and shall be signed by the person that awards the same."[34] Rose J. in *R. v. Arscott*[35] held that his marking the writ upon issuance, "*Per Statutum tricesimo primo Caroli Secundi Regis*" as required by the Habeas Corpus Act of 1679 did not curtail his jurisdiction to that given under the statute; the learned judge said that he still had all the common law jurisdiction.[36]

In *United States v. Browne (No. 2)*,[37] an extradition case, at the hearing on the return to a writ of habeas corpus the United States counsel objected to the validity of the writ which had been issued on the ground that the writ was not signed by the judge who ordered it to be issued and it was not marked "By virtue

of c. 95 of the C.S.L.C." as is provided by s. 3 of that Act for the purpose of identifying the authority of the writ. The court held, rightly, that it is too late at the hearing on the return to a writ of habeas corpus to make such an objection since the beneficial quality of the requisites is no longer a matter of consequence. With or without the signature or notation the return had been made and the habeas corpus proceeding must be completed on its merits.

Re G. R. Johnston[38] and *Grant v. Fader*[39] were concerned with to whom a writ of habeas corpus should be addressed.

5. SERVICE OF THE WRIT

Service of a copy of an ordinary writ of summons is sufficient for it is merely to give notice; but in a habeas corpus proceeding the original of the writ ought to, and in some provinces must, be served for the very form of the writ requires that the person to whom it is addressed bring back the writ itself on the return. The mere showing of the writ is certainly, and service of a copy of the writ may be, insufficient.[40] In *Bussell v. Stoner*[41] the court quashed the writ because the original writ had not been served upon or left with the person to whom it was addressed. However, in *Re Agar*,[42] it was held that the failure to serve or leave the original writ does not entitle the court on the return to quash the writ unless there is evidence before the court to the effect that the writ cannot be obeyed; that is to say, evidence that the person to whom the writ is addressed no longer had custody of the prisoner in question. If no such evidence is before the court on the return the proper course is for the court to refuse to proceed. It has been suggested that if the person to whom the writ was addressed was not prejudiced by the service of a copy of the writ the court in its discretion might allow a new service of the original writ.[43]

6. THE RETURN

The person to whom a writ of habeas corpus is addressed must, upon due service of the writ, make a return before the judge or any other member of the court which issued the writ,[44] upon the date specified, immediately, or within a reasonable period of time,[45] in writing setting out clearly and unambiguously full

particulars of the basis of the detention;[46] as well, the body of the prisoner must be produced with the return unless there is a sufficient cause or reason shown and verified why the prisoner cannot be produced, for example, because he is sick, or unless the production of the prisoner has been dispensed with by judicial order[47] or on consent of the prisoner or his counsel.

In making a return, a sheriff, being only a ministerial officer, may act through a deputy and so not have to sign the return himself.[48] Usually the return will be under oath[49] and attached to or endorsed on the writ of habeas corpus.[50] The proper way to make a return, according to Draper C. J. in *R. v. Reno and Anderson*,[51] is to read the return to the court and then to file it. Nonetheless, it is the substance and not the form of any return that is important.[52] To quote Lord Abinger in *The Canadian Prisoners' Case*[53] which was cited by Martin J. in *R. v. Jungo Lee*:[54]

> "'The court is bound [on habeas corpus] to look at the substance of the return; if it contains sufficient matter in substance to show that the prisoner is lawfully detained, we cannot discharge him upon habeas corpus, though the return should in some respects be informal, or should go into matter not essential to the question.'"

To make a return to the effect that means, financial or otherwise, are lacking to bring up the body of the prisoner has been held to be insufficient.[55] Similarly, to make a return stating simply "that the within named is not in my custody," without a detailed explanation and denial of not only physical custody but also possession and control or power, has been held to be insufficient.[56]

According to *R. v. Soeurs de la Charité de Québec*[57] there may be written pleadings filed on a return to a writ of habeas corpus.

(a) Amendment of Return

Clearly, even after the detainor has been served with a writ of habeas corpus, but before any return is made, the basis of the detention can be amended. Wood C.J., in *R. v. Dease*, said:[58]

> "It is too well settled to be argued that any number of new, or corrected, or amended, convictions and warrants of commitments may now be drawn up, executed and returned . . . provided they be truthful and honest."

Similarly, there would seem to be no problem in amending a return even after it has been filed. In *R. v. Reno and Anderson*,[59] wherein the gaoler had first returned that he would be glad to produce the bodies if he was first furnished with costs and then had subsequently produced the bodies and the warrants of commitment, Chief Justice Draper was of the opinion that there had been only one return made to the writ in question but even if the first alleged return had been valid, the Chief Justice would have had no problem in ordering an amendment to it on the basis of *Leonard Watson's Case*,[60] wherein the court said:

> "After the return to the habeas corpus has been put in and read, it is considered as filed; but the Court has nevertheless power to amend it."[61]

(b) Controversion of Return

This subject will be canvassed in chapter 5. Briefly, at common law on a habeas corpus alone, the face of the return was all that the court could peruse. The hardship which sometimes resulted from the restrictiveness of the common law rule was alleviated in England to some degree by the Habeas Corpus Act of 1816, and by the provincial enactments in Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island affecting habeas corpus. The relief was in the form of a power given to the courts to examine by affidavit evidence or otherwise the truth of the facts stated in the return.

The only other way to enable the court to go behind the return was to obtain an ordinary or statutory certiorari, or an order in lieu thereof, in aid of the habeas corpus. The courts on a certiorari will entertain affidavit evidence dehors the record insofar as jurisdiction is concerned.

(c) Adjournment or Enlargement on the Return

The court would appear to have the power to adjourn or enlarge the proceedings on the return if the

interests of justice warrant such an order. For example, where there is a clerical defect in the warrant of commitment, or where the Crown asks for leave on the return to obtain a certiorari.[62]

In Ontario, s. 1 (3) of the Habeas Corpus Act[63] allows a judge, to whom an application is made for the issuance of a writ of habeas corpus, to direct the motion to be adjourned to be heard before the Court of Appeal. The Liberty of the Subject Act[64] provides for notice to be given to the Attorney General in connection with certain applications and in such cases the Attorney General can have the application referred to the Appeal Division of the Supreme Court.[65]

In Quebec[66] and New Brunswick,[67] express power is given to the judge on a return to a writ of habeas corpus to direct the trial of an issue if there is some doubt as to the truth of the facts returned. A similar power is provided by s. 3 of the English Habeas Corpus Act of 1816 and The Liberty of the Subject Act of Nova Scotia expressly incorporates s. 3 of the Habeas Corpus Act of 1816.[68]

In the Habeas Corpus Act of New Brunswick,[69] s. 9 reads:

> The matter of the return made to the order of a judge may be heard and decided on by any other judge, who shall have the same power and jurisdiction in respect thereof as the judge by whom the first order was made.

Similar provisions appear in all of the other habeas corpus legislation in existence and applicable in Canada.

7. MOTION FOR DISCHARGE

At the hearing on the return to a writ of habeas corpus the applicant makes a motion for the discharge of the prisoner. The order of argument is well established, namely that the prisoner or his counsel argues first, the detainor or his counsel is then heard, and finally the prisoner or his counsel can reply. The successful party naturally must draw up the appropriate order for the judge or court to sign. In connection with an application or motion for discharge in Nova Scotia, regard must be taken of s. 14

of The Liberty of the Subject Act.[70]

8. MOTION TO QUASH PROCEEDINGS

Every superior court "has incident to its jurisdiction an inherent right to inquire into and judge the regularity or abuse of its process."[71] If a writ is improvidently or improperly issued, it will be quashed.[72]

It is not proper to object to the issuance of a writ on a return. Rather, a separate motion should be launched to have the writ, etc., quashed. It is not necessary for the prisoner to be present on a motion to quash.[73]

In *Re Rose*[74] wherein a motion to quash and the motion to discharge were argued together, Wilson J. said:

> "Even if it were clear to me that I have the power [to quash a writ as improvidently issued] . . . I do not know that I would exercise it now that the writ has been returned and filed and the prisoner is here awaiting my judgment."[75]

Once a writ of habeas corpus has been acted upon and the prisoner has been discharged from custody it is probably too late to move to have the order issuing the writ quashed; the remedy, if any, is probably an appeal from the discharge order.[76]

On an appeal from an order quashing a writ of habeas corpus in *Re Agar*,[77] it was questioned whether the Ontario Court of Appeal had jurisdiction to entertain the appeal when leave to appeal had not been obtained. The Court of Appeal held that by virtue of s. 26 (1) (b) of the then Judicature Act, an appeal lay, for the quashing order was an order of a judge in chambers "which finally disposes of any cause or matter" except where otherwise provided by statute and there was no such statute here.

9. DISOBEDIENCE OF WRIT

Harvey C. J. said in *Re Norton*,[78] that the proper remedies for disobedience of a writ of habeas corpus, by the person to whom a writ of habeas corpus is directed, are the issuance of a writ of attachment against that person and an order to the sheriff directing him "to obtain the persons of the applicants or such of them as may be within the jurisdiction of

the court and directing him to bring them before the court".[79] According to the report of the case of *Re Hallock*:[80]

> "An application to commit a person for contempt of Court in disobeying a writ of habeas corpus will not be entertained unless a notice has been served upon him informing him of the consequence of failure to obey, nor unless the writ is signed by the person awarding it as required by s. 3 of 16 Car. 1, c. 10."[81]

In *Greene v. Carpenter*[82] the petitioner was arrested in Quebec City by the defendant under an extradition warrant and brought before the Extradition Commissioner in Montreal who remanded the petitioner to the custody of the defendant and two other constables for two days. The same day of the remand the defendant was served with a writ of habeas corpus which he did not obey for two reasons, both in good faith, namely that no charges had been paid or tendered for the conveyance of the petitioner to Quebec City for purposes of the return and no bond had been posted for his return to Montreal or against his escape. Secondly, the defendant feared that he would be in contempt of the Extradition Commissioner since he did not have sole custody of the petitioner. The Court absolved the defendant under the circumstances of any contempt with respect to the habeas corpus proceeding.

The Habeas Corpus Act of 1679 provides for monetary penalties for various acts and omissions in regard to habeas corpus.[83]

10. CUSTODY DURING PROCEEDINGS

Once the court has granted a writ of habeas corpus to an applicant the prisoner in question is in custody by virtue of the writ until the court has made a determination on the return.[84] Robinson C. J. in *Graham v. Kingsmill*[85] pointed out what should be clear, namely, that when a sheriff has been directed to produce a body, "such person will be legally in his custody in every district he may pass through, and while he has him before the court" and this is so even though the habeas corpus proceedings may be improper or useless. Robinson C. J. added:

> "We are also of opinion that the court could legally remand G to the custody of the sheriff, being present in court, by their verbal order. It is the judgment of the court rendered in open court, of which the sheriff must take notice."[86]

In *Ex parte Greene (No. 1)*[87] Andrews J., upon the return of writs of habeas corpus which he had issued "by mistake" or "without jurisdiction", quashed the writs and remanded the applicants to be delivered by the sheriff of Quebec back to the custody of the keeper of the gaol at Montreal whence they had come. The learned judge expressed his very serious obligation to return the applicants to their original custody, and he emphatically stated that while the applicants remained in his hands and until he gave the "order in the premises" no other judge had the power to interfere with the applicants.[88] On appeal to the Judicial Committee, Lord Chancellor Halsbury quoted Andrews J. and expressly agreed with him.[89]

11. BAIL PENDING DISPOSITION OF PROCEEDINGS

Not to be confused with the law relating to bail in general in connection with criminal detentions, which is now governed by the legislation enacted in the Bail Reform Act,[90] is the law relating to the right to bail pending the disposition of the habeas corpus proceeding of a prisoner who upon the return to the writ is in the custody of the court. The Habeas Corpus Act of 1679 contained no section similar to s. 3 of the Habeas Corpus Act of 1816. However, the pre-Confederation habeas corpus statutes of Ontario, New Brunswick and Nova Scotia all contained sections virtually identical to s. 3 of the Act of 1816; in these provinces it would appear that an applicant can be bailed pending the disposition of criminal habeas corpus proceedings, and it is submitted that in the rest of the provinces the apparent common law right to bail would apply.[91]

Section 3 of The Habeas Corpus Act of 1816 did provide for the applicant to be bailed pending the disposition of habeas corpus proceedings in civil matters. This section is in force in all of the provinces of Canada which do not have habeas corpus statutes and has been virtually re-enacted in the habeas corpus statutes of Ontario, New Brunswick,

Prince Edward Island, Nova Scotia and Quebec.[92]

Where a person has been convicted or charged under a provincial statute the courts have no power to bail that person until after the return has been made to the writ. Russel J. in *R. v. The Keeper of Halifax County Jail*[93] discussed the distinction in the powers of the court to grant bail in general pending trial and after a commitment in execution, making reference to *Archbold's Crown Office Practice*. This author said that there was no power to bail if there was a conviction, commitment in execution, etc. Russell J. decided, however, that since the return had been made to the writ of habeas corpus "the authority under which the original commitment took place is superseded", and the applicant is then in the care and direction of the court; release pending delivery of the judgment is thus in the discretion of the judge. Therefore, Russell J., having examined the return of the applicant, who had been convicted by a magistrate of an offence under the Nova Scotia Temperance Act, and having decided to refer the application to the full court, admitted the applicant to bail. The learned judge did say that a prisoner-applicant should only be released pending delivery of the judgment if the judge is convinced that the imprisonment is illegal.[94] The rest of the court did not express an opinion as to whether bail was proper after a conviction.

In *Re Low*[95] pending an appeal of a refusal to discharge under habeas corpus, the applicant applied to the Court of Appeal for bail. The applicant had already been committed for extradition. The court held that though it had power to entertain the application it would not grant bail. This case was followed by Masten J.A. in *Re Brenner*.[96] Osler J. had earlier neatly side-stepped a decision on the power of the court to entertain such an application in *Re Watts*[97] because the applicant was not in custody; apparently, pending the return of the habeas corpus, the applicant had been admitted to bail and never subsequently taken back in custody. But the learned justice did say that he would "be very slow to admit to bail a person arrested or committed for extradition", in fact he could not recall a single case where such bail had been granted.

In a more recent decision, *Re Haines*,[98] the applicant, who had been convicted of an offence and sentenced under The Liquor Control Act of Ontario, obtained a writ of habeas corpus with certiorari in aid; argument on his motion for discharge was heard, but judgment was reserved. He therefore applied for his release pending the determination of the motion for his discharge, under s. 7 of the then Habeas Corpus Act of Ontario. Chevrier J. observed that there were no Ontario cases on point; the learned judge made reference to the decision in *R. v. The Keeper of the Halifax County Jail*[99] and *Re Harry Hood*,[100] and to sections 3 and 5 of the then Liberty of the Subject Act of Nova Scotia, but concluded that he had no authority to grant bail in the circumstances.[101]

12. COSTS

Walkem J. in *Re Quai Shing*,[102] on the authority of *Cobbett's Case*,[103] pointed out that at common law if an applicant was successful on his application for a writ of habeas corpus, no costs would be awarded for or against the applicant on the return, regardless of whether the applicant was successful on his motion for discharge; however, costs could be awarded against the applicant who initially was unsuccessful in obtaining the issuance of a writ of habeas corpus.[104]

In *Re Christianson*[105] an applicant who, subsequent to his conviction for a criminal offence, had obtained his release from prison via habeas corpus asked Wilson J. of the Supreme Court of British Columbia to order the Crown to pay the costs of his habeas corpus application. The learned judge examined "the considerable body of British Columbia decisions dealing with the right to award costs to successful applicants for the issue of prerogative writs, or where the applicants were not successful to the Crown . . . in the light of . . . *Re Storgoff*."[106] The question for consideration was whether "the power to regulate in criminal matters the practice and procedure as to costs" by virtue of what is now s. 438 (2)(c) of the Criminal Code included "the substantive right to order that these shall be costs paid by litigants, or only the right to regulate the amount of such costs and the procedure as to their being awarded, taxed and collected." Wilson J. refused the application, holding that Parliament had not conferred upon the courts the power to make substantive as well as procedural law in relation to costs. The learned judge concluded, insofar as the case before him was concerned, "that there is no power in our court

to award costs to or against the Crown in an application for the writ of habeas corpus arising from criminal proceedings", there being no federal legislation granting a right to costs in habeas corpus arising from a criminal proceeding.[107]

The practice as to costs in connection with civil habeas corpus proceedings is governed by the various provincial statutes affecting habeas corpus proceedings and by the rules of court passed under provincial authority.

In Ontario, for example, habeas corpus being a proceeding in the High Court, the jurisdiction to deal with costs is covered by The Judicature Act,[108] s. 79 (1):

> Subject to the express provisions of any statute, the costs of and incidental to all proceedings authorized to be taken in court or before a judge are in the discretion of the court or judge, and the court or judge has full power to determine by whom and to what extent the costs should be paid.[109]

Although these enactments give to the court or judge a full and unappealable[110] discretion in regard to costs, it is apparent from the number of awards that a prevalent opinion is the opinion of Meagher J. in *Re Murphy*,[111] namely "that the power to direct the payment of costs, upon habeas corpus proceedings, should be exercised only in very extreme cases, if at all."

Generally speaking, it is not a condition to the bringing of an application for a writ of habeas corpus by a foreign applicant that security for costs be furnished. In *Woollven v. Dame Aird*[112] such an applicant presented an application for a writ of habeas corpus in connection with the custody of a child. The respondent moved for security of costs on account of the foreign residence of the applicant. Beaudin J. said:

> "At first sight I would be inclined to believe that a writ of habeas corpus being, as a general rule, given to a person who is illegally and unjustly detained, to regain his liberty, the effect of the writ should not be interfered with, with a secondary question such as that of costs, because we could imagine a case where a person unjustly detained and not having the means to furnish security, would be obliged to remain confined either in jail or in an asylum for the remainder of his life, or at least for a very long time, which seems contrary to all known principles of a writ of habeas corpus."[113]

Beaudin J. however, held against the motion on another ground, namely that the motion should have been made immediately upon the service of the writ and not after the scheduled return, especially in view of the fact that the respondent had been before the court several times to arrange for delays in arguing the return. However the furnishing of security for costs has been ordered of foreign applicants. In *Re Kenna*[114] a foreign applicant was appealing the dismissal of his application when the people having custody of the child in question requested security for their costs. The court made the requested order, but only for the security of their future costs since they had known at the time of the original application that the applicant was not resident within the jurisdiction.

By virtue of The Supreme Court Act[115], s. 66(1), any appellant must give proper security regarding the effectual prosecution of any appeal and the payment of any costs or damages awarded; to this requirement s. 69 provides exceptions including appeals "in proceedings for or upon a writ of habeas corpus".[116] Insofar as awarding costs is concerned the court in *Re G.R. Johnston*[117] said that "no costs are given in habeas corpus appeals as a general rule, *in favorem libertatis*". But in *Fraser v. Tupper*[118] wherein an appeal to the Supreme Court of Canada was dismissed, because the appellant-prisoner had been liberated between the time of the refusal to discharge and the hearing of the appeal, the respondent was given his general costs of the appeal.

In the miscellaneous case category are *Re E.R.*,[119] wherein a judge of the juvenile court made a committal without jurisdiction, the court upon a habeas corpus not only discharging the applicant but ordering that, upon condition that the applicant would not "bring, institute, commence or prosecute any actions or proceedings against the said Judge of the Juvenile Court . . . arising out of or based upon her said commitment and/or detention, she should recover against the said Judge . . . in his personal capacity, her costs of and incidental to these proceedings payable forthwith after taxation thereof"; and *Bertrand v. Renaud*,[120] wherein the court would not allow counsel for the Attorney General to charge a fee for

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Order

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE DAY, THE DAY OF A.D. 19....

IN CHAMBERS

UPON the application of A.P...., the natural mother of the above-described infant ....., upon reading the affidavit of the said A.P....., filed, no one appearing for the Attorney General of Ontario, although duly served with notice of this motion, as appears by the admission of service upon the notice of motion, filed, and upon hearing counsel for the applicant;

1. IT IS ORDERED that a writ of habeas corpus ad subjiciendum do issue forthwith out of this Court on behalf of the applicant, directed at A.L...., of ..... Street, Toronto, in the County of York, physician, to have the body of the above-described infant before the presiding Judge in Chambers at Osgoode Hall, Toronto, on ..... day, the ..... day of ....., 19....., at the hour of .. o'clock in the ..... noon, together with our writ to undergo and receive all and singular such matters and things as our Court shall then and there consider of concerning him in this behalf, that we may further cause to be done thereupon what of right and according to law we shall see fit to be done.

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Writ of Habeas Corpus

(*Style of Cause*)

Elizabeth The Second, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories, QUEEN, Head of the Commonwealth, Defender of Faith.

TO: Greeting,

WE COMMAND YOU, that you have before the presiding Judge in Chambers at Osgoode Hall, Toronto, on ..... day, the ..... day of ....., 19....., the body of ..... (the above mentioned infant), detained in your custody, as it is said, together with the day and cause of his being taken and detained by whatsoever name he may be called or known therein, with this our writ, that we may further cause to be done thereupon what of right and according to law we shall see fit to be done.

IN WITNESS WHEREOF this writ is signed for the Supreme Court of Ontario by ....., Registrar of the said Court of Toronto, this ..... day of ....., A.D. 19.....

REGISTRAR, S.C.O.

(SEAL)

Issued from the Registrar's office of the Supreme Court of Ontario, at Toronto, in the County of York, pursuant to the order of the Honourable Mr. Justice ... dated the .... day of ....., 19.....

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Return of Writ of Habeas Corpus

(*Style of Cause*)

I, ..., of the City of Toronto, in the County of York, physician, in answer to the writ of habeas corpus herein do state as follows:

1. I am a physician specializing in ..... and I am on the staff of ..... Hospital, Toronto, and I am Chief of ..... in the ..... Hospital, Toronto.

2. I reside with my wife J.L. ., at ... Street, in the City of Toronto.

3. My wife and I now have and have had the custody, care and control of the female infant referred to in the writ of habeas corpus since on or about ....., 19 ...., and we are very devoted to the infant and she is receiving excellent care and attention and we are anxious to adopt the said infant if permitted by the Court so to do.

4. We have had the custody, care and control of the said infant with the full assent and permission of A.P. ..., also known as A.F...., also known as A.H. ., who on or about ....., 19 ....., signed a consent to the adoption of the said female infant who was delivered into our custody on or about ....., 19 .. pursuant to such consent to adoption. The said female infant was born at the City of Toronto on ....., 19.....

5. It is not in the best interests of the said infant that her custody be given to the said A.P.....

6. The said A.P....., is not entitled to custody of the female infant for the following reasons:

(a) she has abandoned the infant;

(b) she is not of good character;

(c) she is not able to support the infant in satisfactory surroundings.

7. Very serious and important reasons require that, having regard to the infant's welfare, custody of the the infant should not be given to the said A.P. .., who by reason of her moral standards and her inability to support, educate and maintain the said infant in satisfactory surroundings is disqualified from being entitled to custody of the infant.

DATED at Toronto this ..... day of ....., 19 .....

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Notice of Motion for Delivery of Child

(*Style of Cause*)

TAKE NOTICE that an application will be made on behalf of A.P....., before the presiding Judge in Chambers at Osgoode Hall, in the City of Toronto, on

... day, the ... day of ..., 19..., at the hour of ... o'clock in the ... noon or so soon thereafter as the motion can be heard on the return of the writ of habeas corpus herein for an order that A.L. ..., do deliver the infant born to A.P. ..., at ..... Hospital in the City of Toronto, on the ... day of ..., 19..., to A.P.... , forthwith, the day and time of such delivery to be set by the presiding Judge or for such other order as may seem just.

AND TAKE NOTICE that in support of such application will be read the affidavit of A.P. ..., and such further and other material as counsel may advise.

V.W.... ,
... Street, Toronto,
Solicitors for the applicant.

TO: ... .
AND TO: The Attorney General of Ontario,
Parliament Buildings,
Toronto, Ontario
AND TO: The Registrar of this Court

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Order

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE ... DAY, THE ... DAY OF ... A.D. 19...

IN CHAMBERS

(*Style of Cause*)

UPON the application of A.P. ..., for an order that A.L. ... do deliver the infant born to A.P. ... at ..... Hospital in the City of Toronto on the ... day of ....., 19..., A.P. ... forthwith and upon reading the writ of habeas corpus ad subjiciendum issued herein on the ... day of ....., 19..., pursuant to the order of the Honourable Mr. Justice ..., dated the ... day of ..., 19..., and the return thereto, dated the ... day of ..., 19..., filed, and the affidavit of A.P...., filed, and upon hearing counsel for the applicant and counsel for A.L.....;

1. IT IS ORDERED that there be the trial of an issue at the non-jury sittings of this Court at Toronto, in which said issue A.P. ..., shall be plaintiff and A.L. and J.L..... ... shall be defendants.

2. AND IT IS ORDERED that the said issue to be tried shall be:
"Should the infant born to A.P.... , at ... Hospital in the City of Toronto on the ..... day of ..... , 19... , be discharged into custody of A.P. ..., or be remanded into the joint custody of A.L. ..., and J.L. ..., or should some further or other order be made concerning the custody of the said infant?"

3. IT IS FURTHER ORDERED that the said issue shall be deemed to originate in the office of the Registrar of this Court at Toronto.

4. IT IS FURTHER ORDERED that the plaintiff shall deliver her statement of claim within 14 days from the date of this order, and that the parties shall thereafter deliver pleadings and proceedings pursuant to the rules of this court.

5. IT IS FURTHER ORDERED that the parties may have examinations for discovery and production pursuant to the rules of this court.

6. IT IS FURTHER ORDERED that, pending the trial or other final disposition of the said issue, there be no application for adoption of the infant born to A.P.... at ..... Hospital in the City of Toronto, on the ... day of ..... 19.....

7. IT IS FURTHER ORDERED that, subject to any further order this Court may make, A.L..... and J.L..... shall jointly have interim custody of the said infant, pending the trial or other final determination of the said issue.

8. IT IS FURTHER ORDERED that this application, save as aforesaid, be, and it is hereby, adjourned to be disposed of by the Judge hearing the trial of the said issue.

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Order (Alternative)

(*Style of Cause and Preamble*)

1. IT IS ORDERED that C.D...., do deliver the infant M.N...., to A.P...., on ..... day, the ..... day of ....., 19.....

2. IT IS FURTHER ORDERED that the said delivery shall be made by C.D...., to V...., acting on behalf of ..... in the County of ..... , in the Province of Ontario, at the hour of .... o'clock in the ..... noon on ... day, the .... day of ....., 19.....

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Order for Habeas Corpus Where Extradition Sought

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR. JUSTICE DAY, THE DAY OF A.D. 19 ..

IN CHAMBERS

IN THE MATTER of an application for the extradition of ..... , in the City of Toronto, in the County of York and Province of Ontario, from the Dominion of Canada